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## DEPARTMENT OF ENERGY

### 10 CFR Parts 207, 218, 429, 431, 490, 501, 601, 820, 824, 851, 1013, 1017, and 1050

### Inflation Adjustment of Civil Monetary Penalties

**AGENCY:** Office of the General Counsel, U.S. Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (''DOE'') publishes this final rule to adjust DOE's civil monetary penalties (''CMPs'') for inflation as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (collectively referred to herein as ''the Act''). This rule adjusts CMPs within the jurisdiction of DOE to the maximum amount required by the Act.

**DATES:** This rule is effective on January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Preeti Chaudhari, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–8078, *preeti.chaudhari@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Background
II. Method of Calculation
III. Summary of the Final Rule
IV. Final Rulemaking
V. Regulatory Review

## I. Background

In order to improve the effectiveness of CMPs and to maintain their deterrent effect, the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note (''the Inflation Adjustment Act''), as further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74) (''the 2015 Act''), requires Federal agencies to adjust each CMP provided by law within the jurisdiction of the agency. The 2015 Act required agencies to adjust the level of CMPs with an initial ''catch-up'' adjustment through an interim final rulemaking and to make subsequent annual adjustments for inflation, notwithstanding 5 U.S.C. 553. DOE's initial catch-up adjustment interim final rule was published June 28, 2016 (81 FR 41790) and adopted as final without amendment on December 30, 2016 (81 FR 96349). The 2015 Act also provides that any increase in a CMP shall apply only to CMPs, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.

In accordance with the 2015 Act, the Office of Management and Budget (OMB) must issue annually guidance on adjustments to civil monetary penalties. This final rule to adjust civil monetary penalties for 2021 is issued in accordance with applicable law and OMB's guidance memorandum on implementation of the 2021 annual adjustment.[1]

## II. Method of Calculation

The method of calculating CMP adjustments applied in this final rule is required by the 2015 Act. Under the 2015 Act, annual inflation adjustments subsequent to the initial catch-up adjustment are to be based on the percent change between the October Consumer Price Index for all Urban Consumers (CPI–U) preceding the date of the adjustment, and the prior year's October CPI–U. Pursuant to the aforementioned OMB guidance memorandum, the adjustment multiplier for 2021 is 1.01182. In order to complete the 2021 annual adjustment, each CMP is multiplied by the 2021 adjustment multiplier. Under the 2015 Act, any increase in CMP must be rounded to the nearest multiple of $1.

## III. Summary of the Final Rule

The following list summarizes DOE authorities containing CMPs, and the penalties before and after adjustment.

| DOE authority containing civil monetary penalty | Before adjustment | After adjustment |
|---|---|---|
| 10 CFR 207.7 | $10,821 | $10,949. |
| 10 CFR 218.42 | $23,437 | $23,714. |
| 10 CFR 429.120 | $468 | $474. |
| 10 CFR 431.382 | $468 | $474. |
| 10 CFR 490.604 | $9,073 | $9,180. |
| 10 CFR 501.181 | —$95,881 | —$97,014. |
| | —$8/mcf | —$8/mcf. |
| | —$39/bbl | —$39/bbl. |
| 10 CFR 601.400 and appendix A | —minimum $20,489 | —minimum $20,731. |
| | —maximum $204,892 | —maximum $207,314. |
| 10 CFR 820.81 | $214,097 | $216,628. |
| 10 CFR 824.1 and appendix A | $152,998 | $154,806. |
| 10 CFR 824.4 and appendix A | $152,998 | $154,806. |
| 10 CFR 851.5 and appendix B | $99,361 | $100,535. |
| 10 CFR 1013.3 | $11,665 | $11,803. |
| 10 CFR 1017.29 | $275,529 | $278,786. |
| 10 CFR 1050.303 | $20,888 | $21,135. |
| 42 U.S.C. 2282(a)[2] | $104,330 | $105,563. |
| 50 U.S.C. 2731[3] | $9,365 | $9,476. |

[1] OMB's annual guidance memorandum was issued on December 23, 2020, providing the 2021 adjustment multiplier and addressing how to apply it.

## IV. Final Rulemaking

The 2015 Act requires that annual adjustments for inflation subsequent to the initial ''catch-up'' adjustment be made notwithstanding 5 U.S.C. 553.

## V. Regulatory Review

### *A. Executive Order 12866*

This rule has been determined not to be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

### *B. National Environmental Policy Act*

DOE has determined that this final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A5 of appendix A to subpart D, 10 CFR part 1021, which applies to a rulemaking that amends an existing rule or regulation and that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment. As discussed above, the 2015 Act requires that annual inflation adjustments subsequent to the initial catch-up adjustment be made notwithstanding 5 U.S.C. 553. Because a notice of proposed rulemaking is not required for this action pursuant to 5 U.S.C. 553, or any other law, no regulatory flexibility analysis has been prepared for this final rule.

### *D. Paperwork Reduction Act*

This final rule imposes no new information collection requirements subject to the Paperwork Reduction Act.

### *E. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 201 excepts agencies from assessing effects on State, local or tribal governments or the private sector of rules that incorporate requirements specifically set forth in law. Because this rule incorporates requirements specifically set forth in 28 U.S.C. 2461 note, DOE is not required to assess its regulatory effects under section 201. Unfunded Mandates Reform Act sections 202 and 205 do not apply to this action because they apply only to rules for which a general notice of proposed rulemaking is published. Nevertheless, DOE has determined that this regulatory action does not impose a Federal mandate on State, local, or tribal governments or on the public sector.

### *F. Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This rule would 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.

### *G. Executive Order 13132*

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

### *H. Executive Order 12988*

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 (February 7, 1996), imposes on Executive 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. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the 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 the 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, this rule meets the relevant standards of Executive Order 12988.

### *I. Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (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 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

### *J. Executive Order 13211*

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 OMB, 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) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of the Office of Information and Regulatory

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[2] Adjustment applies only to violations of 42 U.S.C. 2077(b), consistent with Public Law 115–232 (August 13, 2018).

[3] Implemented by 10 CFR 820.81, 10 CFR 851.5, and appendix B to 10 CFR part 851.

Affairs (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. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*K. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

*L. Approval of the Office of the Secretary*

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

**List of Subjects**

*10 CFR Part 207*

Administrative practice and procedure, Energy, Penalties.

*10 CFR Part 218*

Administrative practice and procedure, Penalties, Petroleum allocation.

*10 CFR Part 429*

Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

*10 CFR Part 431*

Administrative practices and procedure, Confidential business information, Energy conservation, Incorporation by reference, Reporting and recordkeeping requirements.

*10 CFR Part 490*

Administrative practice and procedure, Energy conservation, Penalties.

*10 CFR Part 501*

Administrative practice and procedure, Electric power plants, Energy conservation, Natural gas, Petroleum.

*10 CFR Part 601*

Government contracts, Grant programs, Loan programs, Penalties.

*10 CFR Part 820*

Administrative practice and procedure, Government contracts, Penalties, Radiation protection.

*10 CFR Part 824*

Government contracts, Nuclear materials, Penalties, Security measures.

*10 CFR Part 851*

Civil penalty, Hazardous substances, Occupational safety and health, Safety, Reporting and recordkeeping requirements.

*10 CFR Part 1013*

Administrative practice and procedure, Claims, Fraud, Penalties.

*10 CFR Part 1017*

Administrative practice and procedure, Government contracts, National defense, Nuclear energy, Penalties, Security measures.

*10 CFR Part 1050*

Decorations, medals, awards, Foreign relations, Government employees, Government property, Reporting and recordkeeping requirements.

**Signing Authority**

This document of the Department of Energy was signed on January 7, 2021, 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 January 7, 2021.

**Treena V. Garrett,**

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

For the reasons set forth in the preamble, DOE amends chapters II, III, and X of title 10 of the Code of Federal Regulations as set forth below.

## PART 207—COLLECTION OF INFORMATION

■ 1. The authority citation for part 207 continues to read as follows:

**Authority:** 15 U.S.C. 787 *et seq.;* 15 U.S.C. 791 *et seq.;* E.O. 11790, 39 FR 23185; 28 U.S.C. 2461 note.

■ 2. Section 207.7 is amended by revising the first sentence of paragraph (c)(1) to read as follows:

### § 207.7 Sanctions.

* * * * *

(c) * * *

(1) Any person who violates any provision of this subpart or any order issued pursuant thereto shall be subject to a civil penalty of not more than $10,949 for each violation. * * *

* * * * *

## PART 218—STANDBY MANDATORY INTERNATIONAL OIL ALLOCATION

■ 3. The authority citation for part 218 continues to read as follows:

**Authority:** 15 U.S.C. 751 *et seq.;* 15 U.S.C. 787 *et seq.;* 42 U.S.C. 6201 *et seq.;* 42 U.S.C. 7101 *et seq.;* E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267; 28 U.S.C. 2461 note.

■ 4. Section 218.42 is amended by revising paragraph (b)(1) to read as follows:

### § 218.42 Sanctions.

* * * * *

(b) * * *

(1) Any person who violates any provision of this part or any order issued pursuant thereto shall be subject to a civil penalty of not more than $23,714 for each violation.

* * * * *

## PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 5. The authority citation for part 429 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 6. Section 429.120 is amended by revising the first sentence to read as follows:

### § 429.120 Maximum civil penalty.

Any person who knowingly violates any provision of § 429.102(a) may be subject to assessment of a civil penalty of no more than $474 for each violation. * * *

## PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 7. The authority citation for part 431 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 8. Section 431.382 is amended by revising paragraph (b) to read as follows:

**§ 431.382 Prohibited acts.**

* * * * *

(b) In accordance with sections 333 and 345 of the Act, any person who knowingly violates any provision of paragraph (a) of this section may be subject to assessment of a civil penalty of no more than $474 for each violation.

* * * * *

## PART 490—ALTERNATIVE FUEL TRANSPORTATION PROGRAM

■ 9. The authority citation for part 490 continues to read as follows:

**Authority:** 42 U.S.C. 7191 *et seq.;* 42 U.S.C. 13201, 13211, 13220, 13251 *et seq.;* 28 U.S.C. 2461 note.

■ 10. Section 490.604 is amended by revising paragraph (a) to read as follows:

**§ 490.604 Penalties and Fines.**

(a) *Civil penalties.* Whoever violates § 490.603 shall be subject to a civil penalty of not more than $9,180 for each violation.

* * * * *

## PART 501—ADMINISTRATIVE PROCEDURES AND SANCTIONS

■ 11. The authority citation for part 501 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 8301 *et seq.;* 42 U.S.C. 8701 *et seq.;* E.O. 12009, 42 FR 46267; 28 U.S.C. 2461 note.

■ 12. Section 501.181 is amended by revising paragraph (c)(1) to read as follows:

**§ 501.181 Sanctions.**

* * * * *

(c) * * *

(1) Any person who violates any provisions of the Act (other than section 402) or any rule in this subchapter or order under this subchapter or the Act will be subject to the following civil penalty, which may not exceed $97,014 for each violation: Any person who operates a powerplant or major fuel burning installation under an exemption, during any 12-calendar-month period, in excess of that authorized in such exemption will be assessed a civil penalty of up to $8 for each MCF of natural gas or up to $39 for each barrel of oil used in excess of that authorized in the exemption.

* * * * *

## PART 601—NEW RESTRICTIONS ON LOBBYING

■ 13. The authority citation for part 601 continues to read as follows:

**Authority:** 31 U.S.C. 1352; 42 U.S.C. 7254 and 7256; 31 U.S.C. 6301–6308; 28 U.S.C. 2461 note.

■ 14. Section 601.400 is amended by revising paragraphs (a), (b), and (e) to read as follows:

**§ 601.400 Penalties.**

(a) Any person who makes an expenditure prohibited by this part shall be subject to a civil penalty of not less than $20,731 and not more than $207,314 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B to this part) to be filed or amended if required by this part, shall be subject to a civil penalty of not less than $20,731 and not more than $207,314 for each such failure.

* * * * *

(e) First offenders under paragraph (a) or (b) of this section shall be subject to a civil penalty of $20,731, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $20,731 and $207,314, as determined by the agency head or his or her designee.

* * * * *

**Appendix A to Part 601 [Amended]**

■ 15. Appendix A to part 601 is amended by:

■ a. Removing ''$20,489'' wherever it appears and adding in its place ''$20,731''; and

■ b. Removing ''$204,892'' wherever it appears and adding in its place ''$207,314''.

## PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

■ 16. The authority citation for part 820 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282(a); 7191; 28 U.S.C. 2461 note; 50 U.S.C. 2410.

■ 17. Section 820.81 is amended by revising the first sentence to read as follows:

**§ 820.81 Amount of penalty.**

Any person subject to a penalty under 42 U.S.C. 2282a shall be subject to a civil penalty in an amount not to exceed $216,628 for each such violation. * * *

## PART 824—PROCEDURAL RULES FOR THE ASSESSMENT OF CIVIL PENALTIES FOR CLASSIFIED INFORMATION SECURITY VIOLATIONS

■ 18. The authority citation for part 824 continues to read as follows:

**Authority:** 42 U.S.C. 2201, 2282b, 7101 *et seq.,* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

■ 19. Section 824.1 is amended by revising the second sentence to read as follows:

**§ 824.1 Purpose and scope.**

* * * Subsection a. provides that any person who has entered into a contract or agreement with the Department of Energy, or a subcontract or subagreement thereto, and who violates (or whose employee violates) any applicable rule, regulation, or order under the Act relating to the security or safeguarding of Restricted Data or other classified information, shall be subject to a civil penalty not to exceed $154,806 for each violation. * * *

■ 20. Section 824.4 is amended by revising paragraph (c) to read as follows:

**§ 824.4 Civil penalties.**

* * * * *

(c) The Director may propose imposition of a civil penalty for violation of a requirement of a regulation or rule under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $154,806 for each violation.

* * * * *

## PART 851—WORKER SAFETY AND HEALTH PROGRAM

■ 21. The authority citation for part 851 continues to read as follows:

**Authority:** 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.;* 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

■ 22. Section 851.5 is amended by revising the first sentence of paragraph (a) to read as follows:

**§ 851.5 Enforcement.**

(a) A contractor that is indemnified under section 170d. of the AEA (or any subcontractor or supplier thereto) and that violates (or whose employee violates) any requirement of this part shall be subject to a civil penalty of up to $100,535 for each such violation. * * *

* * * * *

■ 23. Appendix B to part 851 is amended by:

■ a. Revising the last sentences of paragraphs (b)(1) and (2) in section VI; and

■ b. Revising paragraph 1.(e)(1) in section IX.

The revisions read as follows:

**Appendix B to Part 851—General Statement of Enforcement Policy**

* * * * *

**VI. Severity of Violations**

* * * * *

(b) * * *

(1) * * * A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of $100,535.

(2) * * * A Severity Level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty ($50,267).

* * * * *

**IX. Enforcement Actions**

* * * * *

*Notice of Violation*

* * * * *

(e) * * *

(1) DOE may assess civil penalties of up to $100,535 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). *See* 10 CFR 851.5(a).

* * * * *

## PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

■ 24. The authority citation for part 1013 continues to reads as follows:

**Authority:** 31 U.S.C. 3801–3812; 28 U.S.C. 2461 note.

■ 25. Section 1013.3 is amended by revising paragraphs (a)(1)(iv) and (b)(1)(ii) to read as follows:

### § 1013.3 Basis for civil penalties and assessments.

(a) * * *

(1) * * *

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $11,803 for each such claim.

* * * * *

(b) * * *

(1) * * *

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $11,803 for each such statement.

* * * * *

## PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

■ 26. The authority citation for part 1017 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 42 U.S.C. 2168; 28 U.S.C. 2461 note.

■ 27. Section 1017.29 is amended by revising paragraph (c) to read as follows:

### § 1017.29 Civil penalty.

* * * * *

(c) *Amount of penalty.* The Director may propose imposition of a civil penalty for violation of a requirement of a regulation under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $278,786 for each violation.

* * * * *

## PART 1050—FOREIGN GIFTS AND DECORATIONS

■ 28. The authority citation for part 1050 continues to read as follows:

**Authority:** The Constitution of the United States, Article I, Section 9; 5 U.S.C. 7342; 22 U.S.C. 2694; 42 U.S.C. 7254 and 7262; 28 U.S.C. 2461 note.

■ 29. Section 1050.303 is amended by revising the last sentence in paragraph (d) to read as follows:

### § 1050.303 Enforcement.

* * * * *

(d) * * * The court in which such action is brought may assess a civil penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $21,135.

[FR Doc. 2021–00439 Filed 1–13–21; 8:45 am]

BILLING CODE 6450–01–P

## SMALL BUSINESS ADMINISTRATION

## 13 CFR Part 121, 124, 125, 126, and 127

**RIN 3245–AG94**

## Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments; Correction

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Correcting amendments.

**SUMMARY:** The U.S. Small Business Administration (SBA) is correcting regulations that published in the **Federal Register** on October 16, 2020. The rule merged the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This document is making several technical corrections to the regulations.

**DATES:** Effective January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–7625; *mark.hagedorn@sba.gov.*

**SUPPLEMENTARY INFORMATION:** In response to the President's directive to simplify regulations, on October 16, 2020, SBA published a final rule revising the regulations pertaining to the 8(a) BD and size programs in order to further reduce unnecessary or excessive burdens on small businesses and to eliminate confusion or more clearly delineate SBA's intent in certain regulations. (85 FR 66146). This is the second set of corrections. The first set of corrections was published in the **Federal Register** on November 16, 2020. (85 FR 72916). This document augments those corrections.

First, in amending § 121.404(a) to provide clarification as to the time at which size is determined for multiple award contracts, SBA inadvertently deleted the general rule that size is determined as of the date of the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price. In other words, in amending the exception to the general rule for multiple award contracts, the final rule inadvertently deleted the general rule itself. That was not SBA's intent and SBA did not intend to make any substantive changes to the general rule itself. This rule adds back the general rule language to § 121.404(a).

Second, the final rule eliminated the requirement that 8(a) Participants seeking to be awarded a competitive 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award. The preamble to the final rule explained that such approval is no longer necessary because the size protest process has worked well to ensure that small business joint venture partners control performance on non-8(a) contracts with their large business mentors and could work similarly to monitor a joint venturing activity on competitive 8(a) contracts. To this end, where another offeror believes that a joint venture between a protégé and its large business mentor has not complied with the applicable control regulations, it may protest the size of the joint venture. The appropriate Area Office of SBA's Office of Government Contracting would then review the joint venture agreement to determine whether it meets the requirements of SBA's regulations. If that Office determines that the applicable regulations were not followed, the joint venture would lose its exclusion from affiliation, be found to be other than small, and, thus, ineligible for an award as a small business. Because size protests are authorized for competitive 8(a) contracts, SBA reasoned that prior approval is no longer necessary for joint venture agreements seeking to be awarded such contracts.

The final rule inadvertently did not adequately address how the Area Office will review certain joint venture agreements to perform 8(a) contracts formed outside the Mentor-Protégé Program, such as a joint venture between an 8(a) Participant and one or more other small business concerns. Currently, an unsuccessful offeror, SBA, or a contracting officer may protest the status of the apparent successful offeror for a Service-Disabled Veteran Owned (SDVO), Historically Underutilized Business Zone (HUBZone), Women-Owned Small Business (WOSB), or Economically-Disadvantaged Women-Owned Small Business (EDWOSB) contract. In determining the status eligibility of a joint venture apparent awardee, SBA will review the joint venture agreement to assess whether it complies with the formal requirements to receive and perform the award as a joint venture. If the joint venture does not comply with these requirements, SBA will sustain the protest and deem the joint venture ineligible for award. However, there is no existing regulatory process for an unsuccessful offeror, SBA, or a contracting officer to challenge whether a joint venture meets the formal requirements to receive and perform a competitive 8(a) contract. To this end, the eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by a disappointed offeror or any other party because SBA reviews the apparent successful offeror's eligibility for award in connection with each 8(a) contract. In addition, prior to the final rule, where the apparent successful offeror was a joint venture, the joint venture had to be approved by SBA prior to or concurrent with the contract eligibility review. In eliminating SBA's role to review and approve joint ventures formed to perform competitive 8(a) contracts, it was not SBA's intent to allow 8(a) contract benefits to flow to joint ventures that do not meet the applicable regulatory requirements. To the contrary, as noted above, SBA envisioned that the size protest process would work to ensure compliance with the formal 8(a) joint venture requirements. However, in the context of a joint venture between an 8(a) Participant and one or more other small business concerns, the current size protest procedures are not adequate. Under SBA's size regulations, a joint venture is small if each of the partners to the joint venture individually qualify as small. Thus, a joint venture that does not comply with the applicable requirements set forth in § 124.513(c) and (d) could still qualify as small even though the 8(a) partner to the joint venture was not the lead or controlling partner. This rule amends § 121.103(h)(1)(i) to implement SBA's intent that a joint venture must meet the requirements of § 124.513(c) and (d) in order to be eligible for a competitive 8(a) procurement and to make joint ventures in the 8(a) program consistent with those in the HUBZone, WOSB and SDVO programs. Additionally, SBA inadvertently left out conforming revisions in the final rule to remove references to SBA's now obsolete review and approval of joint ventures formed to receive and perform competitive 8(a) contracts. Specifically, the final rule did not make corresponding changes to § 124.513(a), (f), (g), (h), and (j), leaving inconsistency with respect to the requirement for SBA approval. This rule corrects this inconsistency by removing or clarifying references to joint venture approval in § 124.513(a), (f), (g), (h), and (j).

Third, the final rule added a new § 124.501(k) to clearly make the bona fide office requirement applicable to both sole source and competitive 8(a) awards and better defined the geographical area in which an office needs to be in order to meet the bona fide place of business requirement. Although SBA intended to allow an office in the geographic area served by a contiguous SBA district office to meet the bona fide place of business requirement, the final regulatory provision did not make that clear. This rule corrects that ambiguity.

Fourth, the final rule clarified a procuring activity's responsibilities when evaluating the past performance, experience, business systems and certifications of an entity submitting an offer for a small business contract as a joint venture. Specifically, the final rule amended § 125.8(e) to provide that when evaluating such offers, the procuring activity should not require a small business protégé partner to the joint venture to individually meet any evaluation or responsibility criteria as those required of other offerors generally. SBA inadvertently left out conforming revisions in the final rule to §§ 124.513, 125.18, 126.616, and 127.506 to address the evaluation of past performance, experience, business systems and certifications of a joint venture formed outside SBA's Mentor-Protégé Program to pursue a contract set-aside or reserved for 8(a) Participants, SDVO small business concerns, HUBZone small business concerns, WOSB concerns, or EDWOSB concerns. This rule corrects the inconsistency by revising §§ 124.513, 125.18, 126.616, and 127.506 to incorporate this clarification.

**List of Subjects**

*13 CFR Part 121*

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

*13 CFR Part 124*

Administrative practice and procedure, Government procurement, Government property, Small businesses.

*13 CFR Part 125*

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

*13 CFR Part 126*

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

*13 CFR Part 127*

Government contracts, Reporting and recordkeeping requirements, Small businesses.

Accordingly, 13 CFR parts 121, 124, 125, 126, and 127 are corrected by making the following correcting amendments:

## PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

**Authority:** 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by adding a sentence to the end of paragraph (h)(1)(i) to read as follows:

**§ 121.103 How does SBA determine affiliation?**

* * * * *

(h) * * *

(1) * * *

(i) * * * For a competitive 8(a) procurement, a joint venture between an 8(a) Participant and one or more other small business concerns (including two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter) must also meet the requirements of § 124.513(c) and (d) of this chapter as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding in order to be eligible for award.

* * * * *

■ 3. Amend § 121.404 by adding introductory text to paragraph (a) to read as follows:

**§ 121.404 When is the size status of a business concern determined?**

(a) *Time of size.* SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price.

* * * * *

## PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 4. The authority citation for part 124 continues to read as follows:

**Authority:** 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, Pub. L. 116–260, sec. 330, and 42 U.S.C. 9815.

■ 5. Amend § 124.501 by revising the introductory text to paragraph (k) to read as follows:

**§ 124.501 What general provisions apply to the award of 8(a) contracts?**

* * * * *

(k) In order to be awarded a sole source or competitive 8(a) construction contract, a Participant must have a bona fide place of business within the applicable geographic location determined by SBA. This will generally be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area (MSA), a contiguous county (whether in the same or different state), or the geographical area serviced by a contiguous SBA district office to where the work will be performed. SBA may determine that a Participant with a bona fide place of business anywhere within the state (if the state is serviced by more than one SBA district office), one or more other SBA district offices (in the same or another state), or another nearby area is eligible for the award of an 8(a) construction contract.

* * * * *

■ 6. Amend § 124.513 by revising paragraph (a)(1), the second sentence of paragraph (a)(2), and paragraphs (f), (g), (h), and (j) to read as follows:

**§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?**

(a) * * *

(1) A Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.

(2) * * * However, where SBA concludes that an 8(a) Participant brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture to receive an 8(a) sole source contract award and will find the joint venture to be ineligible for a competitive 8(a) award if it is determined to be the apparent successful offeror.

* * * * *

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an 8(a) contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the 8(a) Participant to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution.* Where an 8(a) award will be made to a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award as one to an 8(a) joint venture or an 8(a) mentor-protege joint venture, as appropriate.

(h) *Amendments to joint venture agreement.* Where SBA has approved a joint venture for a sole source 8(a) contract, all amendments to the joint venture agreement must be approved by SBA.

* * * * *

(j) *Certification of compliance.* Prior to the performance of any 8(a) contract by a joint venture, the 8(a) BD Participant to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(1) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section; and

(2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(3) For a sole source 8(a) contract, the parties have obtained SBA's approval of the joint venture agreement and any addendum to that agreement and that there have been no modifications to the agreement that SBA has not approved.

* * * * *

## PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 7. The authority citation for part 125 continues to read as follows:

**Authority:** 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

■ 8. Revise § 125.18(b)(5) to read as follows:

**§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?**

* * * * *

(b) * * *

(5) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an SDVO contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the SDVO SBC to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

* * * * *

## PART 126—HUBZONE PROGRAM

■ 9. The authority citation for part 126 continues to read as follows:

**Authority:** 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a; Pub. L. 111–240, 24 Stat. 2504.

■ 10. Revise § 126.616(f) to read as follows:

**§ 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible to perform on a HUBZone contract?**

* * * * *

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for a HUBZone contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the HUBZone small business concern to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

* * * * *

## PART 127—WOMEN–OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 11. The authority citation for part 127 continues to read as follows:

**Authority:** 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

■ 12. Amend § 127.506 by revising paragraph (f) to read as follows:

### § 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

* * * * *

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an EDWOSB or WOSB contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the EDWOSB or WOSB small business concern to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

* * * * *

**Francis C. Spampinato,**

*Associate Administrator, Government Contracting and Business Development.*

[FR Doc. 2021–00270 Filed 1–13–21; 8:45 am]

**BILLING CODE 8026–03–P**

## SMALL BUSINESS ADMINISTRATION

## 13 CFR Part 127

**RIN 3245–AG75**

## Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification; Correction

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Correcting amendment.

**SUMMARY:** The U.S. Small Business Administration (SBA or Agency) is correcting regulations that published in the **Federal Register** on May 11, 2020. The final rule amended SBA's regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (WOSBs) and Economically-Disadvantaged Women-Owned Small Business Concerns (EDWOSBs), as well as to clarify existing regulations. This document makes corrections to the final regulations.

**DATES:** Effective January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Brenda Fernandez, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205–7337; *brenda.fernandez@sba.gov.*

**SUPPLEMENTARY INFORMATION:** This is a correction to a final rule published in the **Federal Register** on May 11, 2020 (85 FR 27650). SBA is correcting dates that were inadvertently transposed in one of the examples to 13 CFR 127.400. Additionally, SBA is correcting the language in two of the examples to 13 CFR 127.400 to ensure the examples accurately illustrate the application of the new regulatory provisions.

### List of Subjects in 13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

Accordingly, 13 CFR part 127 is corrected by making the following correcting amendments:

## PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 1. The authority citation for part 127 continues to read as follows:

**Authority:** 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

■ 2. Amend § 127.400 by revising paragraph (b)(1) to read as follows:

### § 127.400 How does a concern maintain its WOSB or EDWOSB certification?

* * * * *

(b) * * *

(1) SBA or a third-party certifier will conduct a program examination three years after the concern's initial WOSB or EDWOSB certification (whether by SBA or a third-party certifier) or three years after the date of the concern's last program examination, whichever date is later.

*Example 1 to paragraph (b)(1).* Concern A is certified by SBA to be eligible for the WOSB program on July 20, 2021. Concern A will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2022. To participate in the WOSB Program the following year, Concern A must recertify its eligibility to SBA between June 20, 2022, and July 19, 2022. Concern A will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2023. To participate in the WOSB Program the following year, Concern A must recertify its eligibility to SBA between June 20, 2023, and July 19, 2023. Concern A will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2024. To participate in the WOSB Program the following year, Concern A must recertify its eligibility to SBA between June 20, 2024, and July 19, 2024. Because three years will have elapsed since its application and original certification, SBA will conduct a program examination of Concern A at that time. In addition to its representation that it continues to be an eligible WOSB, Concern A must provide additional information as requested by SBA to demonstrate that it continues to meet all the eligibility requirements of the WOSB Program.

*Example 2 to paragraph (b)(1).* Concern B is certified by a third-party certifier to be eligible for the WOSB program on September 27, 2021. Concern B will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2022. To participate in the WOSB Program the following year, Concern B must recertify its eligibility to SBA between August 28, 2022, and September 26, 2022. Concern B will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2023. On March 31, 2023, Concern B is awarded a WOSB set-aside contract. Subsequently, Concern B's status as an eligible WOSB is protested. On June 28, 2023, Concern B receives a positive determination from SBA confirming that it is an eligible WOSB. Concern B's new certification date is June 28, 2023. Concern B will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through June 27, 2024. To participate in the WOSB Program the following year, Concern B must recertify its eligibility to SBA between May 29, 2024, and June 27, 2024. Concern B will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through June 27, 2025. To participate in the WOSB Program the following year, Concern B must recertify its eligibility to SBA between May 29, 2025, and June 27, 2025. Concern B will be considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) until June 27, 2026. To participate in the WOSB Program the following year, Concern B must recertify its eligibility to SBA between May 29, 2026, and June 27, 2026. Because three years will have elapsed since its certification date of June 28, 2023, Concern B must seek a program examination, by SBA or a third-party certifier, at that time. In addition to its representation that it continues to be an eligible WOSB, Concern B must provide additional information as requested by SBA or a third-party certifier to demonstrate that it continues to meet all the eligibility requirements of the WOSB Program.

* * * * *

Dated: January 7, 2021.

**Francis C. Spampinato,**

*Associate Administrator, Government Contracting and Business Development.*

[FR Doc. 2021–00476 Filed 1–13–21; 8:45 am]

BILLING CODE 8026–03–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2020–1172; Project Identifier MCAI–2020–01661–T; Amendment 39–21388; AD 2021–02–05]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A330–200, –200 Freighter, –300, –800, and –900 series airplanes; Model A340–200 and –300 series airplanes; and Model A340–541 and A340–642 airplanes. This AD was prompted by a report that an erroneous torque value for the attachment nuts to install a pitot probe was included in the affected Aircraft Maintenance Manual (AMM) task. This AD requires re-torqueing the attachment nuts of each affected part. In addition, this AD prohibits the use of the affected AMM task, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD becomes effective January 29, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 29, 2021.

The FAA must receive comments on this AD by March 1, 2021.

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

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

For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1172.

### Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1172; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

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

**SUPPLEMENTARY INFORMATION:**

### Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0279, dated December 14, 2020 (EASA AD 2020–0279) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Model A330–201, A330–202, A330–203, A330–223, A330–223F, A330–243, A330–243F, A330–301, A330–302, A330–303, A330–321, A330–322, A330–323, A330–341, A330–342, A330–343, A330–743L, A330–841, A330–941, A340–211, A340–212, A340–213, A340–311, A340–312, A340–313, A340–541, A340–542, A340–642, and A340–643 airplanes. Model A330–743L, A340–542, and A340–643 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

This AD was prompted by a report that an erroneous torque value for the attachment nuts to install a pitot probe was included in the affected AMM task. The FAA is issuing this AD to address the erroneous torque value. If not addressed it could lead to erroneous total pressure measurement being relayed to navigation systems, possibly resulting in reduced control of the airplane. See the MCAI for additional background information.

**Related Service Information Under 1 CFR Part 51**

EASA AD 2020–0279 describes procedures for re-torqueing the attachment nuts of each affected part and prohibits the use of the affected AMM task. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**FAA's Determination**

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

**Requirements of This AD**

This AD requires accomplishing the actions specified in EASA AD 2020–0279 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0279 is incorporated by reference in this final rule. This AD, therefore, requires compliance with EASA AD 2020–0279 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to "all required actions and compliance times," compliance with this AD requirement is not limited to the section titled "Required Action(s) and Compliance Time(s)" in the EASA AD. Service information specified in EASA AD 2020–0279 that is required for compliance with EASA AD 2020–0279 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1172.

**FAA's Justification and Determination of the Effective Date**

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 waiving notice and comment prior to adoption of this rule because an erroneous torque value for the attachment nuts to install a pitot probe could lead to erroneous total pressure measurement being relayed to navigation systems, possibly resulting in reduced control of the airplane. In addition, the compliance time for the required action is shorter than the time necessary for the public to comment and for publication of the final rule. Therefore, the FAA finds good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reasons stated above, the FAA finds that good cause exists for making this amendment effective in less than 30 days.

**Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2020–1172; Project Identifier MCAI–2020–01661–T" at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

**Confidential Business Information**

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

**Regulatory Flexibility Act (RFA)**

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

**Costs of Compliance**

The FAA estimates that this AD affects 112 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

| Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|
| 1 work-hour × $85 per hour = $85 | $0 | $85 | $9,520 |

### Authority for This Rulemaking

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

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

### Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**2021–02–05 Airbus SAS:** Amendment 39–21388; Docket No. FAA–2020–1172; Project Identifier MCAI–2020–01661–T.

#### (a) Effective Date

This airworthiness directive (AD) becomes effective January 29, 2021.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to all Airbus SAS airplanes, certificated in any category, identified in paragraphs (c)(1) through (9) of this AD.

(1) Model A330–201, A330–202, A330–203, A330–223, and A330–243 airplanes.

(2) Model A330–223F and A330–243F airplanes.

(3) Model A330–301, A330–302, A330–303, A330–321, A330–322, A330–323, A330–341, A330–342, and A330–343 airplanes.

(4) Model A330–841 airplanes.

(5) Model A330–941 airplanes.

(6) Model A340–211, A340–212, and A340–213 airplanes.

(7) Model A340–311, A340–312, and A340–313 airplanes.

(8) Model A340–541 airplanes.

(9) Model A340–642 airplanes.

#### (d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

#### (e) Reason

This AD was prompted by a report that an erroneous torque value for the attachment nuts to install a pitot probe was included in the affected Aircraft Maintenance Manual (AMM) task. The FAA is issuing this AD to address the erroneous torque value. If not addressed it could lead to erroneous total pressure measurement being relayed to navigation systems, possibly resulting in reduced control of the airplane.

#### (f) Compliance

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

#### (g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0279, dated December 14, 2020 (EASA AD 2020–0279).

#### (h) Exceptions to EASA AD 2020–0279

(1) Where EASA AD 2020–0279 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0279 does not apply to this AD.

#### (i) No Reporting Requirement

Although the service information referenced in EASA AD 2020–0279 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

#### (j) Other FAA AD Provisions

The following provisions also apply to this AD:

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

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

(3) *Required for Compliance (RC):* Except as required by paragraph (j)(2) of this AD, if any service information referenced in EASA AD 2020–0279 that contains paragraphs that are labeled as RC, the instructions in RC paragraphs, including subparagraphs under an RC paragraph, must be done to comply with this AD; any paragraphs, including subparagraphs under those paragraphs, that are not identified as RC are recommended. The instructions in paragraphs, including subparagraphs under those paragraphs, not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the instructions identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to instructions identified as RC require approval of an AMOC.

#### (k) Related Information

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

#### (l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0279, dated December 14, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0279, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; internet *www.easa.europa.eu.* You may find this

EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1172.

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

Issued on January 7, 2021.

**Gaetano A. Sciortino,**

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

[FR Doc. 2021–00807 Filed 1–12–21; 11:15 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

### 20 CFR Part 655

### Office of Workers' Compensation Programs

### 20 CFR Parts 702, 725, and 726

### Wage and Hour Division

### 29 CFR Parts 500, 501, 503, 530, 570, 578, 579, 801, and 825

### Occupational Safety and Health Administration

### 29 CFR Part 1903

### Mine Safety and Health Administration

### 30 CFR Part 100

**RIN 1290–AA41**

## Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2021

**AGENCY:** Employment and Training Administration, Office of Workers' Compensation Programs, Office of the Secretary, Wage and Hour Division, Occupational Safety and Health Administration, and Mine Safety and Health Administration, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Labor (Department) is publishing this final rule to adjust for inflation the civil monetary penalties assessed or enforced by the Department, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act). The Inflation Adjustment Act requires the Department to annually adjust its civil money penalty levels for inflation no later than January 15 of each year. The Inflation Adjustment Act provides that agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedure Act (APA). Additionally, the Inflation Adjustment Act provides a cost-of-living formula for adjustment of the civil penalties. Accordingly, this final rule sets forth the Department's 2021 annual adjustments for inflation to its civil monetary penalties.

**DATES:** This final rule is effective on January 15, 2021. As provided by the Inflation Adjustment Act, the increased penalty levels apply to any penalties assessed after January 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** Erin FitzGerald, Senior Policy Advisor, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–5076 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693–5959 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

**SUPPLEMENTARY INFORMATION:**

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### I. Background

On November 2, 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701 (Inflation Adjustment Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 as previously amended by the 1996 Debt Collection Improvement Act (collectively, the ''Prior Inflation Adjustment Act''), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The Inflation Adjustment Act required agencies to (1) adjust the level of civil monetary penalties with an initial ''catch-up'' adjustment through an interim final rule (IFR); and (2) make subsequent annual adjustments for inflation no later than January 15 of each year.

On July 1, 2016, the Department published an IFR that established the initial catch-up adjustment for most civil penalties that the Department administers and requested comments. *See* 81 FR 43430 (DOL IFR). On January 18, 2017, the Department published the final rule establishing the 2017 Annual Adjustment for those civil monetary penalties adjusted in the DOL IFR. *See* 82 FR 5373 (DOL 2017 Annual Adjustment). On July 1, 2016, the U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) (collectively, ''the Departments'') jointly published an IFR that established the initial catch-up adjustment for civil monetary penalties assessed or enforced in connection with the employment of temporary nonimmigrant workers under the H–2B program. *See* 81 FR 42983 (Joint IFR). On March 17, 2017, the Departments jointly published the final rule establishing the 2017 Annual Adjustment for the H–2B civil monetary penalties. *See* 82 FR 14147 (Joint 2017 Annual Adjustment). The Joint 2017 Annual Adjustment also explained that DOL would make future adjustments to the H–2B civil monetary penalties consistent with DOL's delegated authority under 8 U.S.C. 1184(c)(14), Immigration and Nationality Act section 214(c)(14), and the Inflation Adjustment Act. *See* 82 FR 14147–48. On January 2, 2018, the Department published the final rule establishing the 2018 Annual Adjustment for civil monetary penalties assessed or enforced by the Department, including H–2B civil monetary penalties. *See* 83 FR 7 (DOL 2018 Annual Adjustment). On January 23, 2019, the Department published the final rule establishing the 2019 Annual Adjustment for civil monetary penalties assessed or enforced by the Department, including H–2B civil monetary penalties. *See* 84 FR 213 (DOL 2019 Annual Adjustment). On January 15, 2020, the Department published the final rule establishing the 2020 Annual Adjustment for civil monetary penalties assessed or enforced by the Department, including H–2B civil monetary penalties. *See* 85 FR 2292 (DOL 2020 Annual Adjustment).

This rule implements the 2021 annual inflation adjustments, as required by the Inflation Adjustment Act, for civil monetary penalties assessed or enforced by the Department, including H–2B civil monetary penalties.[1] The Inflation Adjustment Act provides that the increased penalty levels apply to any penalties assessed after the effective date of the increase. Pursuant to the Inflation Adjustment Act, this final rule is published notwithstanding Section 553 of the APA.

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a 'major rule,' as defined by 5 U.S.C. 804(2).

## II. Adjustment for 2020

The Department has undertaken a thorough review of civil penalties administered by its various components pursuant to the Inflation Adjustment Act and in accordance with guidance issued by the Office of Management and Budget.[2]

The Department first identified the most recent penalty amount, which is the amount established by the 2020 annual adjustment as set forth in the DOL 2020 Annual Adjustment published on January 15, 2020. The Department is required to calculate the annual adjustment based on the Consumer Price Index for all Urban Consumers (CPI–U). Annual inflation adjustments are based on the percent change between the October CPI–U preceding the date of the adjustment, and the prior year's October CPI–U; in this case, the percent change between the October 2020 CPI–U and the October 2019 CPI–U. The cost-of-living adjustment multiplier for 2021, based on the Consumer Price Index (CPI–U) for the month of October 2020, not seasonally adjusted, is 1.01182.[3] In order to compute the 2021 annual adjustment, the Department multiplied the most recent penalty amount for each applicable penalty by the multiplier, 1.01182, and rounded to the nearest dollar. This resulted in increases to all but four of the penalties administered by the Department, as set forth in the Appendix.

As provided by the Inflation Adjustment Act, the increased penalty levels apply to any penalties assessed after the effective date of this rule.[4] Accordingly, for penalties assessed after January 15, 2021, whose associated violations occurred after November 2, 2015, the higher penalty amounts outlined in this rule will apply. The tables below demonstrate the penalty amounts that apply:

### Civil Monetary Penalties for the H–2B Temporary Non-Agricultural Worker Program

| Violations occurring | Penalty assessed | Which penalty level applies |
|---|---|---|
| On or before November 2, 2015 | On or before August 1, 2016 | Pre-August 1, 2016 levels. |
| On or before November 2, 2015 | After August 1, 2016 | Pre-August 1, 2016 levels. |
| After November 2, 2015 | After August 1, 2016, but on or before March 17, 2017 | August 1, 2016 levels. |
| After November 2, 2015 | After March 17, 2017 but on or before January 2, 2018 | March 17, 2017 levels. |
| After November 2, 2015 | After January 2, 2018 but on or before January 23, 2019. | January 2, 2018 levels. |
| After November 2, 2015 | After January 23, 2019 but on or before January 15, 2020. | January 23, 2019 levels. |
| After November 2, 2015 | After January 15, 2020 but on or before January 15, 2021. | January 15, 2020 levels. |
| After November 2, 2015 | After January 15, 2021 | January 15, 2021 levels. |

### Civil Monetary Penalties for Other DOL Programs

| Violations occurring | Penalty assessed | Which penalty level applies |
|---|---|---|
| On or before November 2, 2015 | On or before August 1, 2016 | Pre-August 1, 2016 levels. |
| On or before November 2, 2015 | After August 1, 2016 | Pre-August 1, 2016 levels. |
| After November 2, 2015 | After August 1, 2016, but on or before January 13, 2017. | August 1, 2016 levels. |
| After November 2, 2015 | After January 13, 2017 but on or before January 2, 2018. | January 13, 2017 levels. |
| After November 2, 2015 | After January 2, 2018 but on or before January 23, 2019. | January 2, 2018 levels. |
| After November 2, 2015 | After January 23, 2019 but on or before January 15, 2020. | January 23, 2019 levels. |
| After November 2, 2015 | After January 15, 2020 but on or before January 15, 2021. | January 15, 2020 levels. |

[1] The Department is also responsible for administering and enforcing a newly-enacted civil monetary penalty under the Fair Labor Standards Act (*see* Public Law 115–141, section 1201 (2018)) and proposed regulations that would codify this civil monetary penalty in the Code of Federal Regulations (CFR) on October 8, 2019. See Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 FR 53956 (proposed Oct. 8, 2019). On December 30, 2020, the Department published a final rule that codifies this civil monetary penalty, adjusted for inflation pursuant to the Inflation Adjustment Act, in the CFR, to be effective on March 1, 2021.

[2] M–21–10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020).

[3] OMB provided the year-over-year multiplier, rounded to 5 decimal points. *Id.* at 1.

[4] Appendix 1 consists of a table that provides ready access to key information about each penalty.

CIVIL MONETARY PENALTIES FOR OTHER DOL PROGRAMS—Continued

| Violations occurring | Penalty assessed | Which penalty level applies |
|---|---|---|
| After November 2, 2015 | After January 15, 2021 | January 15, 2021 levels. |

## III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. The Department has determined that this final rule does not require any collection of information.

## IV. Administrative Procedure Act

The Inflation Adjustment Act provides that agencies shall annually adjust civil monetary penalties for inflation notwithstanding section 553 of the APA. Additionally, the Inflation Adjustment Act provides a nondiscretionary cost-of-living formula for annual adjustment of the civil monetary penalties. For these reasons, the requirements in sections 553(b), (c), and (d) of the APA, relating to notice and comment and requiring that a rule be effective 30 days after publication in the **Federal Register**, are inapplicable.

## V. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Executive Order 12866 requires that regulatory agencies assess both the costs and benefits of significant regulatory actions. Under the Executive Order, a ''significant regulatory action'' is one meeting any of a number of specified conditions, including the following: Having an annual effect on the economy of $100 million or more; creating a serious inconsistency or interfering with an action of another agency; materially altering the budgetary impact of entitlements or the rights of entitlement recipients; or raising novel legal or policy issues.

The Department has determined that this final rule is not a ''significant'' regulatory action and a cost-benefit and economic analysis is not required. This regulation merely adjusts civil monetary penalties in accordance with inflation as required by the Inflation Adjustment Act, and has no impact on disclosure or compliance costs. The benefit provided by the inflationary adjustment to the maximum civil monetary penalties is that of maintaining the incentive for the regulated community to comply with the laws enforced by the Department, and not allowing the incentive to be diminished by inflation.

Executive Order 13563 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility to minimize burden.

The Inflation Adjustment Act directed the Department to issue the annual adjustments without regard to section 553 of the APA. In that context, Congress has already determined that any possible increase in costs is justified by the overall benefits of such adjustments. This final rule makes only the statutory changes outlined herein; thus there are no alternatives or further analysis required by Executive Order 13563.

## VI. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA, 5 U.S.C. 553(b). This final rule is exempt from the requirements of the APA because the Inflation Adjustment Act directed the Department to issue the annual adjustments without regard to section 553 of the APA. Therefore, the requirements of the RFA applicable to notices of proposed rulemaking, 5 U.S.C. 603, do not apply to this rule. Accordingly, the Department is not required to either certify that the final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

## VII. Other Regulatory Considerations

### *A. The Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a state, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. This Final Rule will not result in such an expenditure. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *B. Executive Order 13132: Federalism*

Section 18 of the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 667) requires Occupational Safety and Health Administration (OSHA)-approved State Plans to have standards and an enforcement program that are at least as effective as Federal OSHA's standards and enforcement program. OSHA-approved State Plans must have maximum and minimum penalty levels that are at least as effective as Federal OSHA's, per section 18(c)(2) of the OSH Act. *See also* 29 CFR 1902.4(c)(2)(xi); 1902.37(b)(12). State Plans are required to increase their penalties in alignment with OSHA's penalty increases to maintain at least as effective penalty levels.

State Plans are not required to impose monetary penalties on state and local government employers. *See* § 1956.11(c)(2)(x). Five (5) states and one territory have State Plans that cover only state and local government employees: Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands. Therefore, the requirements to increase the penalty levels do not apply to these State Plans. Twenty-one states and one U.S. territory have State Plans that cover both private sector employees and state and local government employees: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. They must increase their penalties for private-sector employers.

Other than as listed above, this final rule does not have federalism implications because it 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. Accordingly, Executive Order 13132, Federalism, requires no further agency action or analysis.

*C. Executive Order 13175: Indian Tribal Governments*

This final rule does not have ''tribal implications'' because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

**List of Subjects**

*20 CFR Part 655*

Immigration, Labor, Penalties.

*20 CFR Part 702*

Administrative practice and procedure, Longshore and harbor workers, Penalties, Reporting and recordkeeping requirements, Workers' compensation.

*20 CFR Part 725*

Administrative practice and procedure, Black lung benefits, Coal miners, Penalties, Reporting and recordkeeping requirements.

*20 CFR Part 726*

Administrative practice and procedure, Black lung benefits, Coal miners, Mines, Penalties.

*29 CFR Part 500*

Administrative practice and procedure, Aliens, Housing, Insurance, Intergovernmental relations, Investigations, Migrant labor, Motor vehicle safety, Occupational safety and health, Penalties, Reporting and recordkeeping requirements, Wages, Whistleblowing.

*29 CFR Part 501*

Administrative practice and procedure, Agriculture, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

*29 CFR Part 503*

Administrative practice and procedure, Aliens, Employment, Housing, Immigration, Labor, Penalties, Transportation, Wages.

*29 CFR Part 530*

Administrative practice and procedure, Clothing, Homeworkers, Indians-arts and crafts, Penalties, Reporting and recordkeeping requirements, Surety bonds, Watches and jewelry.

*29 CFR Part 570*

Child labor, Law enforcement, Penalties.

*29 CFR Part 578*

Penalties, Wages.

*29 CFR Part 579*

Child labor, Penalties.

*29 CFR Part 801*

Administrative practice and procedure, Employment, Lie detector tests, Penalties, Reporting and recordkeeping requirements.

*29 CFR Part 825*

Administrative practice and procedure, Airmen, Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Penalties, Reporting and recordkeeping requirements, Teachers.

*29 CFR Part 1903*

Intergovernmental relations, Law enforcement, Occupational Safety and Health, Penalties.

*30 CFR Part 100*

Mine safety and health, Penalties.

For the reasons set out in the preamble, 20 CFR chapters V and VI, 29 CFR chapters V and XVII, and 30 CFR chapter I are amended as follows:

## DEPARTMENT OF LABOR

## Employment and Training Administration

**Title 20—Employees' Benefits**

## PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102– 232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–128, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

**§§ 655.620, 655.801, and 655.810 [Amended]**

■ 2. In the following table, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount indicated in the right column.

| Paragraph | Remove | Add |
|---|---|---|
| § 655.620(a) | $9,639 | $9,753 |
| § 655.801(b) | 7,846 | 7,939 |
| § 655.810(b)(1) introductory text | 1,928 | 1,951 |
| § 655.810(b)(2) introductory text | 7,846 | 7,939 |
| § 655.810(b)(3) introductory text | 54,921 | 55,570 |

## DEPARTMENT OF LABOR

## Office of Workers' Compensation Programs

## PART 702—ADMINISTRATION AND PROCEDURE

■ 3. The authority citation for part 702 continues to read as follows:

**Authority:** 5 U.S.C. 301, and 8171 *et seq.*; 33 U.S.C. 901 *et seq.*; 42 U.S.C. 1651 *et seq.*; 43 U.S.C. 1333; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 10–2009, 74 FR 58834.

**§§ 702.204, 702.236, and 702.271 [Amended]**

■ 4. In the following table, for each paragraph indicated in the left column, remove the dollar amount or date indicated in the middle column from wherever it appears in the section or paragraph and add in its place the dollar amount or date indicated in the right column.

| Section/paragraph | Remove | Add |
|---|---|---|
| § 702.204 | $24,441 | $24,730. |
| § 702.204 | January 15, 2020 | January 15, 2021. |
| § 702.236 | 297 | 301. |
| § 702.236 | January 15, 2020 | January 15, 2021. |
| § 702.271(a)(2) | January 15, 2020 | January 15, 2021. |
| § 702.271(a)(2) | 2,444 | 2,473. |
| § 702.271(a)(2) | 12,219 | 12,363. |

## PART 725—CLAIMS FOR BENEFITS UNDER PART C OF TITLE IV OF THE FEDERAL MINE SAFETY AND HEALTH ACT, AS AMENDED

■ 5. The authority citation for part 725 continues to read as follows:

**Authority:** 5 U.S.C. 301; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174; 30 U.S.C. 901 *et seq.,* 902(f), 921, 932, 936; 33 U.S.C. 901 *et seq.*; 42 U.S.C. 405; Secretary's Order 10–2009, 74 FR 58834.

### § 725.621 [Amended]

■ 6. In § 725.621, amend paragraph (d) by removing ''January 15, 2020'' and adding in its place ''January 15, 2021'' and by removing ''$1,488'' and adding in its place ''$1,506''.

## PART 726—BLACK LUNG BENEFITS; REQUIREMENTS FOR COAL MINE OPERATOR'S INSURANCE

■ 7. The authority citation for part 726 continues to read as follows:

**Authority:** 5 U.S.C. 301; 30 U.S.C. 901 *et seq.,* 902(f), 925, 932, 933, 934, 936; 33 U.S.C. 901 *et seq.*; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174; Secretary's Order 10–2009, 74 FR 58834.

### § 726.302 [Amended]

■ 8. In the following table, for each paragraph indicated in the left column, remove the dollar amount or date indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount or date indicated in the right column.

| Paragraph | Remove | Add |
|---|---|---|
| § 726.302(c)(2)(i) table Introductory text | January 15, 2020 | January 15, 2021. |
| § 726.302(c)(2)(i) table | $146 | $148. |
| § 726.302(c)(2)(i) table | 290 | 293. |
| § 726.302(c)(2)(i) table | 436 | 441. |
| § 726.302(c)(2)(i) table | 579 | 586. |
| § 726.302(c)(4) | January 15, 2020 | January 15, 2021. |
| § 726.302(c)(4) | 146 | 148. |
| § 726.302(c)(5) | January 15, 2020 | January 15, 2021. |
| § 726.302(c)(5) | 436 | 441. |
| § 726.302(c)(6) | January 15, 2020 | January 15, 2021. |
| § 726.302(c)(6) | 2,976 | 3,011. |

## DEPARTMENT OF LABOR

## Wage and Hour Division

## Title 29—Labor

## PART 500—MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

■ 9. The authority citation for part 500 continues to read as follows:

**Authority:** Pub. L. 97–470, 96 Stat. 2583 (29 U.S.C. 1801–1872); Secretary's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–74, 129 Stat 584.

### § 500.1 [Amended]

■ 10. In § 500.1, amend paragraph (e) by removing ''$2,549'' and adding in its place ''$2,579''.

## PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

■ 11. The authority citation for part 501 continues to read as follows:

**Authority:** 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–74 at § 701.

### § 501.19 [Amended]

■ 12. In the following table, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount indicated in the right column.

| Paragraph | Remove | Add |
|---|---|---|
| § 501.19(c) introductory text | $1,766 | $1,787 |
| § 501.19(c)(1) | 5,942 | 6,012 |
| § 501.19(c)(2) | 57,833 | 59,528 |
| § 501.19(c)(4) | 117,664 | 119,055 |
| § 501.19(d) | 5,942 | 6,012 |
| § 501.19(e) | 17,650 | 17,859 |
| § 501.19(f) | 17,650 | 17,859 |

## PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY NONIMMIGRANT NON-AGRICULTURAL WORKERS DESCRIBED IN THE IMMIGRATION AND NATIONALITY ACT

■ 13. The authority citation for part 503 continues to read as follows:

**Authority:** 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184; 8 CFR 214.2(h); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at § 701.

### § 503.23 [Amended]

■ 14. In the following table, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph, and add in its place the dollar amount indicated in the right column:

| Paragraph | Remove | Add |
|---|---|---|
| § 503.23(b) | $12,919 | $13,072 |
| § 503.23(c) | 12,919 | 13,072 |
| § 503.23(d) | 12,919 | 13,072 |

## PART 530—EMPLOYMENT OF HOMEWORKERS IN CERTAIN INDUSTRIES

■ 15. The authority citation for part 530 continues to read as follows:

**Authority:** Sec. 11, 52 Stat. 1066 (29 U.S.C. 211) as amended by sec. 9, 63 Stat. 910 (29 U.S.C. 211(d)); Secretary's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at § 701, 129 Stat 584.

■ 16. In § 530.302:

■ a. Amend paragraph (a) by removing ''$1,071'' and adding in its place ''$1,084;'' and

■ b. Revising paragraph (b).

The revision reads as follows:

### § 530.302 Amounts of civil penalties.

* * * * *

(b) The amount of civil money penalties shall be determined per affected homeworker within the limits set forth in the following schedule, except that no penalty shall be assessed in the case of violations which are deemed to be *de minimis* in nature:

TABLE 1 TO PARAGRAPH (b)

| Nature of violation | Penalty per affected homeworker | | |
|---|---|---|---|
| | Minor | Substantial | Repeated, intentional or knowing |
| Recordkeeping | $21–217 | $217–433 | $433–1,084 |
| Monetary violations | 21–217 | 217–433 | |
| Employment of homeworkers without a certificate | | 217–433 | 433–1,084 |
| Other violations of statutes, regulations or employer assurances | 21–217 | 217–433 | 433–1,084 |

## PART 570—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

### Subpart G—General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended

■ 17. The authority citation for subpart G of part 570 continues to read as follows:

**Authority:** 52 Stat. 1060–1069, as amended; 29 U.S.C. 201–219; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at § 701.

### § 570.140 [Amended]

■ 18. In § 570.140, amend paragraph (b)(1) by removing ''$13,072'' and adding in its place ''$13,227'' and paragraph (b)(2) by removing ''$59,413'' and adding in its place ''$60,115''.

## PART 578—MINIMUM WAGE AND OVERTIME VIOLATIONS—CIVIL MONEY PENALTIES

■ 19. The authority citation for part 578 continues to read as follows:

**Authority:** Sec. 9, Pub. L. 101–157, 103 Stat. 938, sec. 3103, Pub. L. 101–508, 104 Stat. 1388–29 (29 U.S.C. 216(e)), Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by Pub. L. 104–134, section 31001(s), 110 Stat. 1321–358, 1321–373, and Pub. L. 114–74, 129 Stat 584.

### § 578.3 [Amended]

■ 20. In § 578.3, amend paragraph (a) by removing ''$2,050'' and adding in its place ''$2,074''.

## PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

■ 21. The authority citation for part 579 continues to read as follows:

**Authority:** 29 U.S.C. 203(l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–7, 129 Stat 584.

### § 579.1 [Amended]

■ 22. In the following table, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount indicated in the right column.

| Paragraph | Remove | Add |
|---|---|---|
| § 579.1(a)(1)(i)(A) | $13,072 | $13,227 |
| § 579.1(a)(1)(i)(B) | 59,413 | 60,115 |
| § 579.1(a)(2) | 2,050 | 2,074 |

## PART 801—APPLICATION OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

■ 23. The authority citation for part 801 continues to read as follows:

**Authority:** Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. 2001–2009; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at § 701, 129 Stat 584.

### § 801.42 [Amended]

■ 24. In § 801.42, amend paragraph (a) introductory text by removing ''$21,410'' and adding in its place ''$21,663''.

## PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

■ 25. The authority citation for part 825 continues to read as follows:

**Authority:** 29 U.S.C. 2654; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–74 at § 701.

### § 825.300 [Amended]

■ 26. In § 825.300, amend paragraph (a)(1) by removing ''$176'' and adding in its place ''$178''.

## DEPARTMENT OF LABOR

## Occupational Safety and Health Administration

## Title 29—Labor

## PART 1903—INSPECTIONS, CITATIONS, AND PROPOSED PENALTIES

■ 27. The authority citation for part 1903 continues to read as follows:

**Authority:** Secs. 8 and 9 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 658); 5 U.S.C. 553; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Section 701, Pub. L. 114–74; Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012).

### § 1903.15 [Amended]

■ 28. In the following table, for each paragraph indicated in the left column, remove the dollar amount or date indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount or date indicated in the right column.

| Paragraph | Remove | Add |
|---|---|---|
| § 1903.15(d) introductory text | January 15, 2020 | January 15, 2021. |
| § 1903.15(d)(1) | $9,639 | $9,753. |
| § 1903.15(d)(1) | $134,937 | $136,532. |
| § 1903.15(d)(2) | $134,937 | $136,532. |
| § 1903.15(d)(3) | $13,494 | $13,653. |
| § 1903.15(d)(4) | $13,494 | $13,653. |
| § 1903.15(d)(5) | $13,494 | $13,653. |
| § 1903.15(d)(6) | $13,494 | $13,653. |

**DEPARTMENT OF LABOR**

**Mine Safety and Health Administration**

**Title 30—Mineral Resources**

## PART 100—CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT OF CIVIL PENALTIES

■ 29. The authority citation for part 100 continues to read as follows:

**Authority:** 5 U.S.C. 301; 30 U.S.C. 815, 820, 957; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at § 701.

■ 30. In § 100.3, amend paragraph (a)(1) introductory text by removing ‘‘$73,901’’ and adding in its place ‘‘$74,775’’ and paragraph (g) by revising Table XIV—Penalty Conversion Table to read as follows:

**§ 100.3 Determination of penalty amount; regular assessment.**

* * * * *

(g) * * *

TABLE XIV—PENALTY CONVERSION TABLE

| Points | Penalty ($) |
|---|---|
| 60 or fewer | $139 |
| 61 | 152 |
| 62 | 163 |
| 63 | 177 |
| 64 | 192 |
| 65 | 208 |
| 66 | 225 |
| 67 | 245 |
| 68 | 264 |
| 69 | 286 |
| 70 | 310 |
| 71 | 336 |
| 72 | 365 |
| 73 | 395 |
| 74 | 426 |
| 75 | 463 |
| 76 | 504 |
| 77 | 542 |
| 78 | 589 |
| 79 | 638 |
| 80 | 692 |
| 81 | 749 |
| 82 | 810 |
| 83 | 879 |
| 84 | 952 |
| 85 | 1,033 |
| 86 | 1,118 |
| 87 | 1,210 |
| 88 | 1,311 |
| 89 | 1,421 |
| 90 | 1,539 |
| 91 | 1,667 |
| 92 | 1,805 |
| 93 | 1,955 |
| 94 | 2,119 |
| 95 | 2,295 |
| 96 | 2,486 |
| 97 | 2,692 |
| 98 | 2,918 |
| 99 | 3,161 |
| 100 | 3,425 |
| 101 | 3,709 |
| 102 | 4,018 |
| 103 | 4,353 |
| 104 | 4,715 |
| 105 | 5,109 |
| 106 | 5,534 |
| 107 | 5,995 |
| 108 | 6,494 |
| 109 | 7,035 |
| 110 | 7,621 |
| 111 | 8,253 |
| 112 | 8,943 |
| 113 | 9,688 |
| 114 | 10,496 |
| 115 | 11,369 |
| 116 | 12,315 |
| 117 | 13,342 |
| 118 | 14,453 |
| 119 | 15,657 |
| 120 | 16,960 |
| 121 | 18,374 |
| 122 | 19,902 |
| 123 | 21,561 |
| 124 | 23,358 |
| 125 | 25,300 |
| 126 | 27,409 |
| 127 | 29,693 |
| 128 | 32,165 |
| 129 | 34,844 |
| 130 | 37,747 |
| 131 | 40,891 |
| 132 | 44,295 |
| 133 | 47,984 |
| 134 | 51,812 |
| 135 | 55,638 |
| 136 | 59,468 |
| 137 | 63,292 |
| 138 | 67,121 |
| 139 | 70,947 |
| 140 or more | 74,775 |

* * * * *

**§§ 100.4 and 100.5 [Amended]**

■ 31. In the following table, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph, and add in its place the dollar amount indicated in the right column.

| Paragraph | Remove | Add |
|---|---|---|
| § 100.4(a) | $2,464 | $2,493 |
| § 100.4(b) | 4,925 | 4,983 |
| § 100.4(c) introductory text | 6,159 | 6,232 |
| § 100.4(c) introductory text | 73,901 | 74,775 |
| § 100.5(c) | 8,006 | 8,101 |
| § 100.5(d) | 338 | 342 |
| § 100.5(e) | 270,972 | 274,175 |

Signed in Washington, DC.

**Eugene Scalia,**

*Secretary, U.S. Department of Labor.*

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

| Agency | Law | Name/description | CFR citation | 2020 Min penalty (rounded to nearest dollar) | 2020 Max penalty (rounded to nearest dollar) | 2021 Min penalty (rounded to nearest dollar) | 2021 Max penalty (rounded to nearest dollar) |
|---|---|---|---|---|---|---|---|
| MSHA | Federal Mine Safety & Health Act of 1977. | Regular Assessment | 30 CFR 100.3(a) | | $73,901 | | $74,775. |
| MSHA | Federal Mine Safety & Health Act of 1977. | Penalty Conversion Table | 30 CFR 100.3(g) | $137 | $73,901 | $139 | $74,775. |
| MSHA | Federal Mine Safety & Health Act of 1977. | Minimum Penalty for any order issued under 104(d)(1) of the Mine Act. | 30 CFR 100.4(a) | 2,464 | | 2,493 | |
| MSHA | Federal Mine Safety & Health Act of 1977. | Minimum penalty for any order issued under 104(d)(2) of the Mine Act. | 30 CFR 100.4(b) | 4,925 | | 4,983 | |
| MSHA | Federal Mine Safety & Health Act of 1977. | Penalty for failure to provide timely notification under 103(j) of the Mine Act. | 39 CFR 100.4(c) | 6,159 | $73,901 | 6,232 | $74,775. |
| MSHA | Federal Mine Safety & Health Act of 1977. | Any operator who fails to correct a violation for which a citation or order was issued under 104(a) of the Mine Act. | 30 CFR 100.5(c) | | $8,006 | | $8,101. |
| MSHA | Federal Mine Safety & Health Act of 1977. | Violation of mandatory safety standards related to smoking standards. | 30 CFR 100.5(d) | | $338 | | $342. |
| MSHA | Federal Mine Safety & Health Act of 1977. | Flagrant violations under 110(b)(2) of the Mine Act. | 30 CFR 100.5(e) | | $270,972 | | $274,175. |
| EBSA | Employee Retirement Income Security Act. | Section 209(b): Per plan year for failure to furnish reports (*e.g.,* pension benefit statements) to certain former employees or maintain employee records each employee a separate violation. | 29 CFR 2575.1–3 | | $31 | | $31. |
| EBSA | Employee Retirement Income Security Act. | Section 502 (c)(2)—Per day for failure/refusal to properly file plan annual report. | 29 CFR 2575.1–3 | | $2,233 | | $2,259. |
| EBSA | Employee Retirement Income Security Act. | Section 502 (c)(4)—Per day for failure to disclose certain documents upon request under ERISA 101(k) and (l); failure to furnish notices under 101(j) and 514(e)(3)—each statutory recipient a separate violation. | 29 CFR 2575.1–3 | | $1,767 | | $1,788. |
| EBSA | Employee Retirement Income Security Act. | Section 502 (c)(5)—Per day for each failure to file annual report for Multiple Employer Welfare Arrangements (MEWAs) under 101(g). | 29 CFR 2575.1–3 | | $1,625 | | $1,644. |
| EBSA | Employee Retirement Income Security Act. | Section 502 (c)(6)—Per day for each failure to provide Secretary of Labor requested documentation not to exceed a per-request maximum. | 29 CFR 2575.1–3 | | $159 per day, not to exceed $1,594 per request. | | $161 per day, not to exceed $1,613 per request. |
| EBSA | Employee Retirement Income Security Act. | Section 502 (c)(7)—Per day for each failure to provide notices of blackout periods and of right to divest employer securities—each statutory recipient a separate violation. | 29 CFR 2575.1–3 | | $141 | | $143. |
| EBSA | Employee Retirement Income Security Act. | Section 502 (c)(8)—Per each failure by an endangered status multiemployer plan to adopt a funding improvement plan or meet benchmarks; or failure of a critical status multiemployer plan to adopt a rehabilitation plan. | 29 CFR 2575.1–3 | | $1,402 | | $1,419. |
| EBSA | Employee Retirement Income Security Act. | Section 502(c)(9)(A)—Per day for each failure by an employer to inform employees of CHIP coverage opportunities under Section 701(f)(3)(B)(i)(l)—each employee a separate violation. | 29 CFR 2575.1–3 | | $119 | | $120. |
| EBSA | Employee Retirement Income Security Act. | Section 502(c)(9)(B)—Per day for each failure by a plan to timely provide to any State information required to be disclosed under Section 701(f)(3)(B)(ii), as added by CHIP regarding coverage coordination—each participant/beneficiary a separate violation. | 29 CFR 2575.1–3 | | $119 | | $120. |

| Agency | Law | Name/description | CFR citation | 2020 Min penalty (rounded to nearest dollar) | 2020 Max penalty (rounded to nearest dollar) | 2021 Min penalty (rounded to nearest dollar) | 2021 Max penalty (rounded to nearest dollar) |
|---|---|---|---|---|---|---|---|
| EBSA | Employee Retirement Income Security Act. | Section 502(c)(10)—Failure by any plan sponsor of group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, to meet the requirements of Sections 702(a)(1)(F), (b)(3), (c) or (d); or Section 701; or Section 702(b)(1) with respect to genetic information—daily per participant and beneficiary during non-compliance period. | 29 CFR 2575.1–3 | | $119 | | $120. |
| EBSA | Employee Retirement Income Security Act. | Section 502(c)(10)—uncorrected de minimis violation. | 29 CFR 2575.1–3 | 2,970 | | 3,005 | |
| EBSA | Employee Retirement Income Security Act. | Section 502(c)(10)—uncorrected violations that are not de minimis. | 29 CFR 2575.1–3 | 17,824 | | 18,035 | |
| EBSA | Employee Retirement Income Security Act. | Section 502(c)(10)—unintentional failure maximum cap. | 29 CFR 2575.1–3 | | $594,129 | | $601,152. |
| EBSA | Employee Retirement Income Security Act. | Section 502(c)(12)—Per day for each failure of a CSEC plan in restoration status to adopt a restoration plan. | 29CFR 2575.1–3 | | $109 | | $110. |
| EBSA | Employee Retirement Income Security Act. | Section 502 (m)—Failure of fiduciary to make a proper distribution from a defined benefit plan under section 206(e) of ERISA. | 29 CFR 2575.1–3 | | $17,213 | | $17,416. |
| EBSA | Employee Retirement Income Security Act. | Failure to provide Summary of Benefits Coverage under PHS Act section 2715(f), as incorporated in ERISA section 715 and 29 CFR 2590.715–2715(e). | 29 CFR 2575.1–3 | | $1,176 | | $1,190. |
| OSHA | Occupational Safety and Health Act. | Serious Violation | 29 CFR 1903.15(d)(3). | | $13,494 | | $13,653. |
| OSHA | Occupational Safety and Health Act. | Other-Than-Serious | 29 CFR 1903.15(d)(4). | | $13,494 | | $13,653. |
| OSHA | Occupational Safety and Health Act. | Willful | 29 CFR 1903.15(d)(1). | 9,639 | $134,937 | 9,753 | $136,532. |
| OSHA | Occupational Safety and Health Act. | Repeated | 29 CFR 1903.15(d)(2). | | $134,937 | | $136,532. |
| OSHA | Occupational Safety and Health Act. | Posting Requirement | 29 CFR 1903.15(d)(6). | | $13,494 | | $13,653. |
| OSHA | Occupational Safety and Health Act. | Failure to Abate | 29 CFR 1903.15(d)(5). | | $13,494 per day. | | $13,653 per day. |
| WHD | Family and Medical Leave Act. | FMLA | 29 CFR 825.300(a)(1). | | $176 | | $178. |
| WHD | Fair Labor Standards Act. | FLSA | 29 CFR 578.3(a) | | $2,050 | | $2,074. |
| WHD | Fair Labor Standards Act. | Child Labor | 29 CFR 579.1(a)(2) | | $2,050 | | $2,074. |
| WHD | Fair Labor Standards Act. | Child Labor | 29 CFR 570.140(b)(1). | | $13,072 | | $13,227. |
| WHD | Fair Labor Standards Act. | Child Labor | 29 CFR 579.1(a)(1)(i)(A). | | $13,072 | | $13,227. |
| WHD | Fair Labor Standards Act. | Child Labor that causes serious injury or death. | 29 CFR 570.140(b)(2). | | $59,413 | | $60,115. |
| WHD | Fair Labor Standards Act. | Child Labor that causes serious injury or death. | 29 CFR 579.1(a)(1)(i)(B). | | $59,413 | | $60,115. |
| WHD | Fair Labor Standards Act. | Child Labor willful or repeated that causes serious injury or death (penalty amount doubled). | 29 CFR 570.140(b)(2); 29 CFR 579.1(a)(1)(i)(B) Doubled. | | $118,827 | | $120,230. |
| WHD | Migrant and Seasonal Agricultural Worker Protection Act. | MSPA | 29 CFR 500.1(e) | | $2,549 | | $2,579. |
| WHD | Immigration & Nationality Act. | H1B | 20 CFR 655.810(b)(1). | | $1,928 | | $1,951. |
| WHD | Immigration & Nationality Act. | H1B retaliation | 20 CFR 655.801(b) | | $7,846 | | $7,939. |
| WHD | Immigration & Nationality Act. | H1B willful or discrimination | 20 CFR 655.810(b)(2). | | $7,846 | | $7,939. |
| WHD | Immigration & Nationality Act. | H1B willful that resulted in displacement of a US worker. | 20 CFR 655.810(b)(3). | | $54,921 | | $55,570. |

| Agency | Law | Name/description | CFR citation | 2020 Min penalty (rounded to nearest dollar) | 2020 Max penalty (rounded to nearest dollar) | 2021 Min penalty (rounded to nearest dollar) | 2021 Max penalty (rounded to nearest dollar) |
|---|---|---|---|---|---|---|---|
| WHD | Immigration & Nationality Act. | D–1 | 20 CFR 655.620(a) | | $9,639 | | $9,753. |
| WHD | Contract Work Hours and Safety Standards Act. | CWHSSA | 29 CFR 5.5(b)(2) | | $27 | | $27. |
| WHD | Contract Work Hours and Safety Standards Act. | CWHSSA | 29 CFR 5.8(a) | | $27 | | $27. |
| WHD | Walsh-Healey Public Contracts Act. | Walsh-Healey | 41 CFR 50–201.3(e) | | $27 | | $27. |
| WHD | Employee Polygraph Protection Act. | EPPA | 29 CFR 801.42(a) | | $21,410 | | $21,663. |
| WHD | Immigration & Nationality Act. | H2A | 29 CFR 501.19(c) | | $1,766 | | $1,787. |
| WHD | Immigration & Nationality Act. | H2A willful or discrimination | 29 CFR 501.19(c)(1) | | $5,942 | | $6,012. |
| WHD | Immigration & Nationality Act. | H2A Safety or health resulting in serious injury or death. | 29 CFR 501.19(c)(2) | | $58,833 | | $59,528. |
| WHD | Immigration & Nationality Act. | H2A willful or repeated safety or health resulting in serious injury or death. | 29 CFR 501.19(c)(4) | | $117,664 | | $119,055. |
| WHD | Immigration & Nationality Act. | H2A failing to cooperate in an investigation. | 29 CFR 501.19(d) | | $5,942 | | $6,012. |
| WHD | Immigration & Nationality Act. | H2A displacing a US worker | 29 CFR 501.19(e) | | $17,650 | | $17,859. |
| WHD | Immigration & Nationality Act. | H2A improperly rejecting a US worker | 29 CFR 501.19(f) | | $17,650 | | $17,859. |
| WHD | Immigration & Nationality Act. | H–2B | 29 CFR 503.23(b) | | $12,919 | | $13,072. |
| WHD | Immigration & Nationality Act. | H–2B | 29 CFR 503.23(c) | | $12,919 | | $13,072. |
| WHD | Immigration & Nationality Act. | H–2B | 29 CFR 503.23(d) | | $12,919 | | $13,072. |
| WHD | Fair Labor Standards Act. | Home Worker | 29 CFR 530.302(a) | | $1,071 | | $1,084. |
| WHD | Fair Labor Standards Act. | Home Worker | 29 CFR 530.302(b) | 21 | $1,071 | 21 | $1,084. |
| OWCP | Longshore and Harbor Workers' Compensation Act. | Failure to file first report of injury or filing a false statement or misrepresentation in first report. | 20 CFR 702.204 | | $24,441 | | $24,730. |
| OWCP | Longshore and Harbor Workers' Compensation Act. | Failure to report termination of payments | 20 CFR 702.236 | | $297 | | $301. |
| OWCP | Longshore and Harbor Workers' Compensation Act. | Discrimination against employees who claim compensation or testify in a LHWCA proceeding. | 20 CFR 702.271(a)(2). | 2,444 | $12,219 | 2,473 | $12,363. |
| OWCP | Black Lung Benefits Act. | Failure to report termination of payments | 20 CFR 725.621(d) | | $1,488 | | $1,506. |
| OWCP | Black Lung Benefits Act. | Failure to secure payment of benefits for mines with fewer than 25 employees. | 20 CFR 726.302(c)(2)(i). | 146 | | 148 | |
| OWCP | Black Lung Benefits Act. | Failure to secure payment of benefits for mines with 25–50 employees. | 20 CFR 726.302(c)(2)(i). | 290 | | 293 | |
| OWCP | Black Lung Benefits Act. | Failure to secure payment of benefits for mines with 51–100 employees. | 20 CFR 726.302(c)(2)(i). | 436 | | 441 | |
| OWCP | Black Lung Benefits Act. | Failure to secure payment of benefits for mines with more than 100 employees. | 20 CFR 726.302(c)(2)(i). | 579 | | 586 | |
| OWCP | Black Lung Benefits Act. | Failure to secure payment of benefits after 10th day of notice. | 20 CFR 726.302(c)(4). | 146 | | 148 | |
| OWCP | Black Lung Benefits Act. | Failure to secure payment of benefits for repeat offenders. | 20 CFR 726.302(c)(5). | 436 | | 441 | |
| OWCP | Black Lung Benefits Act. | Failure to secure payment of benefits | 20 CFR 726.302(c)(5). | | $2,976 | | $3,011. |

[FR Doc. 2021–00018 Filed 1–13–21; 8:45 am]

**BILLING CODE 4510–HL–P**

**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

*Correction*

In rule document C1–2020–28563 appearing on page 1256 in the issue of Friday, January 8, 2021, make the following corrections:

On page 1256, in the first column, in the seventeenth line, ''December 31, 2021'' should read ''December 30, 2021''.

On page 1256, in the first column, in the eighteenth line, ''December 31, 2020'' should read ''December 30, 2020''.

[FR Doc. C2–2020–28653 Filed 1–13–21; 8:45 am]

**BILLING CODE 1301–00–D**

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**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**29 CFR Parts 1601 and 1626**

**RIN 3046–AB19**

## Update of Commission's Conciliation Procedures

**AGENCY:** Equal Employment Opportunity Commission

**ACTION:** Final rule.

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) is amending its procedural rules governing the conciliation process to bring greater transparency and consistency to the conciliation process and help ensure that the Commission meets its statutory obligations regarding conciliation.

**DATES:** This rule will become effective February 16, 2021. However, this Rule shall only apply to conciliations for charges for which a Letter of Determination invitation to engage in conciliation has been sent to respondent on or after the effective date.

**FOR FURTHER INFORMATION CONTACT:** Andrew Maunz, Legal Counsel, Office of Legal Counsel at *andrew.maunz@eeoc.gov.* Requests for this document in an alternative format should be made to the EEOC's Office of Communications and Legislative Affairs at (202) 663–4191 (voice) or (202) 663–4494 (TTY).

**SUPPLEMENTARY INFORMATION:**

### Introduction

On October 9, 2020, the Commission published a Notice of Proposed Rulemaking (NPRM) outlining proposed revisions designed to update the Commission's conciliation procedures for charges alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and/or the Age Discrimination in Employment Act (ADEA). 85 FR 64079. The NPRM described the Commission's obligations to engage in conciliation to resolve these charges, as articulated in Title VII and other statutes and explained by the Supreme Court in *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480 (2015).

Conciliation is an essential component of Title VII's statutory framework that Congress designed to prohibit, identify, and eradicate discriminatory employment practices. *See Alexander* v. *Gardner-Denver, Co.,* 415 U.S. 36, 44 (1974); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982) (''[t]he 'primary objective' of Title VII is to bring employment discrimination to an end.''); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (the objective of Title VII was to break down discriminatory employment practices that ''favor an identifiable group . . . over other employees''). Rather than simply afford victims a cause of action for damages as in other statutory regimes, Congress settled on a framework that ''preferred'' cooperation and voluntary compliance, over litigation. *Mach Mining,* 575 U.S. at 486 (citation omitted). The Supreme Court explained that Title VII was designed to encourage '' '. . . 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace.'' *Ford Motor,* 458 U.S. at 228. ''Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them.'' *Id.* Conciliation was designed—and remains—a critical component of the Commission's mission to eliminate discriminatory employment practices, if possible, without litigation.

The Commission issued conciliation regulatory procedures in 1977 and has not changed them significantly since that time. *See* 85 FR at 64079. The NPRM described various challenges confronting the Commission's conciliation program. Notably, approximately one-third of respondents who receive a reasonable cause finding refuse to participate in conciliation. Overall, more than half of the cases in which the Commission finds reasonable cause that discrimination occurred are not resolved through conciliation. *Id.* at 64080.[1] In order to increase the effectiveness of the EEOC's conciliation program and more frequently achieve the agency's statutory mission, the NPRM proposed certain targeted and straightforward revisions to the Commission's conciliation procedures. *See* 85 FR at 64083–84. The primary objective of these revisions is to make conciliation a more powerful mechanism to halt and remedy unlawful discriminatory employment practices in a greater percentage of charges without litigation—either by the Commission or by employees. The Commission aims to accomplish this with these revisions by implementing requirements regarding the information that it must provide in preparation for and during conciliation, particularly with respect to its findings and demands. At their core, they ensure the Commission will provide certain information—the essential facts and the law supporting the claim, findings, and demands. Compliance with these requirements should put beyond reasonable dispute in most, if not all, cases the Commission's compliance with *Mach Mining.* More important, it will facilitate as a matter of course in all cases respondents' identification of the specific discriminatory practices at issue. This will directly facilitate voluntary prospective remedial action regarding the policy or practice, notwithstanding respondents' position during conciliation or subsequent litigation. And by eliminating such discriminatory practices without litigation, the Commission accomplishes its primary statutory objective in conciliation to purge unlawful discrimination in employment. Moreover, by providing information regarding the basis for the Commission's

[1] The Commission's failure to conciliate cases may have significant ramifications. Each year, failed conciliations leave many victims of discrimination to fend for themselves. As explained below, too often many of these individuals do not commence an action in court because they cannot obtain an attorney and the prospect of litigating is too daunting. Many of those who litigate do so without counsel, potentially placing victims at a disadvantage. Even those represented by counsel may not prevail—and those who do obtain relief sought may not receive it until several years after the discrimination at issue. By conciliating more cases, the Commission will be getting more victims relief, preventing more future discrimination, and ensuring that relief is more timely obtained.

finding and demands, the respondent will be able to more effectively assess its potential liability. This increased information will enhance the conciliation process for all parties to conciliation and may focus discussions in a way more likely to achieve a meeting of the minds or, alternatively, clearly distill areas of disagreement that may aid the Commission in subsequent litigation.

The Commission recognizes that currently, certain information is generally provided to employers prior to a cause finding and in the Letter of Determination, all of which occur prior to conciliation. The Commission also recognizes that the respondent is generally the holder of its own records and information. This rule is not meant to replace those disclosures or duplicate them,[2] but instead to ensure that the information the Commission provides about its position and findings enables respondents to properly evaluate their potential liability and the Commission's settlement offer, and ultimately, result in respondents becoming more likely to participate and resolve the charge.

The comment period for the NPRM closed on November 9, 2020. The Commission received a total of 58 comments in response to the NPRM—15 in favor, 33 in opposition, and 10 non-responsive. Commenters on both sides of the proposal included organizations and individuals. The Commission also received a comment from members of Congress in support of the rule. Former officials and employees of the Commission also submitted comments against the proposed changes. At least one commenter submitted two comments.

As explained in greater detail below, the Commission has carefully considered each of the comments it received. Based on these submissions, the Commission is publishing this final rule that, while similar to the proposed rule in most respects, nevertheless contains certain modifications, which are explained below.

**Comments in Support of Proposal and the Commission's Responses**

Several commenters agreed that there are challenges in the Commission's conciliation practices and procedures as recounted in the proposed rule. Specifically, they echoed and illustrated the ways in which the Commission's procedures and practices complicated and prevented the communication necessary to conciliate charges and stop employment practices that the Commission has determined after an investigation to be discriminatory. Commenters highlighted illustrative examples of conciliations in which the commenters allege the Commission issued large demands, with minimal explanation and insufficient support for the Commission's position. The commenters noted that in these and similar circumstances, the Commission's communications did not describe the act or practice alleged to be discriminatory, why it violated federal law, and which person or class was unlawfully harmed. 42 U.S.C. 2000e–5(b); *Mach Mining,* 575 U.S. at 488. The Commission agrees that without this basic information, the respondent may not be able to evaluate the merit of the Commission's position or demand, weigh the demand against the risk and expense of possible litigation and take directed action to ameliorate the problem. Even more important, a demand without commensurate support does not ''inform the employer about the specific allegations'' in a way that ''endeavors to achieve voluntary compliance.'' *Mach Mining,* 575 U.S. at 488, 494. Indeed, it is axiomatic that a party cannot adequately evaluate a claim or related demand without understanding the factual and legal basis for it. A lack of information can also impact the employer's ability to evaluate its practices or provide potentially helpful information to the Commission that may facilitate conciliation or, at a minimum, inform the Commission's subsequent litigation assessment. In the commenters' view, this short-circuits the conciliation process before meaningful communication between the parties even commences. Without this information, a respondent cannot engage in this analysis and determine whether the offer presented by the EEOC is the best way to resolve the case under the circumstances.

Commenters emphasized the importance of a thorough understanding of the opposing party's position during discussions aimed at reaching a resolution prior to litigation. As one commenter put it, the lack of factual and legal support for a demand or response leaves both the Commission and the employer with an ''asymmetrical view'' of their own position and a lack of understanding of the other side's position. One law firm asserted that the ubiquity of the EEOC's ''no facts'' strategy during conciliation indicates it is deeply engrained in the agency's culture. In the commenter's experience, the dearth of factual and legal support for demands frequently implies weaknesses in the underlying reasonable cause determinations. As another law firm put it: ''[w]hen the conciliation process becomes simply a series of demands, unsupported by relevant facts or legal authority, it is at best a futile and resource-consuming exercise, and at worst, an attempt to bring the weight of the federal government to bear on and extort an employer with little proof of wrongdoing.''

Members of Congress who submitted comments highlighted that on several occasions they had identified issues with the Commission's conciliation process; these issues were distinct from the examples provided by law firm and industry commenters.

The commenters in favor of the proposed rule agreed that the Commission's proposal addresses the principal challenges in its conciliation procedures and processes in ways that are likely to result in more meaningful conciliations and, ultimately, more agreements. Specifically, commenters stated that the proposed changes would ''entice'' more respondents to participate in conciliation. Commenters also noted that establishing these requirements through regulations, as opposed to through sub-regulatory guidance or employee training, would bring more certainty to the conciliation process. As articulated by the Ranking Member of the House Committee on Education and Labor, ''[t]hese commonsense requirements will increase transparency in the conciliation process and facilitate quicker resolutions of charges as the employer will have more information about the underlying charge, EEOC's position, and the employer's legal obligations.''

*Commission Response:* The Commission recognizes the importance of an effective conciliation program in its mission to identify and eradicate discriminatory employment actions and practices and, in so doing, obtain relief for its victims without the delay, expense, and uncertainty of possible litigation. The Commission also appreciates the place of primacy that conciliation holds in Title VII's statutory framework. By providing information concerning the factual and legal bases for its position for charges where it has found reasonable cause, the Commission believes it places itself in a stronger position to achieve conciliation in more cases—eliminating a greater number of unlawful employment practices and obtaining relief for victims of discrimination

[2] In many instances, these previous disclosures will satisfy the Commission's disclosure requirements under the final rule because the rule only requires disclosure of the information if the Commission has not already done so.

earlier than it can through litigation. By providing such information, the Commission can alleviate criticisms that demands are excessive or not supported by the evidence and the law. Providing this information should facilitate respondents' identification and redress of discriminatory practices regardless of the outcome of conciliation. Provided with this information, the Commission believes that a greater number of respondents will be more likely to engage in the conciliation process and comply voluntarily to resolve the charge. And by employing its revised conciliation procedures, the Commission will satisfy the requirements of 42 U.S.C. 2000e–5(b), as elucidated in *Mach Mining.* The Commission hopes that this final rule will reduce collateral attacks on the conciliation process during Commission litigation. In the event of such a challenge, the Commission will be able to demonstrate that it has met the conciliation requirements of the statute by submitting an affidavit stating that it has taken the required steps. *See Mach Mining,* 575 U.S. at 494–95. Ultimately, the Commission has concluded that the final rule will improve its ability to carry out in more cases its statutory mandate to eliminate discriminatory employment practices and achieve relief for workers ''far more quickly than could litigation proceeding at its often ponderous pace.'' *Ford Motor Co.,* 458 U.S. at 228.

As noted above, by improving the Commission's effectiveness to carry out its conciliation responsibilities, the final rule also affords considerable benefits to charging parties. As the EEOC is only able to litigate a small fraction of cases that fail conciliation, in most cases where conciliation fails, workers must fend for themselves in court to obtain relief. This means that charging parties must file and litigate their own lawsuits to secure any relief. Many choose not to sue. And, as several commenters noted, those that decide to seek legal action may be in the position of having to litigate without counsel. Even those who obtain counsel frequently fail to obtain significant relief and, if they prevail, may wait years for discovery, motions, trial, and appeals to conclude. By resolving more cases through conciliation, more victims of discrimination will obtain relief than would have otherwise and even the ones that would have obtained relief through litigation eventually, will receive relief more quickly, without incurring the expense and risk of litigation.

*Suggestions by Commenters:* Several commenters who supported the proposed rule also suggested what they saw as improvements. The Commission addresses each of the suggestions below:

1. *Extend the time period by which respondents must respond to the Commission's conciliation offer beyond fourteen days:* Several commenters stated that the Commission should give respondents more than 14 days to respond, especially in certain complex and systemic cases.

*Commission response:* The Commission declines to change the language or the requirement as it was originally proposed in sections 1601.24(d)(5) and 1626.12(b)(5) because the Commission concludes that these sections contain sufficient flexibility to allow longer response periods in appropriate cases. The proposed rule stated that respondents will be provided ''*at least* 14 days.'' There will certainly be cases where the Commission extends this period beyond 14 days, and the language allows the Commission to make this determination on a case-by-case basis. As a result, the Commission leaves unchanged the proposed language in the final rule.

2. *Allow anonymity in circumstances only where charging parties or aggrieved individuals are at risk of retaliation:* Several commenters urged the Commission to limit the charging parties or aggrieved individuals to whom it grants anonymity in conciliation under sections 1604.24(d)(1) and 1626.12(b)(1). Specifically, commenters suggested that the Commission grant anonymity only to current employees of the respondent because they, unlike former employees or failed applicants, are at risk of retaliation. Commenters indicated that it is often difficult to respond to the Commission's findings of discrimination, particularly in individual cases, when they do not know the identity or circumstances of a particular victim. Although conciliation is not intended to provide an opportunity to challenge the cause finding, one commenter noted that that a respondent could face an allegation that it did not hire an individual because of her race and that if the identity of the individual is withheld, it would not be able to determine if there were other reasons the individual was not hired, such as failing to show up for her interview.

*Commission response:* The Commission acknowledges that it in some cases it may be difficult for respondents to evaluate the merits of the Commission's conciliation proposal if the respondent is unaware of the identity of the victim(s). Respondents do receive the name of the charging parties when they are notified of the charge soon after it is filed. Some commenters suggest that anonymity be limited to only current employees recognizing their concern about potential retaliation. However, the Supreme Court has noted that former, current, and prospective employees are protected from retaliation. *See Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 345–46 (1997). Therefore, the Commission does not adopt this proposed change.

3. *Requiring the charging party to participate in conciliation:* One commenter suggested that the charging party should be required to participate in the conciliation, similar to a mediation.

*Commission response:* The Commission declines to adopt this proposed change. In conciliation, the Commission does not merely serve as the advocate of the charging party or aggrieved individual. Rather, the Commission's core objective is to vindicate the public's interest and eliminate discriminatory employment policies and practices. In some cases, but not all, this will achieve relief for the charging party as well as other workers and potential employees. Given these varied interests, conciliations take different forms and the charging party's participation varies from case to case for a myriad of reasons. The Commission believes it is important to the Commission's ability to achieve the broader purposes of conciliation to preserve its flexibility regarding the involvement of the charging party in each case. *See EEOC* v. *Waffle House, Inc.,* 534 U.S. 279, 291 (2002) (''The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.''). As a result, the Commission declines to mandate the charging party's participation in every instance.

4. *Commission must respond to all counteroffers and affirmative defenses:* Multiple commenters stated that the rule should require the Commission to respond to all counteroffers a respondent makes and that the Commission must respond to all affirmative defenses that are raised during conciliation.

*Commission response:* Conciliation is, first and foremost, the means Congress ''preferred'' the Commission to use to target and eliminate discrimination in employment. Indeed, Congress did not afford the Commission authority to commence litigation until 1972. Conciliation is not a rigid, structured, bargaining framework. As the Supreme Court made clear in *Mach Mining,* Congress afforded the Commission wide latitude to pursue voluntary compliance with a statutory provision, ''every aspect'' of which ''smacks of flexibility.'' *Mach Mining,* 575 U.S. at 492; 42 U.S.C. 2000e–5(b). And like the Supreme Court in that case, the Commission declines to infuse the conciliation process with a rigid code of rules that handcuffs the agency by limiting the broad strategic leeway Title VII affords to it to execute its mission. *See Mach Mining,* 575 U.S. at 492 (rejecting the petitioner's ''proposed code of conduct'' and ''bargaining checklist'' because ''Congress left to the EEOC such strategic questions about whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield.''). The Commission meets its statutory obligation by providing the basic factual and legal information for the respondent to evaluate the claim and identify the discriminatory action or practice. But once this is accomplished, the Commission retains ''discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.'' *Id.* The Commission declines to adopt such proposals because they damage the flexibility critical to its ability to conciliate claims without any concomitant benefit.

5. *Disclosures should be made in writing:* In the NPRM, the Commission solicited comments on whether the disclosures described in the proposed rule should be made in writing. 85 FR at 64081. Several commenters advocated written disclosures in order to ensure clarity. Significantly, one commenter contended that written disclosure of all material should be required so that all parties have a complete and unambiguous understanding of the Commission's position. Another commenter explained that written disclosures are more effective than mere oral exchanges in the negotiation process. This commenter noted that if the parties are required to communicate and exchange information in writing, it is less likely that the parties will be unclear as to the other parties' positions and information exchanged during the process.

*Commission response:* The Commission agrees that written disclosures help ensure clarity throughout the conciliation process. The Commission further agrees that providing information in writing will ensure full transparency of the conciliation process. Exchanging information in writing, where appropriate, eliminates confusion and promotes more accurate and complete information regarding the relevant issues. For these reasons, the Commission will keep the ''written'' reference that was in the NRPM and clarify that the other disclosures be in writing. However, for sections 1601.24(d)(3) and 1626.12(b)(3), the requirement that the disclosure be in writing shall apply only to the initial conciliation proposal made by the EEOC. In order to preserve the Commission's flexibility in conciliation, in recognition of the fact that demands are made at various times in a sequence of offers and counteroffers, and in order to avoid the increased burden on its staff to prepare a written explanation to accompany each change of position, the Commission has determined that disclosures explaining the basis for its requests for relief for subsequent offers and counteroffers need not be in writing and may be issued orally.

6. *Mediators should handle conciliation, not investigators:* One commenter urged the Commission to assign mediators to handle conciliations instead of investigators.

*Commission response:* The Commission disagrees with this comment and shall not adopt it. As the Commission has maintained throughout this process, it is not looking fundamentally to change its conciliation structure with this rule. Investigators remain in the best position to handle conciliation discussions as they are familiar with the case and the issues surrounding it. Furthermore, the process and purpose of conciliation is different than mediation. Accordingly, the Commission rejects this proposal.

7. *The Commission should disclose additional information:* A number of commenters stated that the Commission should make certain disclosures under sections 1601.24(d)(1), such as the identity of harassers or at-fault supervisors and potential class sizes.

*Commission response:* The Commission agrees that these disclosures will allow respondents to better assess their potential liability by identifying discriminatory practices, policies, and actions, and as a result advance the Commission's conciliation efforts to identify and eliminate discriminatory employment practices. However, the identities of harassers or supervisors may not be known at the time of conciliation. Similarly, sometimes class size may not have been fully determined. Accordingly, the final rule makes the disclosures references in the last two sentences of § 1601.24(d)(1) mandatory, only if known to the Commission.

8. *Establish a ''good faith'' standard:* A few commenters requested that the Commission impose a ''good faith'' standard on itself during conciliation.

*Commission Response:* At the outset, the Commission rejects the notion that it does not undertake its statutory responsibilities in good faith. All Commission employees are expected to approach conciliation in good faith and endeavor to achieve conciliation and its purposes within the framework of the Commission's procedures. In those situations where a respondent may disagree with the Commission's strategy in a particular case or a hard line taken in discussions does not mean that Commission personnel are not acting in good faith. The Commission declines to impose upon itself a standard as suggested that could open a door to collateral litigation. For these reasons the Commission declines to adopt such a standard, preferring the straightforward approach as updated by the final rule.

9. *Alter the privilege standard:* Several commenters requested that the Commission revise provisions concerning privilege contained in sections 1601.24(e) and 1626.12(c). Specifically, these commenters argued that the Commission should preclude itself from claiming privilege on the underlying facts it gathers and limiting the discretion of Commission employees in identifying privileged material.

*Commission response:* The Commission declines to make specific statements regarding privilege beyond that which is set forth in the proposed rule. The Commission will continue to claim all privileges to which it is entitled by law. The Commission declines to amend the rule to outline specific criteria for employees to follow concerning assertions of privilege.

10. *Confidentiality of conciliations:* Multiple commenters asked that the Commission prohibit itself from seeking publication of the conciliation, through terms in the conciliation agreement. One commenter explains that, in their experience, it is common for the Commission to require, as a condition of successful conciliation, that a respondent agree to waive confidentiality and allow the Commission to issue a public press release announcing some or all of the terms of the parties' agreement. The commenter contends that this serves not only to deter employers from entering conciliation at the outset but can serve to lead a case that might otherwise be resolved via conciliation to instead fail to be resolved in conciliation.

*Commission response:* The Commission will not make this change.

Section 706 of Title VII clearly requires approval to disclose information concerning conciliation. 42 U.S.C. 2000e–5(b) (''Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.''). As the Commission has explained, conciliation is a ''favored'' method to identify and eliminate illegal discrimination in employment. Publication of conciliation results—or certain elements of those results—often furthers this objective. There are valid reasons for the Commission to seek approval to publicize certain successful agreements and the Commission will continue to do so where appropriate.

11. *Limit disclosure of individual's information to another aggrieved individual:* Some commenters were concerned that sections 1601.24(f) and 1626.12(d) would result in disclosure of information about other victims to the charging party or to other aggrieved individuals that may violate a victim's privacy.

*Commission response:* The Commission agrees with this concern and has included language in the rule that information may be shared with charging parties ''except for information about another charging party or individual'' to ensure that information about an individual is not disclosed to another charging party or aggrieved individual. Although objected to by some commenters who opposed the rule, the Commission will not be taking out the ''upon request'' language regarding disclosures to charging parties. It is important for the Commission to maintain its discretion and flexibility with how it engages with aggrieved individuals during the conciliation process. Moreover, the burden on staff to provide this information to all identified aggrieved parties would be substantial in class cases.

12. *Commission should always make initial offer:* One commenter advocated a requirement that the Commission always make the initial offer in conciliation.

*Commission Response:* The Commission will not add this requirement to the final rule. Although the Commission agrees that often it is appropriate for the Commission to make the initial offer in conciliation, this is not always the case. There are circumstances in which a respondent may prefer to make the initial offer or where such an outcome is otherwise appropriate or more likely to secure terms ''acceptable to the Commission.'' 42 U.S.C. 2000e–5(f)(1). The imposition of such a procedural requirement could operate to impede the Commission's ability to execute this critical statutory obligation to eliminate unlawful discriminatory practices. Therefore, the Commission declines to make this change.

13. *Provide more details to support demands for monetary damages:* Several commenters contend that the Commission should require more explanation for the basis of its damages requested in conciliation. One commenter argues that the Commission will often take the position with respect to compensatory or punitive damages that a charging party is entitled to the maximum statutory cap on compensatory and punitive damages from the start. Consequentially, the commenter urges the Commission to make clear that an initial offer should not routinely rely on the maximum statutory damages cap in an attempt to leverage a higher final settlement. Likewise, another commenter echoes this sentiment and states that the final rule should provide that merely reciting the statutory maximums for compensatory or punitive damages does not satisfy the rule's requirements.

*Commission Response:* The Commission believes that the descriptions provided in sections 1601.24(d)(3) and 1626.12(b)(3) in the NPRM are sufficient because the language covers all requests for damages and relief, including punitive damages. Under the final rule, whatever the Commission's offer—including if it is the statutory cap—must be accompanied by an explanation based on the facts of the case. Furthermore, the commenters' suggestions risk taking away the flexibility that the Commission is seeking to maintain while also increasing transparency in conciliation.

14. *Add language about providing funds to third parties:* One commenter suggested adding language to the rule that would expressly encourage terms allowing distribution of excess settlement funds to third parties, such as charities.

*Commission response:* The Commission declines to add this provision. While these type of clauses may be appropriate in certain circumstances, the Commission is aware that they have recently been subject to greater scrutiny. For these reasons, and to ensure maximum flexibility in conciliation and avoid unnecessary encumbrances on its discretion, the Commission concludes that it would be inappropriate to include such a provision in its regulations. *See Frank* v. *Gaos,* 139 S. Ct. 1041 (2019).

**Comments Opposing the Rule Change and the Commission's Responses**

The EEOC also received comments opposing the rule change. These comments included concerns about the length of the comment period, particularly during the COVID–19 pandemic; whether the rule was premature in light of a pilot program; whether the rule favored employers over workers; whether the rule would undermine the Commission's ability to prevent and remedy discrimination; the rule's potential economic impact; the rule's relationship to the *Mach Mining* case; and whether the Commission sufficiently justified the rule's impact on its enforcement mission.

*Comments Regarding the Length of the Comment Period:* Several commenters claimed that a 30-day comment period was too short and asked that it be extended, some citing Executive Order 13563 and arguing that it provides comment periods should generally be at least 60 days. Others suggested that a short time period deprives the public of a sufficient opportunity to weigh in, citing the COVID–19 pandemic.

*Commission Response:* The Administrative Procedure Act (APA) requires that agencies give ''interested persons an opportunity to participate'' in rulemaking, but it does not establish specific time periods in which a rule must be open for public comment. 5 U.S.C. 553(c). Neither does Executive Order 13563, which provides that an agency ''afford the public a meaningful opportunity to comment through the internet on a proposed regulation, with a comment period that should generally be at least 60 days.'' The language of the APA and Executive Order 13563 anticipates that some rules are extensive and complex, running scores or hundreds of pages in the **Federal Register**; others are far less so. As a result, the ''60 days'' benchmark is neither mandatory nor necessarily appropriate for all rules. Here, as with all EEOC rulemakings, the Office of Management and Budget reviewed the NPRM before publication and agreed that the 30-day comment period was appropriate in light of the contents of the proposed rule.[3] The comment period must afford the public a meaningful opportunity to comment. This has occurred. The depth and breadth of the substantive comments the

[3] Similarly, Section 6(a) of Executive Order 12866 states that in ''most cases'' the comment period should be ''not less than 60 days.''

Commission received evidences that interested persons had a meaningful opportunity to comment.

In addition, the Commission conducted a meeting that called attention to the proposed rule. Specifically, on August 18, 2020, the Commission held a public meeting to discuss and vote on the NPRM. Notice of the meeting was published in the **Federal Register** which identified the topic of the meeting. The public was invited to listen to the meeting live. Press reports before and after the meeting reported the discussion of the proposed rule. The transcript of the meeting was timely uploaded on to the EEOC website.[4] As a result, the public had notice of this proposed rule from several sources and ample opportunity to research and evaluate the proposal, beginning nearly two months before the NPRM was published in the **Federal Register**. The Commission concludes that the length of the comment period on this rule was appropriate and declines to extend it.

*Allegation that the Rule is Premature Because of the Ongoing Pilot Program:* Some commenters contend that the NPRM fails to acknowledge the Commission's ongoing pilot program regarding conciliation procedures and that the Commission should wait to finalize the rule until after the pilot has concluded and been studied. Others argued that the public too should be given the opportunity to study the pilot and incorporate those efforts in further comments regarding this rule. Some commenters expressed concern that the results of the pilot program could be at odds with the rule, suggesting the Commission should delay the final rule to ensure harmony with the results of the pilot.

*Commission response:* In May of 2020, the EEOC launched a six-month pilot program. The pilot was extended in November 2020. This pilot made only a single change to the conciliation process.[5] Specifically, the pilot added a requirement that conciliation offers of certain amounts be approved by the certain levels of management prior to being shared with respondents. This requirement adds additional oversight by management to ensure that conciliation proposals are in line with the facts of the case. The pilot program is not related to this rulemaking; it addresses a different aspect of conciliation. It does not incorporate or add any of the changes to the conciliation procedures that were proposed or are being implemented in this final rule. Given the lack of overlap or connection between the pilot program and this rule, the results of the pilot are not relevant to this rulemaking and there is no reason to delay the latter so that the Commission or the public may study the former. As this rule is neither related to nor dependent on the pilot or its outcome, the Commission declines the delay sought by these commenters.

*Comments that the Rule Primarily Benefits Employers and Respondents:* Some commenters faulted the rule for requiring the Commission to disclose certain information to respondent automatically, while only providing the information to charging parties and aggrieved individuals upon request. Others raised concerns that the new rules could turn the conciliation process into ''quasi-litigation'' by making conciliation more formal and could generate collateral litigation. Still others expressed concern that the disclosures contemplated could potentially reveal the Commission's litigation strategy and inadvertently assist respondents in litigation.

*Commission Response:* The Commission appreciates the concerns expressed regarding the circumstances under which disclosures are made to respondents versus charging parties and aggrieved individuals. However, because the Commission is mindful of the need to maintain flexibility with respect to how staff engage with charging parties and aggrieved individuals, and recognizes the burden disclosure would impose upon staff, the Commission will retain the language ''upon request''.

The Commission is implementing the final rule to improve conciliation. The final rule should enhance the Commission's effectiveness in executing its statutory mandate to identify and eliminate discriminatory employment practices and obtain appropriate relief for victims without litigation, as Congress preferred. The rule accomplishes this end by requiring that the Commission provide certain basic information—the facts and law in support of the claim and who or what class of victims was affected by the allegedly discriminatory practice—that it already develops. By providing this information, respondents can better identify and correct the discriminatory action, policy, or practice. By facilitating such a result without litigation, the Commission achieves its primary goal of ending the discriminatory practice and potentially impacting other employees who may have been affected by the practice. As a result, the primary beneficiaries of more effective conciliations are victims and potential victims of discrimination, as well as the public. The Commission intends for these improvements to encourage more respondents to engage in the process, thus increasing the likelihood of voluntary compliance, and successful conciliations. These results should also provide benefits to discrimination victims by obtaining relief far sooner than would be possible in litigation. Without successful conciliation, employees and applicants are, in most cases, left to fend for themselves to try and obtain relief through litigation. For these reasons, the Commission disagrees with commenters' assertion that the final rule primarily benefits employers.

Nothing in the final rule is intended to create new causes of action for respondents or others; to the contrary, the rule is designed to alleviate concerns that the Commission has failed to meet its conciliation obligation, as explained in *Mach Mining.* Should the Commission's conciliation efforts be challenged in litigation, the final rule provides a framework that allows the Commission to easily demonstrate it has met the requirements laid out in *Mach Mining,* by simply affirming through an affidavit that it followed the procedures described in the statute. Thus, rather than raising the likelihood of collateral litigation over conciliation, the final rule will have the opposite effect by providing a guidepost for the Commission to follow in meeting its conciliation obligations. Furthermore, as the Commission pointed out in the NPRM, the confidentiality provisions of Title VII are inherent barriers to a probing judicial review of conciliation and protects the information disclosed. *See* 85 FR at 64080–81. For these reasons, the Commission has determined that this final rule will not unnecessarily open its conciliation process to judicial review or collateral attacks from employers.

The Commission appreciates the concerns expressed regarding the circumstances under which disclosures are made to respondents versus charging parties and aggrieved individuals. However, because the Commission is mindful of the need to maintain flexibility regarding how staff engage

[4] *See https://www.eeoc.gov/meetings/meeting-august-18-2020-discussion-notice-proposed-rulemaking-conciliation.*

[5] Concurrently with the pilot, the agency conducted refresher training on conciliation practices. In addition to training on the pilot, the refresher training included an emphasis on the pre-determination interview (PDI) requirement, which is conducted before the Commission issues its reasonable cause finding. While some overlap may occur between what employees are already expected to disclose during the PDI and what this final rule ensures is disclosed during conciliation, the pilot did not require any new disclosures.

with charging parties and aggrieved individuals, and in recognition of the burden disclosure would impose upon staff, the Commission will retain the language ''upon request'' as it relates to charging parties and aggrieved individuals. As noted above, the level of engagement by a charging party or aggrieved individual can vary from conciliation to conciliation. Furthermore, as also noted above, the Commission must also focus on the public interest when attempting to resolve the case through conciliation.

The rule is designed to improve the conciliation process by making it more meaningful and effective. Adequate information must be provided to the respondent to allow it to address the discriminatory conduct as well as assess its potential liability. The rule protects disclosure of privileged information, which will protect any confidential attorney work product related to litigation strategy.

*Concerns That the Rule Would Undermine the Commission's Ability to Prevent and Remedy Discrimination and Would Harm Workers:* Some commenters expressed concern that compliance with this rule would divert resources that otherwise would be used to directly serve charging parties. For example, some commenters stated that the new rule would cause the Commission to initiate fewer actions in court or somehow disincentivize the Commission from issuing cause findings. There was also concern that the disclosures required by the proposed rule could lead to retaliation against workers.

*Commission response:* The law requires that the Commission provide information to respondents regarding ''the alleged unlawful employment practice.'' *Mach Mining,* 575 U.S. at 488. The Commission has determined that, at a minimum, this must include factual and legal information sufficient to support its reasonable cause finding and any demand that it has made. This affords a respondent with basic information about the claim, such as the action or practice that the Commission has determined to be discriminatory in violation of Title VII, and the person or categories of persons it has harmed. *Id.* Instead of being ''extensive'' or ''burdensome,'' the disclosures required by the final rule are straight forward. The Commission's employees already engage in the analysis and work outlined in the rule such that compliance with the rule will not ''divert'' resources away from services currently provided to the victims of discrimination. In every case where there is a finding of discrimination, the Commission develops facts, identifies aggrieved parties, evaluates the scope and potential of class or systemic allegations, analyzes legal theories, and calculates potential damages. The rule requires that some of this information be communicated to respondent so that it may evaluate the claim to be conciliated. In communicating this information, the Commission will support its conciliation demand and reinforce its reasonable cause finding, thereby increasing the likelihood of voluntary resolution of charges, just as Congress preferred.

However, in recognition of the complications that could arise with respect to conciliations already in progress, this rule will only apply to conciliations for charges for which a Letter of Determination invitation to engage in conciliation has been sent to respondent on or after the effective date.

Concerns that the rule will cause fewer cases in which reasonable cause is found are inconsistent with the requirements of the final rule. The Commission's mission in conciliation is to identify and designate for elimination unlawful discriminatory employment practices, as well as to obtain relief for victims of discrimination. Whenever the investigation of a charge reveals that unlawful discrimination has likely occurred, the Commission will issue a finding of reasonable cause. This rule merely requires that certain basic information regarding such a charge be provided to the respondent. The Commission is confident that this information will support its findings of reasonable cause and convey the strength of the Commission's determination.

The Commission also rejects the assertion that the final rule will somehow frustrate its mission. The Commission's mission is to prevent and remedy unlawful employment discrimination. While litigation is a useful tool in achieving that end, it is not the exclusive means to achieve that result. Indeed, as noted above, Congress favored conciliation over litigation as a means to eliminate discriminatory employment practices. Furthermore, there is no reason to believe that the new rule will cause Commission employees to find reasonable cause in fewer cases where such a finding is merited pursuant to the facts and the law.

Section 706 of Title VII directs the Commission, after it finds reasonable cause, to endeavor to eliminate discrimination through informal methods of conference, conciliation, and persuasion. Congress further directed that the EEOC could only commence a civil action if, and only if, conciliation fails. By so doing, Congress made it clear that conciliation is the preferred method to address discrimination. *See Mach Mining,* 575 U.S. at 486 (''in pursuing the goal of bringing employment discrimination to an end, Congress chose 'cooperation and voluntary compliance' as its preferred means''). This rule advances that choice.

Commenters' concerns that disclosures could result in retaliation against aggrieved parties are misplaced. The rule provides protection for all workers reasonably susceptible of retaliation, which, of course, is prohibited by Title VII. The Commission will vigorously pursue employers who engage in retaliation against employees who attempt to vindicate their rights.

*Concerns About Economic Impact:* Some commenters expressed concern that the rule does not take into account the negative economic effects of discrimination. Others lodged concerns that the rule claims economic benefits of more conciliations, while ignoring the additional costs to the Commission. One commenter said the Commission relied on ''trickle-down economics'' to claim that cost savings would benefit the economy overall.

*Commission response:* Concerns that the rule does not take into account the negative economic effects of discrimination are misplaced. The Commission is aware of the economic effects of unlawful discrimination and uses every tool available to it to prevent and end unlawful discrimination. Conciliation is an important part of that. The more cases the Commission successfully conciliates, the greater the number of unlawful employment practices it eliminates and the greater number of incidents of discrimination are remedied, achieving its statutory mission. The Commission believes the final rule will lead to greater participation and more successful conciliations, which will have positive economic impacts for employees, employers, and the public at large.

The Commission disagrees with the comments that this rule will increase the rates of discrimination or allow discrimination to go unpunished or unaddressed. These comments fail to explain how the rule will cause more employers to engage in unlawful discrimination or to discriminate more extensively. To the contrary, this rule requires the Commission to provide to respondents factual and legal information about the claim to be conciliated. This will allow the respondent to better identify and address any underlying policy or practice that is discriminatory, even if the respondent elects to contest the particular charge or litigate for other reasons. And as more such policies and practices are identified and eliminated, fewer workers will suffer unlawful discrimination.

*Concerns That the Rule is Inconsistent with Mach Mining and Statutory Authority:* Some commenters argued that the rule is inconsistent with the Supreme Court decision in *Mach Mining,* and that because the changes are not required by statute or court decision the Commission should not make them. For example, a number of commenters pointed to the language of the *Mach Mining* decision that said Title VII's conciliation provision ''smacks of flexibility'' to argue that the Commission's proposed rule was contrary to the Court's holding. *Id.* at 492. Others believe conciliation is already successful and fear that these additional procedures will introduce an unnecessary rigidity that will compromise that success. Still others suggest that any changes to the Commission's conciliation process should be accomplished through internal guidance or pilots instead of rulemaking. Some commenters also claimed that the proposal was inconsistent with the language of Title VII itself, primarily citing to the use of ''informal'' in the statute regarding conciliation, and was therefore outside of the Commission's authority.

*Commission response:* The Commission disagrees that the final rule conflicts with *Mach Mining.* In *Mach Mining,* the Supreme Court began by emphasizing the importance of conciliation. The Court noted that Title VII ''imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit.'' *Mach Mining,* 575 U.S. at 486. That ''obligation,'' as the Court has held repeatedly, is ''mandatory, not precatory'' and ''is a key component of the statutory scheme. In pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means.'' *Id.* (punctuation and citations omitted). When undertaken effectively, conciliation should ''end discrimination far more quickly than could litigation proceeding at its often ponderous pace.'' *Ford Motor,* 458 U.S. at 228.

The Court found that Title VII ''provides certain concrete standards pertaining to what that endeavor must entail.'' *Mach Mining,* 575 U.S. at 488. Based on the statutory language describing the ''attempt'' the Commission must undertake in conciliation, namely ''informal methods of conference, conciliation, and persuasion,'' the Court explained that ''[t]hose specified methods necessarily involve communication between parties, including the exchange of information and views.'' *Id.* (citing 42 U.S.C. 2000e–5(b)). Not only does Title VII require ''communication,'' the Court continued, but ''[t]hat communication . . . concerns a particular thing: The 'alleged unlawful employment practice.' '' *Id.* (citing 42 U.S.C. 2000e–5(b)). Specifically, the Court held, in order ''to meet the statutory condition, [the Commission] must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.'' *Id.* If ''the Commission does not take those specified actions, it has not satisfied Title VII's requirement to attempt conciliation.'' *Id.*

Beyond these basic requirements that are mandatory in all cases, the Court recognized that the Commission enjoys broad discretion regarding the way in which it conducts conciliations. *Id.* at 492. The Court's statement regarding ''flexibility'' cited by commenters was in support of ''the latitude Title VII gives the Commission to pursue voluntary compliance with the law's commands.'' *Id.* The Commission is not required ''to devote a set amount of time or resources'' or take ''any specific steps or measures'' in conciliation. *Id.* The Commission ''alone decides whether in the end to make an agreement or resort to litigation,'' including ''whenever [it is] unable to secure terms acceptable *to the Commission*.'' *Id.* Once it has satisfied its obligations, the Commission decides how it will respond to the respondent and negotiate and how long it will do so. *Id.* (stating that ''Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.'').

The Commission's final rule focuses on the requirement that it communicate about the ''claim.'' *Id.* at 488. The Supreme Court held that the Commission must, at a minimum, communicate to the respondent ''what practice has harmed which person or class'' in order to comply with its conciliation obligation and that courts may review such efforts to ensure compliance with Title VII. *See id.* The Commission has determined that the final rule comprehensively and thoroughly covers the information required to make it compliant with *Mach Mining.* If respondents raise specious challenges, the Commission will be in a strong position to respond and, as appropriate, seek sanctions or other relief.

Some commenters point out that the rule is not mandated by *Mach Mining* or Title VII. While the requirements set out in the rule are not spelled out in either the Court's opinion or the statute, the final rule—or any regulation—need not be *required* by the Supreme Court or a statute to be appropriate. In fact, both Title VII and *Mach Mining* make clear that the Commission ''must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. *Mach Mining,* 575 U.S. at 488. The Commission is exercising its ''wide latitude'' and ''expansive discretion'' over the conciliation process to clarify the contents of statutorily required communications to respondents in such a way that its satisfaction of the requirements will be clear. *Id.* at 488–89. The Commission has concluded that a recitation and summary of the factual and legal basis is a core component of any ''communication about the claim''. This would include the identification of the action or practice the Commission has deemed discriminatory, the reason for its conclusion, as well as ''what person or class'' has been unlawfully harmed—all so that the respondent might be able to bring itself into compliance. With this rule the Commission is implementing a procedure to ensure that it satisfies the conciliation requirements of Title VII, as elucidated in *Mach Mining.*

Some commenters argue that the final rule imposes ''rigid'' or ''extensive'' burdens that will curtail the Commission's ''flexibility'' and ''discretion''. As noted above, the final rule requires the Commission to provide certain basic information that the Commission has concluded will categorically satisfy the minimum statutory requirements of its ''communication'' with respondents. Since EEOC staff already perform this work, this rule does not require the reallocation of resources, and is neither extensive nor voluminous. Contrary to assertions in many comments, this does not weaken the Commission's position in conciliation or litigation in that it does not require the Commission to ''lay all its cards on the table,'' ''devote a set amount of time or resources,'' or ''take any specific steps or measures'' in *any* conciliation. Once the information has been provided, the Commission ''alone decides'' in each case how it will respond to a particular respondent, the manner and particulars of how it will negotiate, and how long it will do so. *See id.* at 492. The Commission ''alone decides whether in the end to make an agreement or resort to litigation,'' including ''whenever [it is] unable to secure terms acceptable *to the Commission.*'' *Id.* The final rule ensures clear and consistent satisfaction of statutory requirements in accordance with the Court's opinion in *Mach Mining* while maintaining the Commission's flexibility to conciliate as it deems appropriate.[6]

While several commenters expressed a preference for internal guidance or pilot programs rather than a rule, the Commission has previously implemented Quality Enforcement Practices and internal guidance to enhance its conciliation efforts, changes that resulted in significant training of EEOC staff. While these changes improved the conciliation process, the Commission believes more should be done to build on that progress and has concluded the structure and predictability of a rule is the best way to make sure that it is consistently satisfying its statutory conciliation obligations. As already noted in the NPRM and above, less than half the cases for which the Commission finds reasonable cause are resolved through conciliation. The Commission aims to achieve more success, including fewer cases in which the respondent opts out of the process entirely. The Commission's purpose is to enhance the processes that will improve its ability to remedy unlawful discrimination without the need to resort to litigation.

Some commenters argued that conciliation is already successful and that the allegedly rigid procedures imposed in the final rule are unnecessary. One commenter noted that following *Mach Mining,* the amount of collateral litigation attacking conciliation decreased and the number of successful conciliations increased. An increase in successful conciliations is admirable and the Commission recognizes and commends the achievements of its employees in the conciliation process. Nothing in the final rule diminishes or recharacterizes that success. To the contrary, the final rule aims to build upon that success. As noted in the NPRM, from fiscal years 2016 to 2019, the Commission successfully conciliated approximately 41.23% of those cases in which it found reasonable cause. This amounts to only a slight increase over the previous four fiscal years. Also, during these years, employers continued to decline to participate in conciliation in approximately 33% of such cases. 85 FR at 64080. The Commission is concerned about the overall rate of successful conciliation and that one-third of employers refuse to participate in conciliation. While there may be many reasons why an employer refuses to conciliate, at least some of these respondents may be motivated, at least in part, by the belief that the current conciliation process is flawed and not worth the effort. The Commission is not targeting a specific percentage of successful conciliations or employer participation. However, the Commission is making minor changes that it believes will allow it to continue to improve its processes and, in so doing, identify and eliminate more discriminatory employment practices.

Finally, this final rule is consistent with section 706 of Title VII's use of ''informal'' when describing the Commission's efforts to resolve cases after finding reasonable cause, and in turn, the Commission's procedural rulemaking authority. The Commission's final rule does not establish a ''formal'' process, but instead provides basic procedures for information sharing that are fundamental to any settlement discussion. The rule does not establish ''quasi-litigation'' with formal rules of evidence or rules of procedure that would be found in federal court. It instead establishes base level procedures, but otherwise leaves conciliation as an informal process that can be adjusted as needed by the case.

*Concerns that the Commission Did Not Justify How the Rule Furthers Its Enforcement Mission:* A few commenters contended that the Commission had not presented any statistics or other data to support its belief that the proposed changes would make successful conciliation more likely or increase respondents' participation in conciliation. In addition, one commenter, argued that many respondents simply have no interest in conciliating, for reasons beyond the Commission's control. In support of this position, the commenter described instances in which employers agreed to resolve a matter after the Commission had filed suit for a higher amount than what the Commission offered in conciliation. Finally, other commenters challenged the portions of the proposed rule requiring that the Commission disclose information obtained that caused it to doubt there was reasonable cause on a variety of grounds.

*Commission response:* The Commission has explained the reasons it believes that the final rule is reasonably likely to increase participation in conciliation. These provisions should encourage greater confidence that the communications in the conciliation process will include the sort of information that the Court determined were required. Providing such basic factual and legal information will encourage more employers to participate and will provide them with a better understanding of the Commission's position.

As explained above, there are many reasons that respondents elect not to conciliate and, as the commenter explained, some of these reasons are beyond the Commission's control. A decision by a respondent to settle a case during litigation for more than what it could have settled during conciliation actually supports the Commission's reason for the rule change. In these situations, a respondent was willing to reach an agreement with the Commission after it received more information about the strength of the case against them, which they obtained in the litigation process. By better explaining its case in conciliation, the Commission makes it more likely that respondents will understand the risk of litigation and be more willing to resolve the matter during conciliation, freeing the Commission's resources to litigate other more challenging cases.

The Commission's Office of Enterprise, Data, and Analytics (OEDA) has conducted a comprehensive analysis of the reasons why conciliations fail.[7] Their analysis identifies two primary reasons charges are not resolved through conciliation: (1) The respondent's choice not to participate and (2) the parties cannot agree on monetary relief. OEDA's statistics also indicate that in cases

[6] As the Court explained in *Mach Mining* and the Commission noted above, ''Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.'' *Id.* at 492. The final rule does nothing to limit or curtail this discretion that the Commission has applied for decades in pursuit of its mission to eradicate unlawful employment discrimination.

[7] The need to complete this analysis was cited by a commenter opposed to the proposed rule as a reason not to move forward. The analysis has been completed and is consistent with the changes made in the final rule.

where employers agree to participate in conciliation, there is more than a 50% chance of achieving resolution. Getting more employers to agree to participate is the first step to getting more resolutions. By providing basic information about the facts and legal arguments behind the claim, the Commission increases the likelihood that the respondent will recognize the merit of the Commission's position and conciliate.

Finally, the Commission has decided to remove from the final rule any requirement that it disclose material information that caused it to doubt its determination of reasonable cause. After reviewing the points raised by several commenters, the Commission is concerned about the potential for collateral challenges that this requirement may create. As the Commission has stated above, the purpose of this final rule is not to create or encourage potential new avenues for dilatory litigation on conciliation. Based on its review of the comments, the Commission believes the litigation risks of this part of the proposal outweigh the increase in transparency that would be achieved specifically by this provision. The Commission expects that its personnel will continue to evaluate, weigh, and proactively address evidence that runs contrary to a reasonable cause finding in its summary under § 1601.24(d)(2). In cases where the facts or the law suggest that reasonable cause is lacking, existing protocols require field personnel not to make such a finding. And the Commission's employees adhere to these protocols—and their professional obligations—in evaluating cases. For these reasons and after carefully considering the comments regarding this proposal, the Commission has removed this requirement from the final rule.

**Final Regulatory Revisions**

After considering all comments received, the Commission is finalizing the proposed rule as modified in the discussion above.[8] These changes will bring more clarity, transparency, and consistency to the conciliation process. They will encourage more respondents to participate and the Commission to better articulate it positions at the outset of conciliation. The final rule sets out procedures that will support the Commission's ability to meet statutory obligations to attempt to conciliate, *i.e.,* to ''tell the employer about the claim—essentially, what practice has harmed which person or class—and provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.'' *Mach Mining,* 575 U.S. at 488. As the Court noted, conciliations ''necessarily involve communication between parties, including the exchange of information and views.'' *Id.* This final rule ensures that the Commission's exchange of information occurs in an open, transparent manner. These changes should make the conciliation process more successful and, in so doing, enhance the Commission's fulfilment of its mission to eliminate unlawful discrimination in employment.

**Regulatory Procedures**

*Executive Order 12866*

This rule has been determined to be significant under E.O. 12866 by the Office of Management and Budget because it raises novel legal or policy issues arising out of legal mandates or the President's priorities. The rule will not have an annual effect on the economy of $100 million or more, nor will it adversely affect the economy in any material way. Thus, it is not economically significant for purposes of E.O. 12866 review. However, the rule will have many benefits as demonstrated by the following cost-benefit analysis.

The rule imposes no direct costs on any third parties and only imposes requirements on the EEOC itself. The rule, if implemented, will likely require the EEOC to conduct training of staff to ensure that it is complying with the new regulation. While these changes and training would likely be absorbed within the Commission's normal operating expenses, any additional expenses that the agency would incur could be offset by cost savings derived from these changes. For example, charging parties often file Freedom of Information Act (FOIA) requests with the Commission after receiving a ''right to sue notice'' in order to receive the charge file. If more cases are resolved in conciliation, these cases would not result in right to sue notices and the Commission would receive fewer FOIA requests, resulting in cost savings for the government.

Furthermore, while the parties ultimately determine whether a conciliation agreement is reached, if the Commission is able to conciliate more cases successfully, it will benefit employees, employers, and the economy as a whole. With respect to employees, an increase in successful conciliations will result in more employees receiving remedies for the discrimination they suffered within an accelerated timeframe. Many employees who receive reasonable cause findings are unable to obtain any relief without conciliation because they do not pursue litigation for fiscal, emotional, or other reasons, or even if they do pursue litigation, ultimately do not attain relief. Even employees who ultimately would otherwise be successful in litigation may benefit from a conciliation because they would then receive remedies sooner and avoid the time, cost, stress, and uncertainty of litigation.

Employers will also benefit from the EEOC conciliating cases more successfully. In some cases, conciliations may provide an opportunity for employers to more quickly correct any discriminatory conduct or policies and seek compliance assistance from the EEOC. Additionally, while employers pay $45,466[9] on average to settle cases in conciliation, they will save time, resources, and money by avoiding (often costly and lengthy) litigation. It is difficult to quantify the average cost of litigating an employment discrimination case for an employer because the cost of a case depends on several factors, such as the complexity of the case, length of the litigation, and the jurisdiction in which it is litigated.[10]

The stage at which litigation concludes has a large effect on litigation costs—attorneys' fees and other litigation expenses are significantly higher for cases that go through trial, as

[8] As noted in the NPRM, the language in § 1626.12 is slightly different in some places than the language of 1601.24 due to the different conciliation language in the ADEA. 85 FR at 64081 n. 10. This includes the fact that the ADEA does not require that conciliation start after a reasonable cause finding, so the provisions in 1601.24 that are dependent on a reasonable cause finding are not found in § 1626.12. *See* 29 U.S.C. 626(d)(2). A letter from former employees of the Commission took issue with the Commission using the phrase ''allegations'' in the ADEA portion of this rule. The reason that Commission used the phrase ''allegations'' instead of referencing a reasonable cause finding is because the ADEA section that describes the Commission's conciliation obligations is not dependent on a reasonable cause finding, unlike Title VII. *See* 29 U.S.C. 626(d)(2).

[9] This was the average for fiscal year 2019.

[10] This analysis focuses only on an employer's litigation costs because most plaintiff-side attorneys use contingency-fee arrangements for pursuing claims, in which the attorney receives a portion of the recovery and charges little or nothing if no recovery is obtained. *See* Martindale-Nolo Research, *Wrongful Termination Claims: How Much Does a Lawyer Cost?* (Nov. 14, 2019), *available at https://www.lawyers.com/legal-info/labor-employment-law/wrongful-termination/wrongful-termination-claims-how-much-does-a-lawyer-cost.html* (noting that 75% of plaintiffs lawyers in employment litigation use contingency fee arrangements and another 15% use a combination of a contingency fee and hourly rate). Thus, more frequent conciliation will save litigation costs for those few plaintiffs who pay their attorneys an hourly rate.

opposed to those that end in summary judgment. For example, in 2013, one experienced defense attorney estimated that the average attorney's fees for employers for cases that end in summary judgment was between $75,000 and $125,000; while cases that go to trial average between $175,000 and $250,000 in fees.[11] Factoring for inflationary changes in legal fees, the present value of those costs is closer to $83,000 to $139,000 for cases ending in summary judgment and $195,000 to $279,000 for cases that end after a trial.[12] Taking the middle of each range in present value results in average costs of $111,000 for cases ending in summary judgment and $237,000 for cases that end after trial. The Commission recognizes that many employers will find these fee estimates to be low, but because there is insufficient, publicly available data for calculating the amount that employers have expended in defending against a charge through conciliation [13] and which otherwise would be subtracted for purposes of this analysis, the Commission believes such a conservative estimate is appropriate.

To determine the average amount spent on attorney's fees, the Commission also must consider the number of cases that were the subject of conciliation that are either resolved at summary judgment or proceed to trial. The majority of cases of employment discrimination are not tried.[14] Some studies suggest that two-thirds or more of employment discrimination lawsuits that are filed in court end in summary judgment.[15] Those statistics, however, include cases filed in court after the EEOC dismissed the charge without a reasonable cause determination. In conciliation cases, by contrast, the EEOC has conducted an investigation and found reasonable cause to conclude that discrimination may have occurred. The Commission believes it is reasonable to assume that more of these latter cases will survive summary judgment. With this assumption, the average litigation cost for employers is $174,000.[16]

Resolving more cases through conciliation will be beneficial to the economy as a whole because the litigation costs that the parties save can be put towards more productive uses, such as expanding businesses and hiring more employees. It is difficult to quantify how many cases in which the Commission finds reasonable cause end up being litigated in court because, if the EEOC decides to not litigate the case, the Commission does not track lawsuits filed by private plaintiffs. The Commission believes that cases in which the EEOC found reasonable cause are the most likely to be litigated by a private plaintiff because the EEOC has already determined that there is reasonable cause to believe that the case has merit. While not all cases in which reasonable case is found and conciliation is unsuccessful are litigated, there is reason to believe that a significant portion are. The Commission itself files lawsuits in roughly 10% of the cases in which reasonable cause is found and conciliation is not successful.[17] It is reasonable to believe that private plaintiffs file lawsuits in at least an additional 40% of cases, so that overall half the cases in which reasonable cause is found, but conciliation is unsuccessful, end up being litigated in court.[18]

Using the numbers above, if the Commission successfully conciliated only 100 more cases each year, that would save the economy over $4 million in litigation costs.[19]

Therefore, the Commission's rule, which establishes basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC's position in conciliation and, thus, make it more likely that the conciliation will be successful, will result in significant economic benefits when it is successfully implemented.

*Executive Order 13771*

This rule is not expected to be an E.O. 13771 regulatory action because it will not impose total costs greater than $0. As described above, the Commission's rule will result in more successful conciliations and therefore, overall cost reduction, so this is considered a deregulatory action. Details on the expected impacts of the rule can be found in the Commission's analysis above.

[11] John Hyman, *How Much Does it Cost to Defend an Employment Lawsuit,* in Workforce, (May 14, 2013), *available at https://www.workforce.com/news/how-much-does-it-cost-to-defend-an-employment-lawsuit.*

[12] These calculations were made using the Department of Labor Bureau of Labor Statistics's (BLS) Consumer Price Index calculator, *available at https://www.bls.gov/data/inflation_calculator.htm.* These increases are likely conservative, as they are similar to increases in legal service costs over a shorter time frame. Historical data for the BLS Producer Price Index for Legal Services in the Mid-Atlantic region, *available at https://www.bls.gov/regions/mid-atlantic/data/producerpriceindexlegal_us_table.htm,* reveals that average costs for employment and labor legal services increased from 100 in December 2014 (the earliest data available) to 109.9 in April 2020 (the most recent non-''preliminary'' data), an increase of approximately 10%. Similarly, the U.S. Department of Justice's USAO Attorney's Fees Matrix, which only measures the change in fees between 2015–2020 across the legal field, reveals a roughly 12% change in hourly rate for the most experienced attorneys in the District of Columbia. *See https://www.justice.gov/usao-dc/page/file/1305941/download.*

[13] ''There do not appear to be any reliable statistics on the percentage of employers who retained outside counsel to defend charges filed with the EEOC.'' Philip J. Moss, *The Cost of Employment Discrimination Claims,* 28 Maine Bar J. 24, 25 (Winter 2013). Supposing ''conservatively'' that 50% of employers relied on outside counsel at an hourly rate averaging $250 (in 2013) and invested 20 hours in cases during the EEO process, *Id.,* employers would average $2,500 in legal costs during the EEO process ($250 × 20 hours × 0.5), which in present value would average $2,792. The costs for employers who use in-house counsel or human resource professionals to handle their EEOC charges are more difficult to quantify.

[14] Paul D. Seyfarth, *Efficiently and Effectively Defending Employment Discrimination Cases,* 63 AmJur Trials 127, § 81 (Supp. 2020) (''It is an undeniable fact that most employment discrimination cases do not get tried; they are either settled or disposed of via summary judgment.'').

[15] Charlotte S. Alexander, Nathan Dahlberg, Anne M. Tucker, *The Shadow Judiciary,* 39 Rev. of Lit. 303 (2020) (Table 3) (finding that among summary judgment motions in employment cases handled by magistrate judges in the Northern District of Georgia, 78% are granted in part or in full); Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases,* 57 N.Y. L. Sch. L. Rev. 815, 817 (2012/2013) (finding that approximately two-thirds of all equal pay act cases end at the summary judgment stage).

[16] Average summary judgment fees ($111,000) + average trial fees ($237,000)/2 = $174,000. This figure is within the range of other estimates for average attorney fee costs. *See* AmTrust Financial, Employment Practices Liability (EPLI) Claims Trends, Stats & Examples, *available at https://amtrustfinancial.com/blog/insurance-products/top-trends-employment-practices-liability-claims* (asserting that attorney fee costs in 2018 averaged $160,000, which in present value would amount to $167,000); Moss, *supra* note 7 (*citing* Blasi and Doherty, California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at $0, UCLA–RAND Center for Law and Public Policy (2010)) (estimating costs to employers in state-level employment discrimination cases in California in 2010 at $150,000, which taken to present value would average approximately $180,000).

[17] For fiscal year 2019, the Commission filed 157 lawsuits. EEOC Litigation Statistics, *https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2019.* Overall, in fiscal year 2019, there were 1,427 cases in which the Commission found reasonable cause but conciliation was unsuccessful. *https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2019.*

[18] To give some sense of the scope of cases, federal courts reported that 42,053 ''Civil Rights'' cases were filed in federal court during the most recent year. *https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf.* While not all these civil rights cases involve employment discrimination, and this number would include cases where a private plaintiff filed suit after the EEOC did not find reasonable cause, it illustrates that the assumption—that half of the roughly 1,400 cases in which conciliation is unsuccessful end up in court—is likely a low estimate.

[19] 100 successful conciliations × $45,466 (average conciliation for fiscal year 19) = $4,546,600. However, this number is offset by the litigation costs saved in 50 cases (assuming half the cases would have ended in in litigation): 50 × $174,000 = $8,700,000. $8,700,000 − $4,546,600 = $4,153,400 in savings for every 100 cases that are conciliated.

*Paperwork Reduction Act*

This rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities because it applies exclusively to employees and agencies of the federal government and does not impose a burden on any business entities. For this reason, a regulatory flexibility analysis is not required.

*Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Congressional Review Act*

While the Commission believes the rule is a rule of agency procedure that does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996), it will still follow the reporting requirement of 5 U.S.C. 801. This is not a ''major rule'' as the term is defined in 5 U.S.C. 804(2).

**List of Subjects in 29 CFR Parts 1601 and 1626**

Administrative practice and procedure, Equal Employment Opportunity.

For the Commission.

**Janet Dhillon,**

*Chair.*

For the reasons set forth in the preamble, the Commission amends 29 CFR parts 1601 and 1626 as follows:

## PART 1601—PROCEDURAL REGULATION

■ 1. The authority citation for part 1601 continues to read as follows:

**Authority:** 42 U.S.C. 2000e to 2000e–17; 42 U.S.C. 12111 to 12117; 42 U.S.C. 2000ff to 2000ff–11.

■ 2. Amend § 1601.24 by adding paragraphs (d), (e), and (f) to read as follows:

**§ 1601.24 Conciliation: Procedure and authority.**

* * * * *

(d) In any conciliation process pursuant to this section, after the respondent has agreed to engage in conciliation, the Commission will:

(1) To the extent it has not already done so, provide the respondent with a written summary of the known facts and non-privileged information that the Commission relied on in its reasonable cause finding, including identifying known aggrieved individuals or known groups of aggrieved individuals for whom relief is being sought, unless the individual(s) has requested anonymity. In the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, to the extent it has not already done so, identify for respondent the criteria that will be used to identify victims from the pool of potential class members. In cases in which that information does not provide an accurate assessment of the size of the class, for example, in harassment or reasonable accommodation cases, the Commission shall provide more detail to respondent, such as the identities of the harassers or supervisors, if known, or a description of the testimony or facts we have gathered from identified class members during the investigation. The Commission will disclose the current class size and, if class size is expected to grow, an estimate of potential additional class members to the extent known;

(2) To the extent it has not already done so, provide the respondent with a written summary of the Commission's legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts. In addition, the Commission may, but is not required to, provide a response to the defenses raised by respondent;

(3) Provide the respondent with the basis for monetary or other relief, including the calculations underlying the initial conciliation proposal and an explanation thereof in writing. A written explanation is not required for subsequent offers and counteroffers;

(4) If it has not already done so, and if there is a designation at the time of the conciliation, advise the respondent in writing that the Commission has designated the case as systemic, class, or pattern or practice as well as the basis for the designation; and

(5) Provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal.

(e) The Commission shall not disclose any information pursuant to paragraph (d) of this section where another federal law prohibits disclosure of that information or where the information is protected by privilege.

(f) Any information the Commission provides pursuant to paragraph (d) of this section to the Respondent, except for information about another charging party or aggrieved individual, will also be provided to the charging party, upon request. Any information the Commission provides pursuant to paragraph (d) of this section about an aggrieved individual will also be provided to the aggrieved individual, upon request.

## PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT

■ 1. The authority citation for part 1626 continues to read as follows:

**Authority:** Sec. 9, 81 Stat. 605, 29 U.S.C. 628; sec. 2, Reorg Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

■ 2. Revise § 1626.12 to read as follows:

**§ 1626.12 Conciliation efforts pursuant to section 7(d) of the Act.**

(a) Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion. Upon failure of such conciliation the Commission will notify the charging party. Such notification enables the charging party or any person aggrieved by the subject matter of the charge to commence action to enforce their rights without waiting for the lapse of 60 days. Notification under this section is not a Notice of Dismissal or Termination under § 1626.17.

(b) In any conciliation process pursuant to this section the Commission will:

(1) If it has not already done so, provide the respondent with a written summary of the known facts and non-privileged information that form the basis of the allegation(s), including identifying known aggrieved individuals or known groups of aggrieved individuals, for whom relief is being sought, but not if the individual(s) has requested anonymity. In the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, if it has not already done so, identify for respondent the criteria that will be used to identify victims from the pool of potential class members;

(2) If it has not already done so, provide the respondent with a written summary of the legal basis for the allegation(s). In addition, the Commission may, but is not required to provide a response to the defenses raised by respondent;

(3) Provide a written basis for any monetary or other relief including the calculations underlying the initial conciliation proposal, and an explanation thereof. A written explanation is not required for subsequent offers and counteroffers;

(4) If it has not already done so, advise the respondent in writing that the Commission has designated the case as systemic, class, or pattern or practice, if the designation has been made at the time of the conciliation, and the basis for the designation; and

(5) Provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal.

(c) The Commission shall not disclose any information pursuant to paragraph (b) of this section where another federal law prohibits disclosure of that information or where the information is protected by privilege.

(d) Any information the Commission provides pursuant to paragraph (b) of this section to the respondent, except for information about another charging party or aggrieved individual, will also be provided to the charging party, upon request. Any information the Commission provides pursuant to paragraph (b) of this section to the respondent about an aggrieved individual will be provided to the aggrieved individual, upon request.

■ 3. Amend § 1626.15 by adding a new sentence to the end of paragraph (d) to read as follows:

**§ 1626.15 Commission enforcement.**

* * * * *

(d) * * * Any conciliation process under this paragraph shall follow the procedures as described in § 1626.12.

* * * * *

[FR Doc. 2021–00701 Filed 1–13–21; 8:45 am]

**BILLING CODE 6570–01–P**

## POSTAL SERVICE

### 39 CFR Part 233

### Inspection Service Authority; Civil Monetary Penalty Inflation Adjustment

**AGENCY:** Postal Service™.

**ACTION:** Interim final rule.

**SUMMARY:** This document updates postal regulations by implementing inflation adjustments to civil monetary penalties that may be imposed under consumer protection and mailability provisions enforced by the Postal Service pursuant to the Deceptive Mail Prevention and Enforcement Act and the Postal Accountability and Enhancement Act. These adjustments are required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This document includes the adjustments for 2021 for statutory civil monetary penalties subject to the 2015 Act.

**DATES:** *Effective date:* January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Steven Sultan, (202) 268–7385, *SESultan@uspis.gov.*

**SUPPLEMENTARY INFORMATION:** The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), Public Law 114–74, 129 Stat. 584, amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (1990 Act), Public Law 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. Section 3 of the 1990 Act specifically includes the Postal Service in the definition of "agency" subject to its provisions.

Beginning in 2017, the 2015 Act requires the Postal Service to make an annual adjustment for inflation to civil penalties that meet the definition of "civil monetary penalty" under the 1990 Act. The Postal Service must make the annual adjustment for inflation and publish the adjustment in the **Federal Register** by January 15 of each year. Each penalty will be adjusted as instructed by the Office of Management and Budget (OMB) based on the Consumer Price Index (CPI–U) from the most recent October. OMB has furnished detailed instructions regarding the annual adjustment for 2021 in memorandum M–21–10, *Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (December 23, 2020), *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.* This year, OMB has advised that an adjustment multiplier of 1.01182 will be used. The new penalty amount must be rounded to the nearest dollar.

The 2015 Act allows the interim final rule and annual inflation adjustments to be published without prior public notice or opportunity for public comment.

**Adjustments to Postal Service Civil Monetary Penalties**

Civil monetary penalties may be assessed for postal offenses under sections 106 and 108 of the Deceptive Mail Prevention and Enforcement Act, Public Law 106–168, 113 Stat. 1811, 1814 (*see,* 39 U.S.C. 3012(a), (c)(1), (d), and 3017 (g)(2), (h)(1)(A)); and section 1008 of the Postal Accountability and Enhancement Act, Public Law 109–435, 120 Stat. 3259–3261 (*see,* 39 U.S.C. 3018 (c)(1)(A)). The statutory civil monetary penalties subject to the 2015 Act and the amount of each penalty after implementation of the annual adjustment for inflation are as follows:

*39 U.S.C. 3012(a)—False Representations and Lottery Orders*

Under 39 U.S.C. 3005(a)(1)–(3), the Postal Service may issue administrative orders prohibiting persons from using the mail to obtain money through false representations or lotteries. Persons who evade, attempt to evade, or fail to comply with an order to stop such prohibited practices may be liable to the United States for a civil penalty under 39 U.S.C. 3012(a). The regulations implemented pursuant to this section currently impose a $73,951 penalty for each mailing less than 50,000 pieces, $147,899 for each mailing of 50,000 to 100,000 pieces, and $14,791 for each additional 10,000 pieces above 100,000 not to exceed $2,957,993. The new penalties will be as follows: A $74,825 penalty for each mailing less than 50,000 pieces, $149,647 for each mailing of 50,000 to 100,000 pieces, and $14,966 for each additional 10,000 pieces above 100,000 not to exceed $2,992,956.

*39 U.S.C. 3012(c)(1)—False Representation and Lottery Penalties in Lieu of or as Part of an Order*

In lieu of or as part of an order issued under 39 U.S.C. 3005(a)(1)–(3), the Postal Service may assess a civil penalty. Currently, the amount of this penalty, set in the implementing regulations to 39 U.S.C. 3012(c)(1), is $36,975 for each mailing that is less than 50,000 pieces, $73,951 for each mailing of 50,000 to 100,000 pieces, and an additional $7,395 for each additional 10,000 pieces above 100,000 not to exceed $1,478,996. The new penalties will be $37,412 for each mailing that is less than 50,000 pieces, $74,825 for each mailing of 50,000 to 100,000 pieces, and an additional $7,482 for each additional 10,000 pieces above 100,000 not to exceed $1,496,478.

*39 U.S.C. 3012(d)—Misleading References to the United States Government; Sweepstakes and Deceptive Mailings*

Persons may be liable to the United States for a civil penalty under 39 U.S.C. 3012(d) for sending certain deceptive mail matter described in 39 U.S.C. 3001((h)–(k), including:

• Solicitations making false claims of Federal Government connection or approval;

• Certain solicitations for the purchase of a product or service that may be obtained without cost from the Federal Government;

• Solicitations containing improperly prepared ''facsimile checks''; and

• Certain solicitations for ''skill contests'' and ''sweepstakes'' sent to individuals who, in accordance with 39 U.S.C. 3017(d), have requested that such materials not be mailed to them.

Currently, under the implementing regulations, this penalty is not to exceed $14,791 for each mailing. The new penalty will be $14,966.

*39 U.S.C. 3017(g)(2)—Commercial Use of Lists of Persons Electing Not To Receive Skill Contest or Sweepstakes Mailings*

Under 39 U.S.C. 3017(g)(2), the Postal Service may impose a civil penalty against a person who provides information for commercial use about individuals who, in accordance with 39 U.S.C. 3017(d), have elected not to receive certain sweepstakes and contest information. Currently, this civil penalty may not exceed $2,957,993 per violation, pursuant to the implementing regulations. The new penalty may not exceed $2,992,956 per violation.

*39 U.S.C. 3017(h)(1)(A)—Reckless Mailing of Skill Contest or Sweepstakes Matter*

Currently, under 39 U.S.C. 3017(h)(1)(A) and its implementing regulations, any promoter who recklessly mails nonmailable skill contest or sweepstakes matter may be liable to the United States in the amount of $14,791 per violation for each mailing to an individual. The new penalty is $14,966 per violation.

*39 U.S.C. 3018(c)(1)(A)—Hazardous Material*

Under 39 U.S.C. 3018(c)(1)(A), the Postal Service may impose a civil penalty payable into the Treasury of the United States on a person who knowingly mails nonmailable hazardous materials or fails to follow postal laws on mailing hazardous materials. Currently, this civil penalty is at least $320, but not more than $127,525 for each violation, pursuant to the implementing regulations. The new penalty is at least $324, but not more than $129,032 for each violation.

**List of Subjects in 39 CFR Part 233**

Administrative practice and procedure, Banks, Banking, Credit, Crime, Infants and children, Law enforcement, Penalties, Privacy, Seizures and forfeitures.

For the reasons set out in the preamble, the Postal Service amends 39 CFR part 233 as follows:

## PART 233—INSPECTION SERVICE AUTHORITY

■ 1. The authority citation for part 233 continues to read as follows:

**Authority:** 39 U.S.C. 101, 102, 202, 204, 401, 402, 403, 404, 406, 410, 411, 1003, 3005(e)(1), 3012, 3017, 3018; 12 U.S.C. 3401–3422; 18 U.S.C. 981, 983, 1956, 1957, 2254, 3061; 21 U.S.C. 881; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–208, 110 Stat. 3009; Secs. 106 and 108, Pub. L. 106–168, 113 Stat. 1806 (39 U.S.C. 3012, 3017); Pub. L. 114–74, 129 Stat. 584.

**§ 233.12 [Amended]**

■ 2. In § 233.12:

■ a. In paragraph (a), remove ''$73,951'' and add in its place ''$74,825'', remove ''$147,899'' and add in its place ''$149,647'', remove ''$14,791'' and add in its place ''$14,966'', and remove ''$2,957,993'' and add in its place ''$2,992,956''.

■ b. In paragraph (b), remove ''$36,975'' and add in its place ''$37,412'', remove ''$73,951'' and add in its place ''$74,825'', remove ''$7,395'' and add in its place ''$7,482'', and remove ''$1,478,996'' and add in its place ''$1,496,478''.

■ c. In paragraph (c)(4), remove ''$14,791'' and add in its place ''$14,966''.

■ d. In paragraph (d), remove ''$2,957,993'' and add in its place ''$2,992,956''.

■ e. In paragraph (e), remove ''$14,791'' and add in its place ''$14,966''.

■ f. In paragraph (f), remove ''$320'' and add in its place ''$324'' and remove ''$127,525'' and add in its place ''$129,032''.

**Joshua Hofer,**

*Attorney, Federal Compliance.*

[FR Doc. 2021–00447 Filed 1–13–21; 8:45 am]

BILLING CODE 7710–12–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Medicare & Medicaid Services

## 42 CFR Part 405

**[CMS–3372–F]**

**RIN 0938–AT88**

## Medicare Program; Medicare Coverage of Innovative Technology (MCIT) and Definition of ''Reasonable and Necessary''

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes a Medicare coverage pathway to provide Medicare beneficiaries nationwide with faster access to new, innovative medical devices designated as breakthrough by the Food and Drug Administration (FDA). The Medicare Coverage of Innovative Technology (MCIT) pathway will result in 4 years of national Medicare coverage starting on the date of FDA market authorization or a manufacturer chosen date within 2 years thereafter. This rule also implements regulatory standards to be used in making reasonable and necessary determinations under section 1862(a)(1)(A) of the Social Security Act (the Act) for items and services that are furnished under Part A and Part B.

**DATES:** This final rule is effective on March 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** Tamara Syrek Jensen and JoAnna Baldwin, (410) 786–2281 or *CAGinquiries@cms.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Department is committed to ensuring Medicare beneficiaries have access to new cures and technologies that improve health outcomes. Section 6 of the October 3, 2019 Executive Order 13890 (E.O. 13890) ''Executive Order on Protecting and Improving Medicare for Our Nation's Seniors,'' [1] directs the Secretary to ''propose regulatory and sub-regulatory changes to the Medicare program to encourage innovation for patients'' including by ''streamlining the approval, coverage, and coding process''.[2] The E.O. 13890 explicitly

[1] Executive Order on Protecting and Improving Medicare for Our Nation's Seniors, *available at https://www.whitehouse.gov/presidential-actions/executive-order-protecting-improving-medicare-nations-seniors/.*

[2] *Id.*

includes making coverage of breakthrough medical devices ''widely available, consistent with the principles of patient safety, market-based policies, and value for patients.'' [3] The E.O. also directs the Secretary to ''clarify the application of coverage standards.'' [4]

Consistent with these directives, we proposed to create a new coverage pathway for breakthrough devices, which we are calling Medicare Coverage of Innovative Technology (MCIT). This pathway will accelerate the coverage of new, innovative breakthrough devices to Medicare beneficiaries. We also proposed to codify the term ''reasonable and necessary'' to provide greater certainty to stakeholders seeking coverage for innovative items and services and to ensure that this substantive legal standard is codified.

The MCIT coverage pathway is specifically for Medicare coverage of devices that are designated as part of the Food and Drug Administration's (FDA) Breakthrough Devices Program (hereafter referred to as ''breakthrough devices'') and are FDA market authorized. FDA's Breakthrough Devices Program is for certain medical devices, device-led combination products, and can include lab tests.[5] The MCIT pathway would be voluntary and device manufacturers would notify CMS if they want to utilize this coverage option.

We proposed that National Medicare coverage under the MCIT pathway could begin immediately upon the date of FDA market authorization (that is, the date the medical device receives Premarket Approval (PMA); 510(k) clearance; or the granting of a De Novo classification request) for the breakthrough device or on the date designated by the manufacturer within any point during the four year eligibility period for coverage under MCIT. This coverage can occur unless the device does not have a Medicare benefit category or is otherwise excluded from coverage by statute (that is, the Medicare statute does not allow for coverage of the particular device.) This coverage pathway delivers on the Administration's commitment to give Medicare beneficiaries access to the newest innovations on the market, consistent with the statutory definitions of Medicare benefits. Because Medicare is a defined benefit program, devices that do not fit within the statutory definitions may not be considered for MCIT. As an example, medical equipment for home use by the beneficiary must be durable (that is, withstand repeated use) for it to be coverable by Medicare (as defined in statutes and regulations by the Secretary).

The Secretary has authority to determine whether a particular medical item or service is ''reasonable and necessary'' under section 1862(a)(1)(A) of the Act. (*See Heckler* v. *Ringer,* 466 U.S. 602, 617 (1984).) When making coverage determinations, our policies have long considered whether the item or service is safe and effective, not experimental or investigational, and appropriate. (For more information see the January 30, 1989 notice of proposed rulemaking (54 FR 4307)). These factors are found in Chapter 13 of the Medicare Program Integrity Manual (PIM) at section 13.5.4—*Reasonable and Necessary Provisions in LCDs* as instructions for Medicare contractors.[6] We proposed to codify in regulations the Program Integrity Manual definition of ''reasonable and necessary'' with modifications, including to add a reference to Medicare patients and a reference to commercial health insurer coverage policies. We proposed that an item or service would be considered ''reasonable and necessary'' if it is—(1) safe and effective; (2) not experimental or investigational; and (3) appropriate for Medicare patients, including the duration and frequency that is considered appropriate for the item or service, in terms of whether it is—

- Furnished in accordance with accepted standards of medical practice for the diagnosis or treatment of the patient's condition or to improve the function of a malformed body member;
- Furnished in a setting appropriate to the patient's medical needs and condition;
- Ordered and furnished by qualified personnel;
- One that meets, but does not exceed, the patient's medical need; and
- At least as beneficial as an existing and available medically appropriate alternative.

We also proposed that an item or service would be ''appropriate for Medicare patients'' under (3) if it is covered in the commercial insurance market, except where evidence supports that there are clinically relevant differences between Medicare beneficiaries and commercially insured individuals. An item or service deemed appropriate for Medicare coverage based on commercial coverage would be covered on that basis without also having to satisfy the previously listed bullets. We believed this definition would be a significant step in meeting the E.O.'s discussion of the need to bring clarity to coverage standards. Stakeholders have expressed interest in codifying a definition of ''reasonable and necessary'' for many years.

### *A. Statutory Authority*

As stated in the previous section, we proposed to codify the PIM's definition of reasonable and necessary with a modification to the appropriateness factor to allow CMS to refer to commercial coverage. We will finalize in regulation the factors we have historically used in making ''reasonable and necessary'' determinations under section 1862(a)(1)(A) of the Act, with a modification, discussed below, to factor (3) to determine whether an item or service is appropriate based, in prescribed circumstances, on coverage in the commercial market. In general, this section of the Act permits Medicare payment under part A or part B for any expenses incurred for items or services that are reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member. Thus, with some exceptions, section 1862(a)(1)(A) of the Act requires that an item or service be ''reasonable and necessary'' to be covered by Medicare. The courts have recognized that the Secretary has significant authority to determine whether a particular item or service is ''reasonable and necessary,'' and that the statute affords broad discretion to interpret this term (*Heckler* v. *Ringer,* 466 U.S. 602, 617 (1984). *See also, Yale-New Haven Hospital* v. *Leavitt,* 470 F.3d 71, 84 (2d Cir. 2006); *Kort* v. *Burwell,* 209 F. Supp. 3d 98, 110 (D. D.C. 2016) (The statute vests substantial authority in the Secretary.)) In regard to the MCIT coverage pathway, we proposed national Medicare coverage for breakthrough devices that are FDA market-authorized and used consistent with the FDA approved or cleared indication for use (also referred to as the ''FDA-required labeling'').[7] This device coverage under the MCIT pathway is reasonable and necessary for a duration of time under section 1862(a)(1)(A) of the Act because the device has met the very unique criteria of the FDA Breakthrough Devices Program.

[3] *Id.*

[4] *Id.*

[5] Food and Drug Administration, Breakthrough Devices Program Guidance for Industry and Food and Drug Administration Staff, *available at: https://www.fda.gov/media/108135/download.*

[6] *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/pim83c13.pdf.*

[7] FDA Guidance for Industry, ''Medical Product Communications That Are Consistent With the FDA-Required Labeling—Questions and Answers'', *available at https://www.fda.gov/media/133619/download.*

### B. FDA Breakthrough Devices Program

Under the MCIT coverage pathway, CMS will coordinate with FDA and manufacturers as medical devices move through the FDA regulatory processes for breakthrough device designation and market authorization to ensure seamless Medicare coverage after market authorization unless CMS determines those devices do not have a Medicare benefit category. The Breakthrough Devices Program is an evolution of the Expedited Access Pathway Program and the Priority Review Program (section 515B of the Federal Food, Drug, and Cosmetic Act (FD&C Act)), 21 U.S.C. 360e–3; see also final guidance for industry entitled, ''Breakthrough Devices Program,'' *https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM581664.pdf*).

The FDA's Breakthrough Devices Program is not for all new medical devices; rather, it is only for those that the FDA determines meet the standards for breakthrough device designation. In accordance with section 3051 of the 21st Century Cures Act (21 U.S.C. 360e–3),[8] the Breakthrough Devices Program is for medical devices and device-led combination products that meet two criteria. The first criterion is that the device provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating human disease or conditions. The second criterion is that the device must satisfy one of the following elements: It represents a breakthrough technology; no approved or cleared alternatives exist; it offers significant advantages over existing approved or cleared alternatives, including additional considerations outlined in the statute; or device availability is in the best interest of patients (for more information see 21 U.S.C. 360e–3(b)(2)). These criteria make breakthrough designated devices unique among all other medical devices.[9] The parameters of the breakthrough devices program focus on innovations for patients, in turn, MCIT, focuses on these breakthrough devices consistent with E.O. 13890 and in order to streamline coverage of innovative medical devices. We note that the FDA's guidance stresses the need for breakthrough devices to still meet the statutory standard of reasonable assurance of safety and effectiveness at the time of approval, meaning that a device which receives FDA breakthrough designation automatically satisfies factor (1) of our reasonable and necessary definition.

### C. Current Medicare Coverage Pathways

Currently, we utilize several coverage pathways for items and services, which includes medical devices. None of the coverage pathways described in this section offer immediate, predictable coverage concurrently with FDA market authorization like the proposed MCIT pathway would do. We summarize the other coverage pathways here to provide context for MCIT.

- National Coverage Determinations (NCDs): Section 1862(l)(6)(A) of the Act defines the term national coverage determination as ''a determination by the Secretary with respect to whether or not a particular item or service is covered nationally under this title.'' In general, NCDs are national policy statements published to identify the circumstances under which particular items and services will be considered covered by Medicare. Traditionally, CMS relies heavily on health outcomes data to make NCDs. Most NCDs have involved determinations under section 1862(a)(1)(A) of the Act, but NCDs can be made based on other provisions of the Act, and includes a determination that the item or service under consideration has a Medicare benefit category. The NCD pathway, which has statutorily prescribed timeframes, generally takes 9 to 12 months to complete.[10]
- Local Coverage Determinations (LCDs): Medicare contractors develop LCDs based on section 1862(a)(1)(A) of the Act that apply only within their geographic jurisdictions. (Sections 1862(l)(6)(B) and 1869(f)(2)(B) of the Act.) MACs will not need to develop LCDs for breakthrough devices when they are nationally covered through MCIT. Manufacturers declining to participate in the MCIT pathway may still seek LCDs from the MACs during and after the four year eligibility period, using the current process.

The MACs follow specific guidance for developing LCDs for Medicare coverage in the CMS Program Integrity Manual, and in some instances, an LCD can also take 9 to 12 months to develop (MACs must finalize proposed LCDs within 365 days from opening per Chapter 13—Local Coverage Determinations of the (PIM) 13.5.1). We note that the MCIT pathway does not alter the existing coverage standards in Chapter 13—Local Coverage Determinations of the PIM.[11] That chapter will continue to be used, to the extent consistent with other parts of this final rule, in making determinations under section 1862(a)(1)(A) of the Act.

- Claim-by-claim Adjudication: In the absence of an NCD or LCD, MACs would make coverage decisions under section 1862(a)(1)(A) of the Act and may cover or not cover items and services on a claim-by-claim basis. The majority of claims are handled through the claim adjudication process.
- Clinical Trial Policy (CTP) NCD 310.1: The CTP pathway can be used for coverage of routine care items and services (but generally not the technology under investigation) in a clinical study that is supported by certain Federal agencies. The CTP coverage pathway was developed in 2000.[12] This coverage pathway has not generally been utilized by device manufacturers because they usually seek coverage of the device, which is not included in the CTP pathway.
- Parallel Review: Parallel Review is a mechanism for FDA and CMS to simultaneously review the submitted clinical data to help decrease the time between FDA's approval of a premarket application or granting of a de novo classification and the subsequent CMS NCD. Parallel Review has two stages: (1) FDA and CMS meet with the manufacturer to provide feedback on the proposed pivotal clinical trial within the FDA pre-submission process; and (2) FDA and CMS concurrently review (''in parallel'') the clinical trial results submitted in the PMA, or De Novo request. FDA and CMS independently review the data to determine whether it meets their respective Agency's standards and communicate with the manufacturer during their respective reviews. This program is most successful for devices that have a significant amount of clinical evidence. (Candidates for parallel review are not be appropriate for simultaneous MCIT consideration.)

[8] 21st Century Cures Act, *available at https://www.congress.gov/114/plaws/publ255/PLAW-114publ255.pdf; see* FDA Guidance for Industry and Food and Drug Administration Staff, Breakthrough Devices Program *available at https://www.fda.gov/medical-devices/how-study-and-market-your-device/breakthrough-devices-program.*

[9] FDA does not publish a list of breakthrough designated or breakthrough designated and subsequently market authorized devices. However if a breakthrough device gains market authorization through a PMA only, then the summary of safety and effectiveness data (SSED) will contain a reference for the breakthrough designation. This is not true for De Novos which have been granted or cleared 510(k)'s. In consideration of that approach, this notice of public rulemaking does not contain such lists.

[10] Section 1869(f)(4) of the Act.

[11] CMS Program Integrity Manual, Chapter 13 Local Coverage Determinations, *available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/pim83c13.pdf.*

[12] CMS, National Coverage Determination for Routine Costs in Clinical Trials *available at https://www.cms.gov/medicare-coverage-database/details/ncd-details.aspx?NCDId=1&fromdb=true.*

In contrast to these other coverage pathways, MCIT is readily available to provide immediate national coverage for new breakthrough devices with a Medicare benefit category as early as the same date as FDA market authorization. The MCIT pathway can support manufacturers that are interested in combining coverage with their own clinical study to augment clinical evidence of improved health outcomes, particularly for Medicare patients.

*Comment:* Many commenters generally supported the MCIT concept, expressing that it would result in faster and more consistent access to newly authorized technologies for Medicare beneficiaries. Those commenters recognized that immediate coverage of newly FDA market-authorized breakthrough technologies via the pathway would avoid the ambiguity and possible inconsistency of claim-by-claim coverage by the MACs as well as the delays inherent in either the LCD or NCD pathways. Commenters suggested that MCIT will bring closer alignment of FDA and CMS decision-making, and would help to more closely coordinate coverage, coding and payment functions. Those who were supportive also stated their belief that the proposal would promote innovation; decrease uncertainty and delays in coverage; improve FDA—CMS coordination; and improve beneficiary access to cutting-edge treatments. Many commenters expressed support for the MCIT proposal in principle but nonetheless requested important clarifications or expressed significant reservations about specific elements.

Some commenters did not believe that the proposed MCIT pathway was necessary because existing coverage pathways provide a sufficient mechanism for coverage of newly FDA market authorized items and services. One commenter expressed concern that the MCIT pathway may undermine or circumvent existing pathways. A few commenters recommended that coverage for breakthrough technologies should be left to MAC discretion because they retain considerable flexibility to cover new technologies and can adjust coverage policy as new evidence emerges. Other commenters discussed the parallel review and Coverage with Evidence Development (CED) programs (CED is a paradigm whereby CMS issues an NCD to cover items and services on the condition that they are furnished in the context of approved clinical studies or with the collection of additional clinical data). The commenters stated that the parallel review program may shorten the time between FDA market authorization and coverage, but is generally more appropriate for items and services where there is relatively greater clinical evidence than under the breakthrough device pathway. For topics where there is less evidence on safety and efficacy available, such as newly FDA market authorized breakthrough technologies, they asserted the CED pathway is more appropriate. A few commenters recommended that instead of establishing the MCIT pathway, more resources should be applied to existing pathways to allow CMS to conduct expeditious review of a larger number of topics.

*Response:* CMS agrees that coverage of breakthrough devices through the MCIT pathway will accelerate access to items and services that address important unmet needs, as well as help CMS work more closely with FDA. We do not believe that simply devoting more resources to the existing coverage pathways will yield the synergy with FDA we anticipate will be created from the MCIT pathway. With the exception of claim-by-claim coverage, both LCDs and NCDs are subject to statutory timeframes and require considerable CMS resources to complete. This includes policy analysts, epidemiologists, physicians, data analysts and additional supporting staff in addition to contract money that is required to host meetings of the Medicare Evidence Development and Coverage Advisory Committee and commission external technical assessments. There are many steps outlined in Chapter 13 of the PIM regarding the process for attaining an LCD, and this process must be repeated in each MAC jurisdiction. The MCIT pathway will increase Medicare beneficiary access to newly FDA market-authorized treatments, for which similar devices may not exist and which improve health outcomes for patients, simplify and accelerate the process to gain coverage, and eliminate geographic variations in coverage that may occur for treatments covered on a claim-by-claim basis. Support for further innovation is a secondary benefit of the MCIT coverage pathway. We also agree with commenters that the parallel review program or CED may not be available to innovators under all circumstances, or may not be the most appropriate pathway for their circumstances, which is in part why we are making the MCIT pathway available as another route to CMS coverage. We remind commenters that coverage under MCIT is provisional, and that once MCIT coverage expires, our standard definition of reasonable and necessary as modified in this rulemaking, will be applied to determine whether and when to cover these devices.

We do not agree that the MCIT pathway will undermine or circumvent existing pathways. Only breakthrough devices will be eligible for the MCIT pathway. Sec. 515B(c) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360e–3(c)) states that a request for a breakthrough device designation may be made at any time prior to the submission of an application for premarket approval, approval under Sec. 510(k) of the FD&C Act (21 U.S.C. 360(k)), or approval under a de novo marketing authorization. Because requesting a breakthrough device designation presumes an application for approval under one of these three pathways, the MCIT pathway depends on, and does not undermine, these three avenues for FDA approval. We also do not agree that coverage for breakthrough technologies should be left to MAC discretion. The MCIT pathway will provide innovators greater certainty of initial Medicare coverage.

*Comment:* We solicited comments in the MCIT proposed rule on whether the MCIT pathway should also include diagnostics, drugs and/or biologics that utilize breakthrough or expedited approaches at the FDA (for example, Breakthrough Therapy, Fast Track, Priority Review, Accelerated Approval) or all diagnostics, drugs, and/or biologics. Some commenters expressed support for changing the way innovative technologies without FDA breakthrough device designation are covered by Medicare. These commenters pointed out that there may be innovative technologies which they believe ought to be covered by Medicare that choose not to use FDA's breakthrough device pathway or may be an innovative technology that may not qualify for the designation. One commenter suggested that CMS should preclude MACs from non-covering these technologies. Other commenters suggested non-breakthrough devices, drugs, and biologics should be eligible for an MCIT type of coverage pathway because non-breakthrough items and services also improve patient health outcomes. One commenter recommended that CMS be able to include non-breakthrough devices based on agency discretion as to when beneficiaries should have expedited access to an item or service.

In response to the question CMS posed about whether MCIT should include diagnostics, drugs, and biologics that use the breakthrough or other expedited FDA pathways, commenters provided varied suggestions. Some commenters offering general support of the MCIT program stated that the MCIT program should be limited, as we proposed, to technologies that are designated by the FDA as breakthrough devices. Some of these commenters supported their position by suggesting that device coverage lags further behind that of drugs and biologics and; therefore, devices are more in need of a program like MCIT. There were specific requests for CMS to include humanitarian use devices. Other commenters suggested that innovative devices using FDA Investigational Device Exemption (IDE) Category B designation should be eligible for MCIT.

*Response:* We appreciate that commenters shared their interest in CMS providing a pathway for non-breakthrough designated devices, and we share their interest in furthering innovation. Noting that, as stated in our proposed rule, E.O. 13890 makes explicit mention of medical devices in its directive, we have heard concerns from stakeholders that there is more uncertainty surrounding coverage of devices than for other items and services, such as drugs and biologics. For this reason, our proposal centered on breakthrough designated devices, since we believed that this was the area with the most immediate need, particularly in light of the unique FDA criteria for breakthrough designation status. We agree with commenters that we should undertake efforts to promote innovation across all items and services which could potentially be covered under Medicare. However, because we have consistently heard from stakeholders about the need for more rapid approval of breakthrough devices in particular, E.O. 13890 explicitly mentions devices, and because the immediate opportunity is to align with the FDA's breakthrough device designation, we are not expanding beyond breakthrough devices for the final rule. As the MCIT pathway develops and proves successful, we may consider expanding its application to other items and services, including Category B IDE and HUD devices in future rulemaking.

*Comment:* Some commenters asserted that FDA market authorization of breakthrough devices should suffice to establish that they are safe and effective. Other commenters argued further that establishment of safety and effectiveness is within the exclusive purview of the FDA, and no additional evidence should be required to meet the CMS reasonable and necessary evidence standard.

*Response:* We agree that establishment of safety and effectiveness is generally within the purview of the FDA under its statute, but not all items and services that may be covered under Medicare are regulated by the FDA.

*Comment:* A significant number of commenters noted that some breakthrough devices have no clinical data at the time of FDA market authorization, and many breakthrough devices lack data on patients older than 65, patients with disabilities, and patients with end stage renal disease, which poses some uncertainty about the FDA's ability to gauge safety and efficacy in the context of the Medicare population. There was also concern expressed about how the Medicare population is often excluded from clinical trials due to age and health status. Numerous commenters noted that the FDA frequently extends market authorization after reviewing short-term clinical studies with the proviso that ongoing data collection in the post-market authorization period is required to establish long-term durability of treatment effect. Furthermore, commenters cited evidence that FDA mandated post-market studies are not reliably completed and asserted that explicit assessment of safety and effectiveness in Medicare beneficiaries is essential. Several commenters provided specific examples of FDA market authorized devices that failed to demonstrate benefit when subjected to post-market clinical study.

*Response:* FDA assessments of safety and efficacy are general characterizations of a product. It is always up to an individual, in consultation with their physician, to determine whether an item or service is best applied to their individual health circumstances. Given this fact, we believe that current FDA requirements for demonstrating safety and efficacy are sufficient in determining whether to grant coverage to a breakthrough device under MCIT. We also note that our rule provides for the termination of MCIT coverage in instances where a medical device safety communication or warning letter is issued by the FDA, or if the FDA revokes market authorization for a device. We believe that these provisions will help protect beneficiary safety while ensuring that beneficiaries have more rapid access to new and innovative technology.

Additionally, in our proposed rule, we recognized that breakthrough devices are those that HHS has determined may provide better health outcomes for patients facing life-threatening or irreversibly debilitating human disease or conditions. We believe that a device meeting these criteria, once also FDA market authorized, is ''reasonable and necessary'' for purposes of Medicare coverage. The MCIT pathway establishes rapid coverage of breakthrough devices because existing coverage pathways do not provide immediate, national Medicare coverage. We believe this policy will provide a balance of ensuring rapid adoption of breakthrough devices, which by definition provide more effective treatment or diagnosis for life threatening or debilitating conditions, while benefitting beneficiaries. We do not agree that automatic coverage for other FDA approved products under section 1862(a)(1)(A) is warranted because by definition, breakthrough devices are those for which no approved alternative exists or that offer significant advantages over existing approved or cleared alternatives (21 U.S.C. 360e–3(b)(2)). Because other alternatives exist for conditions that can be treated with non-breakthrough devices, the urgency to provide coverage for these items and services on a provisional basis is not as great. In addition, we believe other avenues exist for non MICT eligible items and services to expeditiously gain coverage. For example, FDA has special procedures in place to grant fast track designation for certain new drugs, and other types of new drugs are eligible for a separate breakthrough therapy designation (not to be confused with the breakthrough device designation for which this rule makes MCIT coverage available). Furthermore, the need for certainty in this regard is not as high as compared to breakthrough devices because, the FDA only grants breakthrough designation to devices where no approved or cleared alternatives exist and device availability is in the best interests of patients.

### *D. MCIT Pathway*

We proposed that the MCIT pathway would provide immediate national coverage for breakthrough devices beginning on the date of FDA market authorization and continue for up to 4 years, unless we determine the device does not have a Medicare benefit category as determined by us as part of the MCIT pathway process. The MCIT pathway is voluntary (that is, manufacturers would affirmatively opt-in), and would be initiated when a manufacturer notifies CMS of its intention to utilize the MCIT pathway. (This notification process is described further in section III. of this final rule). We would subsequently coordinate with the manufacturer regarding steps that need to be taken for MCIT implementation purposes. The frequency of subsequent engagement will be largely driven by whether the manufacturer has questions for CMS, or CMS and FDA. The timing of coverage will be left to the manufacturer's discretion provided they request to enter the MCIT pathway within the four year timeframe for which they would be eligible to participate. Engagements can take place in the form of in-person meetings, phone calls, emails, etc. We intend to put devices that are covered through the MCIT pathway on the CMS website so that all stakeholders will be aware of what is covered through the MCIT pathway. This measure was completely supported by the public comments. Manufacturers of breakthrough devices will not be obligated or mandated by CMS to conduct clinical studies during coverage under the proposed MCIT pathway. However, we sought comment as to whether CMS should require or incentivize manufacturers to provide data about outcomes or should be obligated to enter into a clinical study similar to CMS's Coverage with Evidence Development (CED) paradigm.[13] We are aware some manufacturers may be required by the FDA to conduct post market data collection as a condition of market authorization, and nothing in this proposed rule would alter that FDA requirement. Manufacturers are encouraged to develop the clinical evidence base needed for one of the other coverage pathways after the MCIT pathway ends. This evidence is encouraged not only for CMS and commercial health insurer coverage policies but also to better inform the clinical community and the public generally about the risks and benefits of treatment. CMS encourages early manufacturer engagement, both before and after FDA market authorization, for manufacturers to receive feedback from CMS on potential clinical study designs and clinical endpoints that may produce the evidence needed for a definitive coverage determination after MCIT. This feedback would not involve CMS predicting specific coverage or non-coverage.

In order to further the goals of E.O. 13890, CMS proposed to rely on FDA's breakthrough device designation and market authorization of those devices to define the universe of devices eligible for MCIT, except for those particular devices CMS determines do not have a Medicare benefit category or are statutorily excluded from coverage under Part A or Part B. We proposed to establish a four year time limit on how long a breakthrough device can be eligible for MCIT (that is, considered a breakthrough device for coverage purposes). The 4 year coverage period is particularly important for manufacturers of breakthrough devices that choose to further develop the clinical evidence basis on which the FDA granted marketing authorization. From our experience with clinical studies conducted as part of an NCD, 4 years is approximately the amount of time it takes to complete a study.

At the end of the 4-year MCIT pathway, coverage of the breakthrough device would be subject to one of these possible outcomes: (1) NCD (affirmative coverage, which may include facility or patient criteria); (2) NCD (non-coverage); or (3) MAC discretion (claim-by-claim adjudication or LCD). Manufacturers that are interested in a NCD are encouraged to submit a NCD request during the third year of MCIT to allow for sufficient time for NCD development. We sought public comment on whether CMS should open a national coverage analysis if a MAC has not issued an LCD for a breakthrough device within 6 months of the expiration date of the 4-year MCIT period.

We sought public comment on the proposed MCIT pathway, the considerations described, whether any of the existing coverage pathways should be modified to achieve the goals set out by the E.O., and solicited alternatives to these proposals. We specifically sought public comment on whether the MCIT pathway should also include diagnostics, drugs and/or biologics that utilize breakthrough or expedited approaches at the FDA (for example, Breakthrough Therapy, Fast Track, Priority Review, Accelerated Approval[14]) or all diagnostics, drugs and/or biologics. We sought data to support including these additional item categories in the MCIT pathway. Also, we specifically sought manufacturer input on whether an opt-in or opt-out approach would work best for utilizing the MCIT pathway. We believe manufactures will welcome this new coverage pathway. We want to preserve manufacturers' business judgment and not assume which Medicare coverage pathway a given manufacturer of a breakthrough device would prefer (if any). Therefore, we proposed an opt-in approach with an email to CMS to indicate affirmative interest in coverage. We expressed interest in whether an opt-out approach would be less burdensome for stakeholders. We encouraged public comment on a process for stakeholders to opt-out of MCIT that would not be burdensome. Also, we sought public comment on whether, once a manufacturer has opted-out of coverage, it can subsequently opt-in to MCIT.

*Comment:* The majority of comments generated by our questions concern issuing an NCD at the end of the four year period did not support CMS automatically opening an NCD if MACs had not issued an LCD after 6 months. One commenter stated that the 6 month timing was arbitrary with another stated that 6 months would not be enough time for MACs to perform a comprehensive analysis as data may not be fully available or there may be LCDs in-process at the 6 month mark. Many manufacturers cited the desire for flexibility in the timing of requesting an NCD and some specifically cited support for claim by claim adjudication by the MACs and believe that FDA approved or cleared indications will be covered by MACs on a claim by claim basis. Some commenters did not want automatic LCDs or NCDs but wanted assurance that absent those mechanisms the MACs would, on a claim by claim basis, cover MCIT graduated technologies consistent with their FDA approved or cleared indications. A few commenters supported some version of a process by which an NCD would automatically be triggered including that the manufacturer would be required to submit an NCD request during year 3 of MCIT coverage and requiring the NCD to be complete by the end of year 4. A few commenters expressed general concern for potential uncertainty among patients and providers regarding whether MCIT coverage of a device would continue past year 4. One commenter noted that submission of requests for NCDs and LCDs are not restricted to manufacturers, anyone can submit a request.

*Response:* We appreciate commenters' input. We agree that manufacturers should have flexibility in timing their request for an NCD under MCIT so that they can adequately prepare to market the device and satisfy consumer expectations. We further believe that flexibility in the case of timing for the development of LCDs and NCDs would be in the best interest of beneficiaries, manufacturers and providers. We believe that there will be situations in which not enough evidence will be available on which an LCD or NCD can

[13] CMS, *Guidance for the Public, Industry, and CMS Staff Coverage with Evidence Development, available at https://www.cms.gov/medicare-coverage-database/details/medicare-coverage-document-details.aspx?MCDId=27.*

[14] Fast Track, Breakthrough Therapy, Accelerated Approval, Priority Review, *available at https://www.fda.gov/patients/learn-about-drug-and-device-approvals/fast-track-breakthrough-therapy-accelerated-approval-priority-review.*

be made and claim by claim adjudication is most appropriate, if even temporarily while the data continues to be developed. A 6-month timeframe may not be appropriate in all situations so this one size fits all approach to trigger an NCD at 6 months after the close of the 4 year MCIT coverage period is not flexible enough to account for the various levels of evidence that may be available. We are not able to require MACs to adjudicate claims for a particular result, this merely sidesteps the NCD process. However, we note that manufacturers and providers can discuss technologies with the clinical staff and medical directors working for each MAC. We also appreciate and are sensitive to the concern over the continuity of care for patients who are using breakthrough devices and find it important to state that beneficiaries with a device covered under MCIT will continue coverage of any routine services or complications related to that device beyond the 4-year period of MCIT coverage. After considering the comments, we are not making any changes in the final rule with respect to the possible outcomes at the end of the 4-year MCIT pathway, which are: (1) NCD (affirmative coverage, which may include facility or patient criteria); (2) NCD (non-coverage); or (3) MAC discretion (claim-by-claim adjudication or LCD). Manufacturers that are interested in a NCD are encouraged to submit a NCD request during the third year of MCIT to allow for sufficient time for NCD development. CMS will not automatically open a national coverage analysis within six months of the expiration four year MCIT period.

*Comment:* CMS received overwhelming support from commenters in favor of the voluntary, opt-in model of MCIT as proposed because it allows manufacturers to use their judgment in determining whether to participate. Some of the commenters who supported opting-in also added that communicating with CMS for entry into the MCIT program would be beneficial for both parties by encouraging discussion about the technology, coding, payment, and the evidentiary expectations after 4 years of coverage under MCIT. Another commenter indicated that opting-in would not be burdensome and would not likely be a deterrent to MCIT participation. A small number of commenters were in favor of automatic participation in MCIT unless a manufacturer chose to opt-out. One of these commenters cited the likelihood of administrative errors that could occur which could delay opting-in and would inadvertently exclude a manufacturer from MCIT.

*Response:* We agree with commenters that supported the voluntary, opt-in model for the MCIT program. Of the commenters that had concerns, we believe their concerns will be addressed by finalizing that manufacturers may opt-into MCIT using no more than an email from the manufacturer to CMS indicating a desire to opt-in and the requested start date of MCIT coverage. We believe that this should ensure a simple engagement with CMS to opt and will limit burden and improve collaboration with CMS. Commenters who expressed support for the opt-in model spoke to increased collaboration with CMS. Commenters who supported the opt-out method in order to limit administrative burden and confusion will be pleased by the simplicity of and public information available for the process of opt-in. Manufacturers may request to opt-in any time during the first 2 years in which they are eligible to participate in MCIT, however, the four year coverage period begins the day the breakthrough devices receives FDA authorization. A more complete discussion including summary of comments and responses on the four-year coverage period and when it begins appears later in this rule.

## II. Provisions of Proposed Regulations and Analysis of and Responses to Public Comments

### *A. Defining ''Reasonable and Necessary''*

As described in section I. of this final rule, the Secretary has authority to determine the meaning of ''reasonable and necessary'' under section 1862(a)(1)(A) of the Act. We proposed to codify the longstanding Program Integrity Manual definition of ''reasonable and necessary'' into our regulations at 42 CFR 405.201(b), with modification. Under the current definition, an item or service is considered ''reasonable and necessary'' if it is (1) safe and effective; (2) not experimental or investigational; and (3) appropriate, including the duration and frequency that is considered appropriate for the item or service, in terms of whether it is—

- Furnished in accordance with accepted standards of medical practice for the diagnosis or treatment of the patient's condition or to improve the function of a malformed body member;
- Furnished in a setting appropriate to the patient's medical needs and condition;
- Ordered and furnished by qualified personnel;
- One that meets, but does not exceed, the patient's medical need; and
- At least as beneficial as an existing and available medically appropriate alternative.

In addition to codifying the previously discussed criteria, we proposed to include a separate basis under which an item or service would be appropriate under (previously stated) (3) that is based on commercial health insurers' coverage policies (that is, non-governmental entities that sponsor health insurance plans). We proposed the commercial market analysis would be initiated if an item/service fails to fulfill the existing factor (3) criteria defining appropriate for Medicare patients but fulfills (1) safe and effective and (2) not experimental or investigational. We believed that this approach would be in line with E.O. 13890 that directs us to make technologies ''widely available, consistent with the principles of patient safety, market-based policies, and value for patients.'' Under this separate basis, we proposed that an item or service would satisfy factor (3) if it is covered under a plan(s) coverage policy if offered in the commercial insurance market, unless evidence supports that differences between Medicare beneficiaries and commercially insured individuals are clinically relevant. Under our proposal, we would exclude Medicaid managed care, Medicare Advantage, and other government administered healthcare coverage programs from the types of coverage CMS would consider, as these enrollees are not in the commercial market. In the following paragraphs, we sought comment on this proposal and on how best to implement this mechanism.

We solicited comments on the following:

- Sources of data that could be used to implement this policy, and whether CMS should make this information public and transparent.
- Appropriate source(s) for these coverage policies and the best way to determine which commercial plan(s) we would rely on for Medicare coverage.
- Whether beneficiaries, providers, innovators, or others wishing to gain coverage for an item or service should demonstrate that the item or service is covered by at least one commercial insurance plan policy. If they could provide CMS with evidence of commercial coverage or if CMS or its MACs identify such coverage from its review of compilations of health insurance offerings or data from other sources, CMS would consider factor (3) to be satisfied.

• Whether we should limit our consideration of commercial plan offerings or covered lives to a subset of the commercial market in the interest of simplicity, including looking at geographic subsets, subsets based on number of enrollees, subsets based on plan type (HMO, PPO, etc.), or other subsets of plans—including utilizing a singular plan.

• Whether, given considerations such the variation and distribution of coverage policies and access to innovations, we should only cover an item or service if it is covered for a majority, or a different proportion such as a plurality, of covered lives amongst plans or a majority, plurality, or some other proportion of plan offerings in the commercial market. (A plan offering is a contract an insurer offers to its enrollees, and a single insurance company may provide many different offerings).

We recognized that plan offerings may impose certain coverage restrictions on an item or service, *e.g.* related to clinical criteria, disease stage, or number and frequency of treatment. We proposed, when coverage is afforded on the basis of commercial coverage, we would adopt the least restrictive coverage policy for the item or service amongst the offerings we examine. However, given potential unreasonable or unnecessary utilization, we also solicited comment on whether we should instead adopt the most restrictive coverage policy. We further considered a variation whereby, if coverage restrictions are largely similar and present across the majority of offerings, CMS would adopt these in its coverage policies. We sought comment on whether, if we were to take this approach, we should instead use a proportion other than a majority, as low as any offering and as high as all offerings, as a sufficient threshold. As a final variation, we proposed we could defer, in the absence of an NCD or national policy, to the MACs to tailor the restrictions on coverage based on what they observe in the commercial market, just as we rely on MACs with regards to the current definition.

We further solicited comment on whether to grant coverage for an item or service to the extent it meets the first and second factors and the commercial coverage basis for the third factor. Under this approach, we would only use the current definition of ''appropriate'' from the current PIM when the exception for clinically relevant differences between Medicare beneficiaries and commercially insured individuals applies (or if the commercial coverage basis is determined by a proportion like a majority and there is insufficient commercial coverage information available). We noted that referring to commercial coverage in this way may expand or narrow the circumstances under which we would cover a particular item or service and; therefore, solicited comment on whether, under such an approach, we should grandfather our current coverage policies for items and services. We also emphasized that the MACs would continue to make judgements in evaluating individual claims for reimbursement, such that a decision by CMS that an item or service is reasonable and necessary in general does not mean that it is reasonable and necessary in all circumstances with respect to individual claims for reimbursement.

We sought public comment on the most appropriate source(s) for these coverage policies. Further, we proposed each MAC would be responsible for reviewing commercial offerings to inform their LCDs or claim by claim decisions, which would include individual medical necessity decisions. We proposed that we may also allow the MACs to develop approaches to address any or all of the considerations as previously outlined, parallel to their current practice of making coverage decisions in the absence of an NCD or national policy. We solicited comment on the best role of the MACs, along these lines or otherwise. We also solicited comment on whether the discretion to use the current criteria in the PIM when there is evidence to believe Medicare beneficiaries have different clinical needs should be exercised through the NCD process or in other ways, as well as what quantum of evidence should be sufficient.

In sum, we proposed to define the term ''reasonable and necessary'' based on the factors currently found in the PIM, plus an alternative basis for meeting factor (3) based on any coverage in the commercial market. We also solicited comment on an alternative under whether an item or service satisfies the commercial coverage basis for factor (3) is determined by how it is treated across a majority of covered lives amongst commercial plan offerings, as well as an alternative whereby an item or service would be appropriate for Medicare patients to the extent it is covered in the commercial market. When evidence supports that differences between Medicare beneficiaries and commercially insured individuals are clinically relevant, we proposed we would rely on the criteria in the current PIM. In the proposed, we stated we would continue relying on local administration of the program by MACs (including coverage on a claim by claim basis and LCDs) and maintain our discretion to issue NCDs based on the final rule.

We solicited comment on the proposed definition of reasonable and necessary, and the previously outlined alternatives, as well as other mechanisms or definitions we could establish for the term ''reasonable and necessary'', and the merits and drawbacks associated with each, including the potential impact on Medicare program expenses or complexity. We proposed to finalize any variation or outgrowth of the policies described in the proposal, or some combination of these options in lieu of or in conjunction with the proposed definition.

''Reasonable and Necessary'' Definition

*Comment:* CMS received many comments requesting that the agency not finalize the reasonable and necessary definition in regulation. These commenters point out the Medicare has not codified the definition since the program was established. Some commenters recognized that the longstanding reasonable and necessary definition in the Program Integrity Manual is understood by stakeholders, including CMS, however, they believed that retaining this definition only in sub-regulatory guidance will allow for greater flexibility.

*Response:* We disagree with those commenters that opposed the agency issuing a final rule codifying long-standing agency policies with modifications. When we establish substantive legal standards governing the scope of benefits, payment for services, or the eligibility of individuals, entities, or organizations definition that is currently in CMS manuals will not change how CMS is implementing reasonable and necessary currently. Adding it to furnish or receive services, the Medicare statute generally requires that the Secretary establish those policies by regulation. Although it is true that regulations cannot be changed as quickly as other policies, the public benefits by having the opportunity to participate in the rulemaking and the resulting policies will have the force of law and provide greater stability. In addition, issuing regulations in these circumstances is consistent with the Supreme Court's decision in *Azar* v. *Allina Health Services,* 139 S. Ct. 1804 (2019). Thus, we believe it is appropriate to establish the reasonable and necessary criteria in regulations, and will not adopt the commenters' suggestion.

*Comment:* Commenters questioned whether the reasonable and necessary definition would apply to items and services beyond devices.

*Response:* Yes, the reasonable and necessary definition applies to all items and services Medicare covers under Part A and Part B. This includes, but may not be limited to, drugs, devices and biologics. Medicare Advantage plans are required to offer coverage of these items and services on terms at least as permissive as those adopted by fee for service Medicare under this policy.

*Comment:* CMS received a few comments regarding broadening the definition of reasonable and necessary to include prevention and screening items and services.

*Response:* We are not adopting this suggestion because Congress has made express exceptions to 1862(a)(1)(A) in order to provide Medicare coverage for covers. Because those services are based on statutory authorities. CMS has already issue specific regulations for those services, it is not necessary or appropriate to amend the regulations defining reasonable and necessary to include preventive measures.

Safe and Effective

*Comment:* Several comments stated that CMS should further define what it means by ''safe and effective.'' For example, one commenter recommend that evidence-based guidelines that should be considered for meeting the safe and effective criteria. In addition, we had other comments state that FDA market authorization should meet the safe and effective criterion. However, other commenters state that there are items and services not regulated by the FDA; therefore, CMS should not further define this criterion to FDA-market authorization/approval.

*Response:* The requirement of safe and effective is a long-standing part of the definition of reasonable and necessary. CMS believes the long-standing factor is an appropriate starting point for a definition, with minor technical changes as proposed and then finalized in this rule.

*Comment:* CMS should establish its own stand-alone criteria that allows for ''investigational and experimental'' treatment to be deemed to be reasonable and necessary.

*Response:* CMS has stand-alone criteria that allows for coverage of certain investigational and experimental items and services. CMS covers certain Investigational Device Exemptions (IDE) devices under 42 CFR 405 Subpart B). In addition, CMS also covers certain investigational items under the Clinical Trial Policy (see *https://www.cms.gov/medicare-coverage-database/details/nca-details.aspx?NCAId=186&bc=AAgAAAAAAAAA&*).

Appropriate for Medicare Patients

*Comment:* Commenters requested more clarification on how the appropriateness criteria may be applied. For example, one commenter requested CMS further explain ''at least as beneficial.'' Another commenter requested clarification regarding appropriate setting.

*Response:* Because this is a long-standing definition and we are not making significant changes, we believe implementation will have no effect on its application to claim-by-claim adjudication, LCDs or NCDs. We also note that all NCDs and LCDs must go through a transparent process that includes opportunities for full stakeholder engagement when applying the reasonable and necessary definition criteria, including ''at least as beneficial.''

*Comment:* A few commenters requested that CMS update the appropriateness standard that states, '' . . . furnished in accordance with accepted standards of medical practice for the diagnosis or treatment of the patient's condition or to improve the function of a malformed body member'' to include additional criteria such as improve, maintain, or prevent.

*Response:* This long-standing definition allows flexibility and consistency to Medicare coverage process. By continuing to use the long-standing definition, there should not be any changes to its applicability when making coverage determinations. We note that prevention is addressed in statute and regulation elsewhere (see 1861(ddd) and 42 CFR 410.64). Further, under 1862(a)(1)(A), the statute states ''diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.'' The long-standing definition, while not a direct quote, uses the same terms in the statute.

*Comment:* Some public commenters suggested that MACs must maintain flexibility for determining what is appropriate on case-by-case basis, because this factor turns on particular medical facts. They suggested that finalizing the regulatory proposal could mean patients with rare conditions are overlooked because ''appropriate for Medicare patients'' means decisions are not individualized.

*Response:* We appreciate commenters' feedback. We agree that the appropriate factor is made based on the consideration of specific facts and that MACs should continue to adjudicate individual claims to ensure that they are reasonable and necessary, in the absence of a NCD. We also agree that it is important to consider whether an item or service is reasonable and necessary when making NCDs that often apply to a particular patient population. Because it is the same long-standing definition, we do not believe the application of reasonable and necessary determinations on a case-by-case determination, LCDs or NCDs will change. Specifically, for treatments for rare diseases. The application of appropriateness for a small population may be best addressed as a claim-by-claim decision that takes into consideration the individual patient's clinical situation. The MAC will continue to have the flexibility to decide the best approach to coverage on a local level.

*Comment:* One commenter stated that the definition of appropriateness for Medicare beneficiaries should ensure all beneficiaries are considered—not just the aged.

*Response:* We thank commenters for their input. We agree that it is important to consider the entire Medicare population, including beneficiaries younger than age 65, when deciding whether an item or service is reasonable and necessary.

(3) Commercial Insurer Policy Utilization

*Comment:* Commenters point out that review of commercial insurer policies to be the sole determinant of appropriate coverage is a ''substantial policy change'' and needs more stakeholder input. The commenters state that the proposal is vague, stated over 25 questions, and provided little detail to support framework. Commenters questioned why CMS would need to codify this when the agency has already used its authority to look to commercial policies. One commenter outlined several questions CMS should ask the public to ensure we have appropriate stakeholder input and information before finalizing a definition.

*Response:* At this time, we are not codifying the proposed modification to the PIM definition that allows commercial insurers to be the sole determinant. As some commenters pointed out CMS currently has the authority and has exercised this authority in the past to review commercial insurer policies as part of the NCD development process. However, we are including regulatory language that will give CMS clear authority to review the majority of commercial insurers in the event that an item or service does not meet the appropriateness criteria that is long established policy. As part of CMS' consideration, if Medicare coverage is different than the majority of commercial insurers, CMS will include in the national or local coverage determination its reasoning for different coverage. To ensure there is adequate public input, CMS has committed not later than 12 months after the effective date of this rule, CMS will publish for public comment draft methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

*Comment:* Some commenters suggested that if CMS were to adopt a review of commercial insurer policies it should not be based on a single commercial policy, but a majority of commercial payers or use the most restrictive policy in the commercial market. Commenters also stated that commercial insurance policies vary widely and CMS could use any of the policies, including the most restrictive. The commenters continued that CMS should only adopt a commercial insurer policy if it expands coverage.

*Response:* To ensure there is adequate public input on which commercial insurers are appropriate and to what extent, CMS has committed not later than 12 months after the effective date of this rule, it will publish draft methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

*Comment:* A few commenters suggested that if CMS were to finalize the reasonable and necessary definition that includes consideration of commercial insurer policies, that CMS should consider the model CMS currently uses for compendia (*https://www.cms.gov/Medicare/Coverage/CoverageGenInfo/compendia*) to determine which commercial insurers to include.

*Response:* We appreciate the idea and agree that more stakeholder engagement is needed. Therefore, CMS has committed not later than 12 months after the effective date of this rule, it will establish the methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

*Comment:* A commenter asked why the Agency would assess the appropriateness of a service, find it lacking, but then decide to move forward with affirmative coverage because somewhere out in the private insurance landscape the service is covered. This approach would create new areas of important conflicts of interest between manufacturers and payers that would be difficult to monitor.

*Response:* As the commenter stated, CMS will review commercial insurers only in the event it does not meet the appropriateness criteria. We believe it is important to ensure that we have evaluated all relevant evidence. To ensure we have full stakeholder engagement before we evaluate all commercial insurer policies, we will issue a sub-regulatory guidance for the public to comment. Further, CMS has committed to publish this no later than 12 months after the effective date of this rule. The guidance will establish the methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

*Comment:* Several commenters noted that commercial insurers typically consider other factors such as cost-effectiveness of items or services in making coverage determinations; whereas, CMS does not. There is no single standard for commercial payer coverage policies which could create significant challenges in applying a commercial payer analysis to an item or service to determine coverage, including some commercial insurers may use Medicare coverage policies as part of its coverage. Commenters wanted to know how CMS will weigh and use these commercial analyses to determine coverage. These same commenters wanted that methodology to be transparent and public.

*Response:* We agree. After further analyzing the definition along with the public comments it would be challenging to fully implement this part of the reasonable and necessary definition without further engagement with stakeholders. CMS has committed not later than 12 months after the effective date of this rule, it will establish the methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

*Comment:* Commenters noted that, rather than include commercial payer as a separate criteria in the reasonable and necessary definition, CMS should review commercial policies as part of the established NCD/LCD development process to ensure beneficiaries have access to items and services.

*Response:* We agree. CMS currently may consult commercial insurer policies as part of the NCD and LCD process and we have further committed to establish the methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

*Comment:* CMS received many comments that if we adopted commercial insurer policies as part of the reasonable and necessary definition that transparency would be extremely important in the policies we reviewed. Many commenters stated that commercial insurers' coverage policies are not public or transparent. The commenters stated that the public must have access to the scientific basis of commercial payers' coverage decisions, including sources of data and the data itself.

*Response:* We agree transparency is an important aspect of the coverage process. After reviewing the public comments, we recognized that implementation of inclusion of commercial payers would be challenging. Therefore, a transparent analysis of commercial insurers will be part of the NCD and LCD process, which includes public comment period of at least 30 days.

*Comment:* If the reasonable and necessary definition is finalized with the commercial insurer policy provision, commenters were concerned it will cede essential government decisions to commercial insurers.

*Response:* We appreciate the comment. Based on comments, we are finalizing a definition that requires CMS to explain why it would not follow a commercial insurer. This will be added to the NCD and LCD process to allow for a stakeholder engagement during the public comment period. In addition, as mentioned in previous responses, CMS committed not later than 12 months after the effective date of this rule, to establish the methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

Commercial Insurer Policy—Universe and Analysis

*Comment:* CMS received a wide variety of comments regarding which commercial insurers we should review for consideration. The comments ranged from supporting any single plan to working with both national and local health care management groups who have a stake in the various regions to a plurality of plans to commercial insurance changes too rapidly and should not be considered. We also received a few comments to include government insurance plans. A few larger insurers stated that it used fully insured commercial plans and not administrative services only (ASO) commercial plans.

*Response:* For reasons noted above including concerns there is not enough information or specificity regarding the commercial insurer criteria, we have committed to issuing standards on what types of commercial insurers should CMS consider for making NCDs and LCDs.

Evidence That Supports Clinically Relevant Differences

*Comment:* Commenters suggested that CMS provide greater specificity regarding its standard for determining when there are ''clinically relevant differences between Medicare beneficiaries and commercially insured individuals.'' Commenters recommended a variety of factors to consider. A commenter also stated there likely are not clinical differences in the need for DME and medical supplies between the privately insured and Medicare beneficiaries.

*Response:* We have removed this criteria from the final definition.

Grandfathering

*Comment:* A few comments stated that CMS should grandfather established NCDs and LCDs that have already been subject to notice, stakeholder comment, and evidence review from any coverage restrictions stemming from incorporation of commercial coverage policies. Another comment stated that CMS should grandfather existing NCDs/LCDs and policies generated through negotiated rulemaking.

*Response:* CMS does not intend to revise its LCDs and NCDs. We believe initially that definition is the familiar and will not require CMS to revise its coverage decisions. As we write the standards for establishing the methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives, we will consider how these standards may effect coverage at that time.

Appeals Process

*Comment:* Several commenters requested that a new appeals process be developed that allows a beneficiary or provider to use a commercial policy as part of their evidence that an item or service is reasonable and necessary, and then require the MAC to afford this policy significant weight as part of its review on reconsideration. Another commenter requested clarification on how the newly codified reasonable and necessary definition will be used for appeals. Another commenter stated that CMS would need a transparent and accelerated process to appeal coverage policies and articles.

*Response:* We thank commenters for their input. We added in the final rule that commercial insurer coverage may be used as part of the evidence during an appeal. Nothing in this rule changes the process to appeal a claim.

*Final Action:* We are finalizing our proposal with modification to define the term ''reasonable and necessary'' based on the factors currently found in the PIM. Further, for national and local coverage determinations, which have insufficient evidence to meet the long-standing appropriateness criteria, CMS will consider coverage to the extent the item or services are covered by a majority of commercial insurers. To ensure there is adequate stakeholder engagement on the standards, CMS committed, not later than 12 months after the effective date of this rule, it will establish the methodology by which commercial insurer's policies are determined to be relevant based on the measurement of majority of covered lives.

This definition is effective 60 days after publication of this final rule in the **Federal Register**.

*B. Application of the ''Reasonable and Necessary'' Standard to the MCIT Pathway*

We proposed that, under the MCIT pathway, an item or service that receives a breakthrough device designation from the FDA would be considered ''reasonable and necessary'' under section 1862(a)(1)(A) of the Act because breakthrough devices have met the FDA's unique breakthrough devices criteria, and they are innovations that serve unmet needs. While other devices are still considered new to the market, for example, PMAs and even some 510(k)s, the devices designated by the FDA as breakthrough are representative of true innovations in the marketplace. This application of the ''reasonable and necessary'' standard in this way would ensure that the MCIT pathway can provide a fast-track to Medicare coverage of innovative devices that may more effectively treat or diagnose life-threatening or irreversibly debilitating human disease or conditions.

MCIT would provide by providing national Medicare coverage for devices receiving the FDA breakthrough device designation, which are FDA market-authorized and used consistent with the FDA approved or cleared indication for use (also referred to as the ''FDA required labeling''),[15] so long as the breakthrough device is described in an appropriate Medicare benefit category under Part A or Part B and is not specifically excluded by statute. We believe the criteria for qualification as a breakthrough device, as defined in section 515B(b) of the Food, Drug and Cosmetic Act (21 U.S.C. 360e–3(b)) is sufficient to satisfy the elements of the ''reasonable and necessary'' standard. The first breakthrough device designation criterion is that a device must ''provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating human disease or conditions'' (21 U.S.C. 360e–3(b)(1)). The second criterion is that the device must satisfy one of the following elements: It represents a breakthrough technology; there are no approved or cleared alternatives; it offers significant advantages over existing approved or cleared alternatives, including additional considerations outlined in the statute; or availability of the device is in the best interest of patients (21 U.S.C. 360e–3(b)(2)). Thus, breakthrough devices are those that HHS has determined may provide better health outcomes for patients facing life-threatening or irreversibly debilitating human disease or conditions. We believe that a device meeting these criteria, once also FDA market authorized, is ''reasonable and necessary'' for purposes of Medicare coverage.

We recognize that the FDA market authorization of breakthrough devices warrants immediate coverage under the ''reasonable and necessary'' clause in section 1862(a)(1)(A) of the Act. We previously stated that FDA determinations were not controlling determinations for Medicare coverage purposes under section 1862(a)(1)(A) of the Act. (For more information see the January 30, 1989 **Federal Register** (54 FR 4307) (''FDA approval for the marketing of a medical device will not necessarily lead to a favorable coverage recommendation . . . '') and the August 7, 2013 **Federal Register** (78 FR 48165) (''However, FDA approval or clearance alone does not entitle that technology to Medicare coverage.''). Under the Secretary's authority to interpret section 1862(a)(1)(A) of the Act (*supra* section I.A.), we are revising our interpretation of the statute because of the practical concerns that our current standards have delayed access to a unique set of

[15] FDA Guidance for Industry, ''Medical Product Communications That Are Consistent with the FDA—Required Labeling—Questions and Answers'', *available at https://www.fda.gov/media/133619/download.*

innovative devices that FDA has found to be safe and effective, and we believe are ''reasonable and necessary'' for purposes of Medicare coverage.

In light of E.O. 13890, the Secretary has determined that application of the current standards for making ''reasonable and necessary'' determinations may take too long following FDA market authorization of breakthrough devices. More importantly, the existing standard has not always provided Medicare beneficiaries access to certain breakthrough medical devices when needed to improve health outcomes. We proposed that breakthrough devices per se meet the reasonable and necessary standard in order to increase access and to reduce the delay from FDA market authorization to Medicare coverage.

*Comment:* We received a few comments supporting that FDA-designated breakthrough devices should meet the reasonable and necessary definition under the MCIT pathway.

*Response:* We appreciate the comments. Under the Secretary's authority to interpret section 1862(a)(1)(A) of the Act (*supra* section I.A.), we are revising our interpretation, we are finalizing this rule as proposed, FDA-designated breakthrough devices are considered reasonable and necessary for purposes of MCIT.

*Comment:* We received a comment that stated reasonable and necessary should apply to any FDA breakthrough device regardless of entry into MCIT.

*Response:* We disagree, qualification as a breakthrough device, as defined in section 515B(b) of the Food, Drug and Cosmetic Act (21 U.S.C. 360e–3(b)) is sufficient to satisfy the elements of the ''reasonable and necessary'' standard. The first breakthrough device designation criterion is that a device must ''provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating human disease or conditions'' (21 U.S.C. 360e–3(b)(1)). The second criterion is that the device must satisfy one of the following elements: It represents a breakthrough technology; there are no approved or cleared alternatives; it offers significant advantages over existing approved or cleared alternatives, including additional considerations outlined in the statute; or availability of the device is in the best interest of patients (21 U.S.C. 360e–3(b)(2)). Thus, breakthrough devices are those that HHS has determined may provide better health outcomes for patients facing life-threatening or irreversibly debilitating human disease or conditions. We believe that a device meeting these criteria, once also FDA market authorized, is ''reasonable and necessary'' for purposes of Medicare coverage.

*Comment:* Commenters expressed concern that MCIT eligibility will be based on commercial payer policies.

*Response:* MCIT eligibility is not based on commercial payer policies. It is solely based on the eligibility criteria outlined in the rule.

*Final Action:* After consideration of the public comments we received, we are finalizing this policy as proposed.

*C. MCIT Pathway*

We proposed the MCIT pathway to deliver on the Administration's commitment to provide access to breakthrough devices to Medicare beneficiaries. The MCIT pathway provides up to 4 years of national coverage to newly FDA market authorized breakthrough devices. We are aware that this coverage may also facilitate evidence development on devices for the Medicare population because manufacturers can gather additional data on utilization of the device during the MCIT coverage period.

1. Definitions

In § 405.601(a), we proposed that the MCIT pathway is voluntary. Operationally, we proposed that manufacturers of breakthrough devices notify CMS of their intention to elect MCIT shortly after receiving notice from the FDA of being granted the breakthrough device designation. Ideally, this notification would be sent to CMS within 2 weeks of receiving breakthrough designation. However, entities will not be penalized for notifying CMS after that time. Alternatively, submitting a notification to CMS shortly before or concurrently with the date of the FDA marketing application submission should also afford CMS sufficient time to operationalize MCIT for the device. The CMS Coverage and Analysis Group would establish an email box for these inquiries and notification. This notification alerts CMS to offer guidance to manufacturers about the MCIT pathway and point to resources for coding and payment, which are key conversations to effectuate coverage upon FDA market authorization. We intend to utilize the existing coverage implementation processes to be prepared to offer coverage immediately upon the FDA market authorization when requested by the manufacturer.

In § 405.601(b), we proposed the following definitions for the purposes of 42 CFR part 405. We proposed to define ''breakthrough device'' as a medical device that receives such designation by the FDA (section 515B(d)(1)) of the FD&C Act (21 U.S.C. 360e–3(d)(1)). We also proposed to define, for the sake of clarity in the rule that the acronym MCIT stands for Medicare Coverage of Innovative Technology.

*Comment:* We received a few comments requesting that we not finalize MCIT and do not include drugs and biologics until there is evidence of a gap in coverage. The commenters suggested including drugs and biologics would require separate rulemaking and need to consider other FDA pathways (*e.g.,* accelerated approval, priority review vouchers, orphan drug designation).

*Response:* The final MCIT rule will not include drugs or biologics. The final rule will only include FDA-designated breakthrough devices as defined by the FDA (section 515B(d)(1) of the FD&C Act (21 U.S.C. 360e–3(d)(1)).

*Comment:* We received several comments that support the definition of breakthrough devices. These comments stated that it ''allows Medicare to focus resources and seems to be a reasonable filter to prevent overutilization of the pathway.''

*Response:* We appreciate the comment.

*Comment:* We received several comments requesting clarification of whether FDA-designated breakthrough devices that are clinical diagnostic lab tests or non-implanted devices are considered eligible for the MCIT pathway.

*Response:* Any medical device that receives such designation by the FDA (section 515B(d)(1) of the FD&C Act (21 U.S.C. 360e–3(d)(1)) and meets the other criteria outlined in this rule is eligible for the MCIT pathway. This includes any clinical lab diagnostic test, including in-vitro diagnostics, and devices that are not implanted, as long as it meets the MCIT eligibility criteria as outlined at § 405.603.

*Comment:* Some commenters stated that the greater predictability afforded by the MCIT pathway would decrease reimbursement risk and increase both manufacturer and investor interest in developing new and innovative therapies. Several commenters stated that investors perceive reimbursement risk as a greater threat to innovation than technology, regulatory, or clinical risks. Some commenters asserted that the MCIT pathway would make it easier for innovators to raise funds necessary for development and refinement of new technologies (*e.g.,* artificial kidney). However, some commenters argued that the MCIT pathway could give specific technologies an unfair advantage that would be unavailable to subsequent market entrants, thereby paradoxically decreasing innovation and market competition. As a modification to the proposed MCIT rule, some commenters suggested that CMS cover iterative refinements of the same breakthrough device for the duration of the original device's MCIT term. Some commenters also suggested coverage under the MCIT pathway for similar but unrelated breakthrough and non-breakthrough designated devices of the same type and indication for the balance of the first device's MCIT term. Other commenters proposed that new market entrants that are very similar to a breakthrough device should each receive the full four years of MCIT coverage.

*Response:* CMS agrees that the MCIT pathway is likely to promote development and refinement of innovative technologies and support medical advancement. CMS also agrees that iterative refinements of devices are common following FDA market authorization. These often represent material improvements, and Medicare beneficiaries should have access to the improved version of the predicate breakthrough device. In practice, many of these device refinements are market authorized through a supplement to the initial FDA PMA submission and would therefore remain eligible for coverage through the MCIT pathway for the duration of the original devices MCIT coverage period.

CMS disagrees that the MCIT pathway provides an unfair advantage to a single device, or that it impedes market competition. The FDA defines breakthrough technologies in section 515B(b) of the FD&C Act (21 U.S.C. 360e–3(b)) as those (1) that provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating human disease or conditions; and (2)(A) that represent breakthrough technologies; (B) for which no approved or cleared alternatives exist; (C) that offer significant advantages over existing approved or cleared alternatives, including the potential, compared to existing approved alternatives, to reduce or eliminate the need for hospitalization, improve patient quality of life, facilitate patients' ability to manage their own care (such as through self-directed personal assistance), or establish long-term NCD definition, FDA breakthrough-designated devices address an unmet need, and subsequent devices do not enjoy the same prioritized review process or breakthrough designation because there is an existing approved or cleared alternative. CMS similarly would not extend automatic coverage to subsequent similar devices because there would no longer be an unmet need in the market. Subsequent similar FDA market-authorized devices will benefit from any evidence generated through MCIT coverage of the predicate device. Please explain that although not automatically covered under the regulation, contractors could make a favorable coverage decision if a claim is submitted.

*Comment:* Several commenters requested that CMS include devices that meet the ''spirit of breakthrough'' regardless of whether the device applied or received the FDA breakthrough designation. Examples commenters gave were second-to-market or subsequent technologies of the same type, even for the same indication or subsequent-to-market non-breakthrough designated technologies that fall under the same class or category as the breakthrough technology and approved for the same indication. Commenters stated that competing devices from other manufacturers that are not breakthrough devices could be caught in a precarious limbo, at least for a time. At least one commenter, submitted a description of its device and how it meets the spirit of the FDA breakthrough designation.

*Response:* If the device meets the eligibility criteria as outlined in § 405.603, it is eligible for the MCIT pathway. Outside of that designation, CMS is not expanding the eligibility for MCIT. We will, of course, consider whether the subsequent devices satisfy the reasonable and necessary criteria if a claim is submitted for review.

*Comment:* We received comments supporting expansion of MCIT to include diagnostic radiopharmaceuticals, combination drug or devices (device or drug-led), drugs, biologics and other technologies. At least one commenter wanted CMS to specifically include pain management and antimicrobial therapies. Another commenter stated that certain cellular and tissue-based wound care products (CTPs) do not require the traditional FDA PMA, BLA and 510k processes, but rather are regulated by the FDA under Section 361 as HCT/Ps.

*Response:* Any medical device that receives such designation by the FDA (section 515B(d)(1)) of the FD&C Act (21 U.S.C. 360e–3(d)(1)) and meets the other criteria outlined in this rule is eligible for the MCIT pathway. We received mixed public comments on expanding beyond devices and have determined to finalize the proposed rule which only includes devices that meet the criteria proposed. We need to provide a rationale not to extend automatic coverage further in light of the language in the Executive Order. We don't provide reasons to support the conclusion.

*Comment:* A few commenters requested that CMS include screening tests and preventive screening tests.

*Response:* Screening and prevention tests have a unique statutory authorities and are not covered based on 1862(a)(1)(A). These items and services fall outside the scope of this rule. Medicare has separate regulations for screening and preventive services that have been codified primarily in 42 CFR part 410, subpart B.

*Comment:* We had several commenters request CMS to create new benefit categories or make a determination that an item or service (*e.g.,* software, digital technologies) falls within a benefit category.

*Response:* Decisions regarding specific items and services and the relevant benefit categories are outside the scope of this rule. For more information on benefit category determinations see the *CMS Innovator's Guide to Navigating Medicare* (*https://www.cms.gov/medicare/coverage/councilontechinnov/downloads/innovators-guide-master-7-23-15.pdf*).

*Comment:* The Executive Order was interpreted too narrow. The commenter stated that MCIT should not be tied to the FDA breakthrough device definition but should include other CMS-recognized innovative non-breakthrough technologies (*e.g.,* technologies eligible for New Technology Add-on Payment or Transitional Pass-through Payment). To aid in operationalizing this, commenter recommend that CMS consider preventing MACs from denying coverage of innovative non-breakthrough technologies that meet predetermined criteria.

*Response:* At this time, CMS will finalize its proposed definition of any medical device that receives such designation by the FDA (section 515B(d)(1) of the FD&C Act (21 U.S.C. 360e–3(d)(1)) and meets the other criteria outlined in this rule is eligible for the MCIT pathway. We received mixed public comments on expanding beyond devices and have determined to finalize the proposed rule which only includes devices. At this time, MACs retain the ability to make coverage determinations through current processes of either an LCD or claim by claim adjudication.

*Comment:* Commenters requested that MCIT include IDEs involving breakthrough devices.

*Response:* Investigation Device Exemptions (IDEs) are devices defined at 42 CFR 405 Subpart B. IDE devices are not FDA market authorized or cleared (often referred to as premarket devices). Any IDE device FDA-designated as breakthrough device is eligible for MCIT when it is FDA authorized for marketing The MCIT pathway begins no earlier than the date the breakthrough device receives FDA market authorization, or the date requested by the manufacturer, provided the requested date is within the four year window for MCIT eligibility.

*Comment:* CMS should continue working to expand to a wider range of innovative medical devices (outside of breakthrough designation).

*Response:* We appreciate the comment. CMS continues to review its coverage pathways to find appropriate efficiencies.

*Comment:* CMS should expand MCIT to include humanitarian use devices. Commenter asserted they approved through an FDA expedited program to get technology to patients with rare conditions.

*Response:* At this time, we are not expanding the MCIT pathway beyond the proposed rule. This includes any medical device that receives such designation by the FDA (section 515B(d)(1) of the FD&C Act (21 U.S.C. 360e–3(d)(1)) and meets the other criteria outlined in this rule is eligible for the MCIT pathway.

*Comment:* If CMS chooses to retain the fifth criteria proposed in Section 405.603(e), then we would ask that the agency clarify that ineligibility is tied to an absolute national non-coverage determination.

*Response:* Upon receiving notification by a manufacturer of interest in MCIT, CMS will determine if there is an existing NCD on point. While possible, it is unlikely that there is pre-existing, explicit non-coverage NCD given the breakthrough nature of eligible devices.

*Comment:* Patient preference should be considered when qualifying devices for MCIT. Commenter gave the example of non-invasive medical devices (including focused ultrasound) that may be strongly preferred by patients.

*Response:* Any medical device that receives such designation by the FDA (section 515B(d)(1) of the FD&C Act (21 U.S.C. 360e–3(d)(1)) and meets the other criteria outlined in this rule is eligible for the MCIT pathway. FDA takes patient preference under consideration as they make market authorization decisions.

After consideration of the public comments we received, we are finalizing our proposed definition of breakthrough devices.

2. MCIT Pathway Device Eligibility

In § 405.603(a) we proposed that the pathway is available to devices that meet the definitions proposed in § 405.601. Based on the explicit mention of devices in E.O. 13890 and our interaction and feedback from stakeholders who expressed their concern that there is more uncertainty of coverage for devices than for other items and services (for example, diagnostics, drugs and biologics), the proposed policy is for devices only.

We proposed in § 405.603(b) that the breakthrough devices that received FDA market authorization no more than 2 calendar years prior to the effective date of this subpart (the date the final rule is finalized) and thereafter will be eligible for coverage for claims submitted on or after the effective date of this rule. Claims for breakthrough devices with dates of service that occurred before the effective date of this rule will not be covered claims through MCIT. Breakthrough devices market authorized prior to the effective date of this rule will not be eligible for all 4 years of coverage. For these ''lookback'' devices, the 4-year period starts on the date of FDA market authorization. We proposed that if a manufacturer initially chooses to not utilize the MCIT pathway, and then chooses to do so some time after the breakthrough device's market authorization, coverage still only lasts 4 years from the date of FDA market authorization. We sought comment on this eligibility criterion for devices and specifically the 2 year lookback.

*Comment:* Almost all commenters were supportive of a lookback period. Many agreed with a two year interval. A few commenters suggested a four year lookback or unlimited to the start of the Breakthrough Devices Program.

*Response:* We appreciate the comments. We proposed a two year lookback to try to maximize the benefit of the MCIT rule. We believe this interval includes the recent period that presented the greatest initial confusion and uncertainty for manufacturers of innovative devices before the MCIT rule. We agree with commenters that the lookback period is important to launch the rule with highest impact. Considering comments, we believe that a two year lookback remains appropriate and maintains efficiency at start up. For breakthrough devices older than 2 years, it is possible that other coverage pathways such as LCDs or NCDs may have been developed and coverage concerns have been addressed. Potential overlap of coverage policies would hinder implementation. In addition, the majority of breakthrough devices were approved in the past 2 years since the program was authorized in 2017 (final agency guidance issued in December 2018 (available at: *https://www.fda.gov/media/108135/download*). We note that the lookback period is a one-time occurrence since there will not be a need for a lookback period for breakthrough devices approved going forward once the MCIT rule is effective.

We proposed in § 405.603(c) that to be part of the MCIT pathway, the device must be used according to its FDA approved or cleared indication for use. We proposed that the device is only covered for use consistent with its FDA approved or cleared indication for use because that is the indication and conditions for use that were reviewed by the FDA and authorized for marketing. Data are unlikely to be available to support uses extending beyond the FDA required labeling for breakthrough devices on the date of marketing authorization. Use of the device for a condition or population that is not labeled (''off-label'') will not be covered as that use would not be FDA authorized. We specifically sought comment on whether off-label use of breakthrough devices should be covered and, if so, under what specific circumstances and/or evidentiary support.

*Comment:* Most commenters agreed with the inclusion of the FDA required indication. A number of commenters noted that off indication or off label uses should be included under MCIT as well. Some commenters raised concern for on-indication use of breakthrough devices because the devices are so new to market.

*Response:* We appreciate the comments. Consistent with the breakthrough device designation, we specified the FDA required indication (on-indication) for MCIT. We did not specifically provide automatic coverage for off-indication or off-label uses in the proposed MCIT rule, but we do not preclude possible coverage under other coverage mechanisms, such as through the claims process. However, we note that in general there is typically little clinical evidence to support off-label uses of new technology. We are aware that concerns for on-indication use of breakthrough devices were reiterated in recent published articles (Neumann and Chambers. Health Affairs, 12/02/2020; Bach. New York Times, 12/01/2020).

*Comment:* Commenters noted that the FDA label indication only is not sufficient since other factors have important roles in determining positive outcomes from device therapy such as physician training and experience and facility capabilities and experience.

*Response:* We appreciate the comments and agree. We proposed provider and facility requirements in the proposed reasonable and necessary definition (please say what they were and where they are addressed in other comments) and finalize these requirements to maximize positive health outcomes for the Medicare population. We will look to the appropriate sources for provider and facility requirements for implementation purposes.

*Comment:* Commenters noted that new FDA approved indications should be included.

*Response:* We appreciate the comments and agree. We recognize that new FDA approved indications for a breakthrough device could be added during the MCIT period. We believe the new FDA required indication would also meet the MCIT definition and would be eligible for the duration of the breakthrough device MCIT period.

In § 405.603(d) and (e), we additionally proposed limitations to what is coverable under the Act. In § 405.603(e), we proposed that if CMS has issued an NCD on a particular breakthrough device, that breakthrough device is not eligible for MCIT. We proposed this because, once the device has been reviewed by CMS for the FDA required approved or cleared indication for use; CMS has made a coverage determination based on the available evidence for that technology. We believe this would happen rarely because breakthrough devices are new technologies that are not likely to have been previously reviewed through the NCD process. In § 405.603(f), we acknowledge that devices in the MCIT pathway may be excluded due to statute or regulation (for example, 42 CFR 411.15, Particular services excluded from coverage) and, like other items and services coverable by Medicare, the device must fall within the scope of a Medicare benefit category under section 1861 of the Act and the implementing regulations. If the device does not fall within a Medicare benefit category as outlined in the statute and implementing regulations, the device is not eligible for Medicare coverage; therefore, the device would not be eligible for the MCIT pathway.

*Comment:* CMS proposed that the breakthrough device must fall into an existing benefit category to be included under MCIT. Commenters supported the benefit category designation. Several comments recommended the inclusion of breakthrough devices that do not fall within an existing benefit category, for example, digital health technologies, or to modify existing benefit categories to include these devices.

*Response:* We appreciate the comments. However, in general, for Medicare coverage, an item or service must fall within an existing benefit category. Benefit categories are generally established by statute. CMS is unable to create a new benefit category or alter the language of existing benefit categories in this rule.

After consideration of the public comments we received, we are finalizing the rule as proposed with slight modification, as we indicated with a placeholder in the proposed, to update 405.603(b) with the latest date for the lookback to be the date two years prior to the effective date of the rule.

3. General Coverage of Items and Services Under the MCIT Pathway

We proposed in § 405.605 that devices covered under the MCIT pathway are covered no differently from devices that are covered outside of MCIT. In other words, provided the items and services are otherwise coverable (that is, not specifically excluded and not found by CMS to be outside the scope of a Medicare benefit category), covered items and services could include the device, reasonable and necessary surgery to implant the device, if implantable, related care and services of the device (for example, replacing reasonable and necessary parts of the device such as a battery), and coverage of any reasonable and necessary treatments due to complications arising from use of the device. What the MCIT pathway offers compared to other pathways is predictable national coverage simultaneous with FDA market authorization that will generally last for a set time period.

The proposed MCIT pathway would support and accelerate beneficiary access to certain innovative devices. CMS encourages manufacturers that have breakthrough devices covered under MCIT to develop additional data for the healthcare community.

*Comment:* Commenters questioned for clarification of whether breakthrough diagnostic medical tests are eligible for MCIT.

*Response:* Diagnostic medical tests are considered FDA medical devices and fall within an existing benefit category. Based on this categorization, breakthrough designated diagnostic medical tests would be eligible to be included under MCIT.

*Comment:* Commenters questioned whether breakthrough medical devices that are approved for screening indications, for example cancer screening tests, would be eligible under MCIT.

*Response:* We appreciate the comments. MCIT is based on a specific Medicare authority. Since screening tests and preventive services have separate and distinct statutory authorities, items and services used for screening and preventive services are outside the scope of the MCIT rule.

*Comment:* Commenters suggested the inclusion of medical devices approved under different FDA designations, such as IDE, Humanitarian Device Exemption (HDE) and devices that have not received the breakthrough device designation.

*Response:* We appreciate the comments. Medical devices that receive breakthrough designation from the FDA and meet the definition and inclusion criteria in the final rule will be eligible for MCIT. By the definition, non-breakthrough devices will not be eligible for MCIT but in general other coverage mechanisms such as the claim review process, NCDs, or LCDs may be available. We note that for certain other medical devices that have received FDA IDE there are existing coverage regulations (42 CFR 405 Subpart B). The IDE regulation generally applies to devices that have not yet received formal FDA approval. Some breakthrough devices may also have IDE status and may be eligible for coverage under the IDE regulation and also may be subsequently eligible for coverage under MCIT once the breakthrough device receives FDA market authorization.

*Comment:* Commenters requested clarification of what is covered under MCIT—the device only or the device and the implantation of the device if required.

*Response:* MCIT would cover both the breakthrough device and the implantation of the device. Other items and services for the diagnosis and treatment of the patient's illness would be recoverable as usual through existing coverage regulations and policies or when determined to be reasonable of the local Medicare Administrative Contractors (MACs) in the claims appeals process. There are existing Medicare coverage and payment policies that also may apply to other items and services that may be used for treatment during hospitalizations and complications that may arise from the device treatment in subsequent hospitalizations. MCIT rule does not supersede existing coverage and payment policies on routine and related items and services for the diagnosis and treatment of the patient's illness.

After consideration of the public comments we received, we are finalizing this section of the proposed rule with only a minor textual clarification to also include reasonable and necessary procedures to *use* the breakthrough device. The proposed text stated only reasonable and necessary procedures to implant the device, which would not be representative of the universe of breakthrough devices.

4. MCIT Pathway for Breakthrough Devices: 4 Years of Coverage

In § 405.607(a), we proposed that the MCIT pathway for coverage would begin on the same date the device receives FDA market authorization. We proposed this point in time to ensure there is no gap between Medicare coverage and FDA market authorization. This start date supported the MCIT pathway's focus of ensuring beneficiaries have a predictable access to new devices.

*Comment:* CMS proposed that MCIT coverage would start on the day of FDA approval of the breakthrough device and last for 4 years. Several commenters supported the MCIT start date as proposed on the day of FDA approval. A number of other commenters recommend flexibility in the start date to be determined by the manufacturer since the breakthrough device may not be immediately available in the market on the date of FDA approval. Commenters noted that flexibility would allow the manufacturer time to be fully prepared for device dissemination with set coding, payment, and evidence development if the manufacturer voluntarily chooses.

*Response:* We appreciate comments and agree. We recognize that not all breakthrough devices may be immediately available in the market on date of FDA approval due to various factors including production, large scale distribution, and coding. We have modified and, in the final rule, will include flexibility in the start date of MCIT to be determined by the manufacturer within certain parameters. We note that regardless of the date the manufacturer selects to begin MCIT coverage, they are eligible only during the four year period beginning on the date of FDA market authorization. Therefore, if a manufacturer waits one year after receiving FDA approval to request MCIT coverage of an item or service, the relevant item or service will have three years of coverage under MCIT. For implementation purposes, manufacturers must inform CMS of the desired future start date. We believe that the clarity and transparency of MCIT will assist manufacturers in developing product development and deployment plans earlier so the 4 years of MCIT can be used more efficiently.

While we believe it is in the best interest of the manufacturer to invoke MCIT coverage early in the 4-year coverage period there may be breakthrough devices that can achieve the desired level of evidence development in less time. Because the time period for evidence development is dependent on the nature of the device and the disease or clinical condition for which it is intended we are comfortable with manufacturers electing their MCIT coverage start date (within the parameters outlined above). We further believe that it is counterintuitive for a breakthrough device manufacturer to opt-into MCIT coverage toward the end of the 2-year opt-in window. However, manufacturers have expressed interest in this type of flexibility and CMS is not in a position to predict the various reasons a manufacturer may find themselves in a position of needing to wait to opt-in.

*Comment:* Commenters noted the potential time delays from coverage, coding, and payment.

*Response:* We appreciate the comments and agree that enhanced coordination of coverage, coding and payment would be useful. While a detailed description of coding and payment is beyond the scope of the MCIT rule and resides in other payment rules, CMS, as directed by E.O. 13890, has worked to streamline coverage, coding, and payment. We have established new collaborations internally to enhance efficiency going forward.

We proposed in § 405.607(b)(1) that the MCIT pathway for breakthrough devices ends 4 years from the date the device received FDA market authorization. We proposed this 4 year time period because it could allow manufacturers to develop clinical evidence and data regarding the benefit of the use of their device in a real world setting. For example, we believe 4 years would allow most manufacturers sufficient time to complete FDA required post-approval or other real-world data collection studies that may have been a condition of FDA market authorization. This assumption is based upon our historical experience with studies conducted through coverage with evidence development (CED). Many of these studies were completed within approximately 4 years. Further, this time period allows Medicare to support manufacturers that, whether required by the FDA or not, have an interest in better understanding the health outcomes of their device in the Medicare population, including impacts on patient-reported and longer-term outcomes.

Further, in § 405.607(b) we proposed reasons that the MCIT pathway may end prior to 4 years. This included circumstances whereby the device became subject to an NCD, regulation, statute, or if the device could no longer be lawfully marketed.

*Comment:* Most commenters were supportive of the four year period. Some commenters suggested longer duration up to 5 years at CMS discretion or if the manufacturer is actively conducting a clinical study.

*Response:* We appreciate the comments and believe the 4 year duration of MCIT continues to be an adequate time period to foster innovation. We recognize the importance of continuing data collection and evidence development but have not mandated evidence development. We believe, with the transparency of MCIT, that manufacturers will be able to appropriately plan studies that could be completed within 4 years. In general evidence on improvements in health outcomes for Medicare patients not only would help support coverage through other mechanisms after MCIT but also importantly help physicians and patients in choosing the treatment that is best suited for the individual patient.

*Comment:* A large number of respondents supported voluntary evidence development. Many commenters noted that the FDA already requires post market-authorization data collection in most cases. Many commenters argued that manufacturers should discuss their evidence development plans with CMS soon after FDA market-authorization. CMS, in turn, should be clear and transparent about any evidence gaps and any additional evidence needed to reach the reasonable and necessary threshold required for durable coverage after MCIT coverage ends. Commenters suggested that CMS be more flexible in agreeing to acceptable study designs and outcomes, including use of real world data. Commenters stated that manufacturers already have considerable incentive to meet the reasonable and necessary standard to assure coverage continuity after MCIT. Some commenters objected to a one-size-fits-all mandate for evidence development noting a diversity of devices come through the FDA breakthrough program. They argued that a voluntary evidence development regime allows flexibility for manufacturers to manage their own clinical study and evidence development programs in line with their goals and business needs.

A larger number of commenters supported mandatory evidence development. One commenter did not support the MCIT pathway, but if implemented, argued that mandatory evidence development mitigates the risks of this regulation. A number of commenters stated that early coverage tied to mandatory evidence development strikes an economically appropriate balance. Some commenters noted that post-market clinical studies may more efficiently capture longer-term outcomes than within conventional clinical studies. Several commenters stated that mandatory evidence development is appropriate provided that it is efficient, streamlined, and time-limited. Several commenters noted that post-market evidence development is essential for development and refinement of clinical practice guidelines that inform evidence-based clinical practice. Other commenters noted that mandatory data collection is necessary to assure appropriate use of technologies, and that use without oversight could be economically disastrous. Furthermore, they stated that low-value practice patterns may be very difficult to reverse once they are established.

*Response:* CMS is not mandating evidence development during MCIT coverage. After coverage through the MCIT pathway ends, all existing coverage pathways will remain available to manufacturers to establish durable coverage. CMS will require breakthrough devices to meet the long-established reasonable and necessary coverage standard, just as they would without the MCIT pathway. CMS anticipates that most manufacturers will voluntarily pursue robust evidence development to secure durable coverage after MCIT coverage sunsets.

We are aware of stakeholders' interest in CMS providing detailed, specific, and actionable guidance to manufacturers on evidence deficits relative to the long-established reasonable and necessary threshold. We are considering the feasibility of this approach. CMS notes that the expected diversity of breakthrough devices speaks to flexibility in evidence development. In some instances, manufacturers may wish to participate in conventional clinical studies; in others, a registry-based clinical study may offer the most robust and cost-efficient option. Manufacturers may also wish to pursue studies that rely on real-world evidence, but they are strongly encouraged to review these study designs with CMS. Manufacturers are encouraged to engage CMS soon after FDA market authorization with an evidence development plan that addresses any identified evidence gaps.

CMS believes that rigorous and publicly available evidence is necessary to inform beneficiaries, the clinical community, and the public about the risks and benefits of available treatment options. Published studies are also necessary for breakthrough devices to be included in evidence-based guidelines, which feature heavily in CMS' assessment of accepted standards of medical practice. Therefore, CMS requires that stakeholders publish evidence in the peer-reviewed clinical literature and applies rigorous methodologic standards in evidence review supporting local or national coverage analyses.

*Comment:* As related to the ending of MCIT, a number of commenters noted safety concerns of breakthrough devices over the four years. Commenters noted the need to continue to monitor use and outcomes and to suspend MCIT if the FDA withdraws approval or there are concerns with safety in post-market data.

*Response:* We appreciate the comments and agree on the need to monitor harms.

These concerns are particularly relevant to the suggested 4 year duration of MCIT. We believe appropriate mechanisms should be in place to end automatic coverage in certain scenarios. In general, safety is within the FDA authority. However, there are appropriate commonalities when the health outcomes are higher mortality or higher numbers of strokes or heart attacks. Based on overall comments on safety, we will include a mechanism in the final rule to allow suspension or termination of MCIT when FDA has issued a warning letter, medical device safety communication, or black box warning and CMS determines that harms outweigh benefits for Medicare patients.

*Comment:* A series of comments cited FDA guidance that the Breakthrough Devices Program allows for greater uncertainty of risks and benefits than non-breakthrough approval processes because the breakthrough devices meet an important and unmet clinical need. Several commenters also note that the FDA relies more heavily on post-market data collection for these devices, and often breakthrough devices lack data on long-term safety and effectiveness at the time of FDA market authorization. Several commenters cited evidence that many FDA mandated post market studies are never completed and that the FDA safety and surveillance system is both flawed and insufficient to assure beneficiary safety during MCIT coverage. One commenter noted that lax FDA safety reporting may allow continued CMS coverage despite important safety problems. One commenter suggested that CMS should mandate safety reporting to both CMS and the FDA Manufacturer and User Facility Device Experience (MAUDE) database at regular intervals as a condition of MCIT coverage. Several commenters suggested that CMS should regularly review FDA safety reports for covered breakthrough devices. Several commenters argued that any safety warnings or product recalls should terminate coverage within the MCIT coverage pathway.

One commenter noted that Medicare beneficiaries are likely to perceive that FDA market-authorized and CMS-covered items or services have been established as safe and effective. Another commenter suggested that Medicare beneficiaries will be unwitting clinical trial subjects if they are treated with a breakthrough device through the MCIT coverage pathway. Several commenters stated that the proposed MCIT regulation lacks any mechanism for stakeholder input, especially specialty societies, into operator and institutional requirements that protect beneficiary safety prior to national coverage. A large number of commenters noted that absent mandatory evidence development, the MCIT regulation lacks a mechanism to assure safety, outcomes, and quality of care for covered breakthrough devices. Several commenters suggested that CMS should monitor safety events using registries, FDA safety reports, and claims data monitoring.

*Response:* The Administration is committed to encouraging medical innovation and to ensuring Medicare beneficiaries have access to new cures and technologies that improve health outcomes. The MCIT regulation meets this goal for FDA market-authorized breakthrough devices. However, patient safety is always a central concern, and CMS agrees that the MCIT regulation must balance early access to innovative medical devices with strong patient safety protections.

CMS has developed a number of process steps to address this important balance of access and safety. First, the Administration has championed transparency as a critical mechanism for beneficiary empowerment in decision-making about their own healthcare. Accordingly, devices covered through the MCIT pathway will be publicly posted on the CMS website. We aim to also indicate publicly available clinical evidence related to the device. Patients and their clinicians are strongly encouraged to review this information. With access to this information, CMS believes that patients and their clinicians are best able to consider the risks and benefits of innovative new treatments in the context of their personal health and values. Second, CMS will continue to engage with relevant stakeholders—notably specialty societies with expert knowledge of the available treatments. CMS recognizes that these guidelines may evolve with greater experience with breakthrough devices and may assist CMS and clinicians in coverage of the devices after MCIT coverage sunsets. CMS advises operators and institutions to consider them carefully when offering breakthrough devices covered through the MCIT pathway. Third, CMS will coordinate with the FDA to receive regular feedback on important safety signals and concerns. As a practical matter, CMS will rely on existing FDA safety and surveillance publicly available reporting structures as an important mechanism for identifying safety concerns about covered breakthrough devices. While evidence development is voluntary, manufacturers have strong incentives to develop evidence that addresses any gaps identified through engagement with CMS at the onset of MCIT coverage. If these gaps are insufficiently addressed during the MCIT coverage pathway, manufacturers may risk not meeting the reasonable and necessary evidentiary threshold when MCIT coverage sunsets. Where manufacturers voluntarily pursue evidence development through robust clinical registries, those data may also provide detailed and timely data on safety of breakthrough devices under real-world conditions. Lastly consistent with some suggestions from commenters, we revised the rule to specify that coverage of a breakthrough device through MCIT can end if the FDA removes market authorization of a breakthrough device or at the discretion of the Secretary, subsequent to an FDA medical device safety communication or Warning Letter about the breakthrough device.

*Comment:* Nearly a fifth of the comments received on the proposed rule were from individuals who urged Medicare to cover artificial kidney technology. The majority of these comments were from people who are affected by or care for someone affected by a form of kidney disease and/or End Stage Renal Disease. While some specifically mentioned MCIT, most did not.

*Response:* CMS appreciates every comment and thanks commenters for sharing their personal stories and how their lives or the life of someone they care for could be improved by coverage of artificial kidney technology when it becomes broadly available.

*Comment:* A large number of comments addressed the issue of how CMS should establish durable coverage after MCIT coverage sunsets. Several commenters acknowledged that CMS has limited resources and cannot open an NCD for all MCIT devices without securing more resources in the Coverage and Analysis Group. One commenter warned that an excessive emphasis on coverage review for MCIT devices could delay consideration of important non-breakthrough NCD requests. Several commenters recommended that CMS be more transparent about the existing NCD wait list, the expected timing of any new NCDs, and the prioritization criteria for NCDs. They argued that manufacturers will need this information when considering which pathway is best after MCIT. The largest proportion of commenters stated that there should not be any automatic opening of an NCD, including if there is no LCD by 6 months after the end of MCIT coverage. Many commenters believe that manufacturers should instead have flexibility in choosing a coverage pathway. A smaller number of commenters recommended automatic opening of an NCD with sufficient time for seamless coverage after MCIT coverage sunsets. Several of these commented that because the MCIT pathway establishes national coverage that an NCD is the appropriate coverage pathway after MCIT coverage sunsets. A small number of commenters argued that coverage for devices in the MCIT pathway should continue indefinitely to the FDA label absent an LCD or NCD that specifically constrains coverage.

*Response:* As previously noted, devices approved through the FDA breakthrough device program may have greater uncertainty about the risks and benefits of treatment than non-breakthrough devices, and they generally lack data on long-term safety and effectiveness at the time of FDA market authorization. By contrast, CMS heavily considers demonstration of improved health outcomes in making positive coverage determinations. All of the conventional coverage pathways will be available for MCIT devices after the pathway sunsets, and our regulatory reasonable and necessary coverage standard will apply. Manufacturers and stakeholders must be aware of the important distinctions between FDA and CMS review criteria and use the time during the MCIT coverage pathway to close any evidence gaps that may be identified at the time of FDA market authorization.

Based on the comments, we are aware not every manufacturer wishes to pursue the NCD coverage pathway. CMS already publishes an NCD Wait List (available here: *https://www.cms.gov/Medicare/Coverage/DeterminationProcess*) which is updated every month as need be and we are aware of stakeholder interest in guidance on how CMS will prioritize formal and complete NCD requests. Additionally, CMS intends to stay abreast of clinical evidence development for breakthrough devices in the MCIT pathway, and focus on whether there is new evidence in the published, peer-reviewed literature that addresses gaps identified at the time of FDA market authorization, especially whether there is compelling evidence that the device improves patient health outcomes. To allow greater stakeholder flexibility and efficient use of CMS resources, CMS will not automatically open a National Coverage Determination (NCD) as a part of the MCIT coverage pathway. As previously noted, the full range of coverage options at the end of the MCIT pathway includes opening an NCD or and claim submission to a MAC. MACs may either open Local Coverage Determinations (LCDs) or cover the breakthrough device on a claim-by-claim basis after MCIT coverage sunsets. After consideration of the public comments we received, we are finalizing the proposed rule and adding modifications consistent with the safety concerns raised by commenters. We updated the text to allow for coverage to end prior to 4 years at the discretion of the Secretary subsequent to an FDA medical device safety communication or Warning Letter. Additionally coverage will end if the FDA removes authorization of a device.

## Final Action

In summary, the MCIT pathway will be voluntary for manufacturers on an opt-in basis, and would provide immediate or near immediate national coverage depending upon the manufacturer's chosen start date. MCIT coverage expires four years after the date of FDA approval, irrespective of when the manufacturer requested activation of their MCIT coverage, at which point, the manufacturer may request CMS to undertake an NCD for the breakthrough device. We sought public comment on all of our proposals, and have included summaries of the comments received and the responses to those comments in this document.

## III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We solicited public comment on each of the section 3506(c)(2)(A)-required issues for the following sections of this document that contain information collection requirements (ICRs).

To derive average costs, we used data from the U.S. Bureau of Labor Statistics' May 2018 National Occupational Employment and Wage Estimates for all salary estimates (*https://www.bls.gov/oes/current/oes131041.htm,* released May 2019). In this regard, the table that follows presents the mean hourly wage, the cost of fringe benefits (calculated at 100 percent of salary), and the adjusted hourly wage.

TABLE 1—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES FOR MCIT

| Occupation title | Occupation code | Mean hourly wage ($/hr) | Fringe benefit ($/hr) | Adjusted hourly wage ($/hr) |
|---|---|---|---|---|
| Compliance Officer | 13–1041 | 34.86 | 34.86 | 69.72 |

As indicated, we are adjusting our employee hourly wage estimates by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer. Nonetheless, there is no practical alternative and we believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

The proposed coverage pathway allows for a voluntary participation and therefore necessitates that manufacturers of breakthrough devices notify CMS of their intent to enter the MCIT pathway. Therefore, the burden associated with notifying CMS is the time and effort it would take for each of the organizations to send CMS an email or letter. We anticipate two MCIT pathway participants in the first year based upon the number of medical devices that received FY2020 NTAP and were non-covered in at least one MAC jurisdiction by LCDs and related articles.

We estimate notifying CMS of intent to participate in MCIT would involve 15 minutes at $69.72 per hour by a compliance officer. In this regard, we estimate 15 mins per notification at a cost of $17.43 per organization (0.25 hours × $69.72). In aggregate, we estimate 0.5 hours (0.25 hours × 2 submissions) at $34.86 ($17.43 × 2 submissions).

After the anticipated initial 2 submitters, over the next 3 years we expect 3 submitters in year 2, 4 submitters in year 3, and 5 submitters in year 4 to notify CMS of interested in the MCIT pathway. We expect this increase in submitters each year to level off at this point. In this regard, we estimate the same 0.25 hours per submission at a cost of $17.43 per organization. Similarly, in aggregate, we estimate, for year 2 (0.75 hours at $52.29 an hour), for year 3 (1.0 hour at $69.72 an hour), and for year 4 (1.25 hours at $87.15 an hour).

The proposed requirements and burden will be submitted to OMB under control number 0938–NEW.

## IV. Regulatory Impact Statement

This final rule makes Medicare coverage policy updates pursuant to the authority at section 1862(a)(1)(A) of the Act. We are using regulatory action per the October 3, 2019 ''Executive Order on Protecting and Improving Medicare for Our Nation's Seniors'' to create a swift Medicare coverage pathway to allow beneficiaries across the nation to access breakthrough devices after FDA market authorization and define ''reasonable and necessary''.

We have examined the impact of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This final rule reaches the economic threshold and thus is considered a major rule.

CMS considered several alternatives for defining ''reasonable and necessary.'' These alternatives included not defining the term in regulation, define the term as finalized in this rule (commercial insurer coverage may be considered under the Medicare program), and define the term as commercial insurer coverage being the sole determinant of coverage under the Medicare program. Given the direction in E.O. 13890 to clarify standards we proposed and finalized in regulation, the definition of the term ''reasonable and necessary.'' The definition we are finalizing provides consistency and flexibility regarding the role of commercial insurer coverage in the Medicare program and the majority of public comments did not support the commercial payer alternative without more public engagement. We believe the final rule is consistent with what the public requested.

The impact of defining ''reasonable and necessary'' is hard to quantify without knowing the specific items and services that would be included in future NCDs and LCDs and the criteria that CMS will use for determining which commercial insurers will be considered. Additional information regarding which commercial insurers and policies will be developed within 12 months of the effective date of this rule. In order to demonstrate the potential impact on Medicare spending, we developed scenarios that illustrate the impact of implementing the three alternatives for defining ''reasonable and necessary.'' The number of NCDs and LCDs finalized in a given year can vary and the cost of items and services within the coverage decisions varies. Further, while we reviewed coverage of items and services, we did not take into account unique Medicare rules regarding which type of providers/clinicians may furnish certain services, place of service requirements, or payment rules. Our analysis is based on whether Medicare covered or non-covered an item or service and whether we could find coverage for that item or service by any commercial insurer. Lastly, this impact analysis is based on the numbers of NCDs and LCDs finalized in 2020. (See Table 2 below)

In 2020, CMS and the MACs finalized 3 NCDs and 31 LCDs. (This number represents new LCDs in 2020 and made publically available via the Medicare Coverage Database. If more than one MAC jurisdiction issued an LCD on the same item or service with the same coverage decision, only 1 of the LCDs was included in the count.)

Of the NCDs finalized in 2020, all 3 resulted in expanded national Medicare coverage. Because none of those NCDs resulted in non-coverage we did not evaluate whether commercial insurers also covered. Therefore, based on 2020 data for NCDs only, the impact would be $0 for all three alternatives.

Of the 31 LCDs, 27 provided Medicare positive coverage and 4 resulted in non-coverage. For those items and services non-covered we identified 3 of those items and services were covered in at least 1 commercial insurer policy. For these non-covered items and services we can establish that the possible range of the cumulative cost of covering them could be from $0 to $3.4 billion for a single year (based on price and approximate Medicare beneficiary utilization). Because our analysis looked for any commercial insurer that covered the item or service, the cost may be less when utilizing commercial insurer polices that represent a majority of covered lives (CMS will publish draft guidance explaining its methodology within 12 months of the effective date of this rule). In addition, even if a commercial insurer covers an item or service, for the final rule it is not a requirement to automatically adopt the commercial insurers' coverage. Therefore, not all items and services that are non-covered by Medicare and covered by a can be assumed covered under this rule. Rather, commercial insurer coverage is a factor that CMS will take into account as part of the body of evidence in determining coverage through the NCD and LCDs processes. Because not all commercial insurer positive coverage will necessarily transfer to Medicare coverage and because CMS still to define which types of commercial insurers (based on majority of covered lives) are relevant, we believe that commercial insurer coverage impact is likely much smaller, closer to 15–25% of $3.4 billion, that is, $51–$880 million. Under the third alternative which requires Medicare to rely on any coverage by a commercial insurer in order to achieve Medicare coverage, the cost would much higher. Using the same data for the first 2 alternatives, there were 4 LCDs that resulted in Medicare non-coverage, and 3 commercial insurers covered the item or service. Assuming that for this third assumption that Medicare must cover these items and services, the cost to the program could be at least $3.4 billion for a year for the commercial insurer as sole determinant of coverage. Because our analysis looked for any commercial insurer that covered the item or service, the cost may be less when utilizing commercial insurer polices that represent a majority of covered lives.

TABLE 2—ILLUSTRATED IMPACT FOR THE MEDICARE PROGRAM BY DEFINITION OF REASONABLE AND NECESSARY

| | Estimated change in Medicare costs for the alternatives considered | | |
|---|---|---|---|
| | No change (not codifying a definition) | Codified definition | Commercial insurer coverage as sole determinant |
| Coverage Determinations (NCDs and LCDs) | $0 | $51–880 million. | $3.4+ billion |

Regulatory alternatives to this final rule for MCIT were to combine Medicare coverage with clinical evidence development under section 1862(a)(1)(E) of the Act, to take no regulatory action at this time, or to adjust the duration of the MCIT pathway. Combining coverage with clinical evidence development would have met the E.O. 13890 overarching goal of beneficiary access to breakthrough devices. However, this alternative did not meet the other E.O. 13890 aims of minimizing time between FDA market authorization and Medicare coverage and wide availability. The timing of coverage would depend upon the manufacturer being able to initiate a clinical study and the wide availability of coverage could be an issue if providers did not have the infrastructure necessary to participate in the clinical study. The pathway had the benefit of reducing the potential for patient harm by ensuring Medicare had clinical evidence while providing coverage. CMS chose to not to pursue combining coverage with evidence development for breakthrough devices because we wanted to meet the timing and wide availability aims of E.O. 13890.

CMS also considered taking no regulatory action and trying to leverage the existing Medicare coverage pathways or proposing subregulatory policies to achieve the streamlined coverage process described in E.O. 13890. We could not develop subregulatory policies to achieve the desired national coverage and access envisioned in E.O. 13890 because, as described in this preamble, the existing coverage pathways do not consistently provide swift, national beneficiary access to innovative devices. As discussed elsewhere in the preamble, the nature of the problem being addressed by this final rule is a potential delay between a milestone such as FDA market authorization and

CMS coverage; as such, we requested comment on a policy option of shortening of the duration of the MCIT pathway from the proposed 4 years to 1 year.

The impact of implementing the MCIT pathway is difficult to determine without knowing the specific technologies that would be covered. In addition, many of these technologies would be eligible for coverage in the absence of this rule, such as through a local or national coverage determination, so the impact for certain items may be the acceleration of coverage or adoption by just a few months. Furthermore, some of these devices would be covered immediately if the MACs decide to pay for them, which would result in no impact on Medicare spending for devices approved under this pathway. However, it is possible that some of these innovative technologies would not otherwise be eligible for coverage in the absence of this rule. Because it is not known how these new technologies would otherwise come to market and be reimbursed, it is not possible to develop a point estimate of the impact. In general, we believe the MCIT coverage pathway would range in impact from having no impact on Medicare spending, to a temporary cost for innovations that are adopted under an accelerated basis.

The decision to enter the MCIT pathway is voluntary for the manufacturer. Because manufacturers typically join the Medicare coverage pathway that is most beneficial to them, this could result in selection against the existing program coverage pathways (to what degree is unknown at this point). In addition, the past trend of new technology costing more than existing technology could lead to a higher cost for Medicare if this trend continued for technologies enrolling in the MCIT pathway. Nevertheless, new technology may also mitigate ongoing chronic health issues or improve efficiency of services thereby reducing some costs for Medicare.

In order to demonstrate the potential impact on Medicare spending, the CMS Office of the Actuary (OACT) developed three hypothetical scenarios that illustrate the impact of implementing the proposed MCIT pathway. Scenarios two and three assume that the device would not have been eligible for coverage in the absence of the proposed rule. (See Table 2) The illustration used the new devices that applied for a NTAP in FY 2020 as a proxy for the new devices that would utilize the MCIT pathway. The submitted cost and anticipated utilization for these devices was published in the **Federal Register**.[16] In addition, we assumed that two manufacturers would elect to utilize the MCIT pathway in the first year, three manufacturers in the second year, four manufacturers in the third year, and five manufacturers in the fourth year each year for all three scenarios. This assumption is based on the number of medical devices that received FY 2020 NTAP and were non-covered in at least one MAC jurisdiction by LCDs and related articles and our impression from the FDA that the number of devices granted breakthrough status is increasing. For the first scenario, the no-cost scenario, we assumed that all the devices would be eligible for coverage in the absence of the proposed rule. If the devices received payment nationally and at the same time then there would be no additional cost under this pathway. For the second scenario, the low-cost scenario, we assumed that the new technologies would have the average costs ($2,044) and utilization (2,322 patients) of similar technologies included in the FY 2020 NTAP application cycle. Therefore, to estimate the first year of MCIT, we multiplied the add-on payment for a new device by the anticipated utilization for a new device by the number of anticipated devices in the pathway ($\$2,044 \times 2,322 \times 2 = \$9.5$ million). For the third scenario, the high-cost scenario, we assumed the new technologies would receive the maximum add-on payment from the FY2020 NTAP application cycle ($22,425) and the highest utilization of a device (6,500 patients). Therefore, to estimate for the first year of MCIT, we estimated similarly ($\$22,425 \times 6,500$ patients $\times 2 = \$291.5$ million). For subsequent years, we increased the number of anticipated devices in the pathway by three, four, and five in the last two scenarios until 2024.[17] In addition to not taking into account inflation, the illustration does not reflect any offsets for the costs of these technologies that would be utilized through existing authorities nor the cost of other treatments (except as noted). It is not possible to explicitly quantify these offsetting costs but they could substantially reduce or eliminate the net program cost. However, by assuming that only two to five manufacturers will elect MCIT coverage, we have implicitly assumed that, while more manufacturers could potentially elect coverage under MCIT, the majority of devices would have been covered under a different coverage pathway. Therefore, a substantial portion of the offsetting costs are implicitly reflected.

Based on this analysis, there is a range of potential impacts of the proposed MCIT coverage pathway as shown in Table 2. The difference between the three estimates demonstrates how sensitive the impact is to the cost and utilization of these unknown devices.

TABLE 3—ILLUSTRATED IMPACT ON THE MEDICARE PROGRAM BY MCIT COVERAGE PATHWAY

| | Costs (in millions) | | | |
|---|---|---|---|---|
| | FY 2021 | FY 2022 | FY 2023 | FY 2024 |
| No-cost Scenario | $0 | $0 | $0 | $0 |

[16] FY 2020 Hospital Inpatient Prospective Payment System (IPPS) Proposed Rule (84 FR 19640 and 19641) (May 3, 2019) *available at https://www.govinfo.gov/content/pkg/FR-2019-05-03/pdf/2019-08330.pdf* (accessed October 17, 2019).

[17] An indirect cost of the proposed rule would be increased distortions in the labor markets taxed to support the Medicare Trust Fund. Such distortions are sometimes referred to as marginal excess tax burden (METB), and Circular A–94—OMB's guidance on cost-benefit analysis of federal programs, available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf*—suggests that METB may be valued at roughly 25 percent of the estimated transfer attributed to a policy change; the Circular goes on to direct the inclusion of estimated METB change in supplementary analyses. If secondary costs—such as increased marginal excess tax burden is, in the case of this final rule—are included in regulatory impact analyses, then secondary benefits must be as well, in order to avoid inappropriately skewing the net benefits results, and including METB only in supplementary analyses provides some acknowledgement of this potential imbalance.

TABLE 3—ILLUSTRATED IMPACT ON THE MEDICARE PROGRAM BY MCIT COVERAGE PATHWAY—Continued

| | Costs (in millions) | | | |
|---|---|---|---|---|
| | FY 2021 | FY 2022 | FY 2023 | FY 2024 |
| Low-cost Scenario | 9.5 | 23.7 | 42.7 | 66.4 |
| High-cost Scenario | 291.5 | 728.8 | 1,311.9 | 2,040.7 |

We believe the assumptions used in the three scenarios are reasonable to show the possible wide range of impacts for implementing this proposed pathway, in particular for a technology that would not have otherwise been eligible for coverage.

*Comment:* A commenter supported CMS' assertion that new technology may mitigate ongoing chronic health issues or improve efficiency of services thereby reducing some cost for Medicare, and that incentivizing breakthrough medical devices will lead to both direct cost offsets (*i.e.,* cost savings) and indirect benefits (*e.g.,* quality of life, clinical outcomes) across multiple therapeutic areas. Another expressed concern that funding for MCIT will result in neutrality adjustments across the Physician Fee Schedule (PFS).

*Response:* We appreciate these comments. Payment for Medicare covered physician services and other services paid under the PFS are subject to statutorily-required budget neutrality adjustments, determined based on the utilization of particular services. The RIA did not incorporate changes to PFS as we do not expect that it is likely PFS will require adjustment.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Some hospitals and other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.5 million to $38.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We reviewed the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System (NAICS) Codes to determine the NAICS U.S. industry titles and size standards in millions of dollars and/or number of employees that apply to small businesses that could be impacted by this rule.[18] We determined that small businesses potentially impacted may include surgical and medical instrument manufacturers (NAICS code 339112, dollars not provided/1,000 employees), Offices of Physicians (except Mental Health Specialists) (NAICS code 621111, $12 million/employees not provided), and Freestanding Ambulatory Surgical and Emergency Centers (NAICS code 621493, $16.5 million/employees not provided). During the first 4 years of MCIT, we anticipate approximately 14 surgical and medical instrument manufacturers may participate, and based off of U.S. Census data, the majority of this businesses type are small businesses with less than 1,000 employees (968 out of 1,093 businesses have less than 500 employees).[19] As such, this final rule will impact less than 5 percent of these businesses, and the revenue impact, if any, would not be negative. Rather, it would be a positive impact because MCIT would provide Medicare coverage (and subsequent payment) to providers who purchase the devices from these manufacturers. For Offices of Physicians (except Mental Health Specialists) and Freestanding Ambulatory Surgical and Emergency Centers that may be providing the breakthrough devices, the majority are small businesses with less than 1,000 employees (4,060 out of 4,385 and 160,367 out of 161,286 have less than 500 employees, respectively).[20] Given that we estimate, at most in the high-cost scenario, that 6,500 beneficiaries would utilize breakthrough devices through MCIT per year, and even if each beneficiary were to access services at only one of these small businesses (that is, no two beneficiaries used the same office or center), still less than 5 percent of these small businesses would be impacted by MCIT. As such, the revenue impact, if any, would not be negative, rather, it would be a positive impact because MCIT would provide Medicare coverage (and subsequent payment) to providers. Overall, this final rule results in a payment, not a reduction in revenue. We are not preparing a further analysis for the RFA because we have determined, and the Secretary certifies, that the proposed rule and this subsequent final rule will not have a significant negative economic impact on a substantial number of small entities because small entities are not being asked to undertake additional effort or take on additional costs outside of the ordinary course of business. Rather, for small entities that develop or provide breakthrough devices to patients, the proposed rule and this final rule are a means for the device to be covered through the Medicare program, which does not detract from revenue and could be viewed as a positive economic impact. With the limited information we had to base this estimate, we solicited public comment on improvements to this estimate for this final rule.

After consideration of the public comments we received, we are finalizing the rule as proposed.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that the proposed rule and the final rule would not have a significant impact on the operations of a substantial number of small rural hospitals because small rural hospitals are not being asked to undertake additional effort or take on additional costs outside of the ordinary course of business. Obtaining breakthrough devices for patients is at the discretion of providers. We are not requiring the purchase and use of breakthrough devices. Providers should

[18] Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System (NAICS) Codes, *available at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.*

[19] 2017 County Business Patterns and 2017 Economic Census. Number of Firms, Number of Establishments, Employment, Annual Payroll, and Preliminary Receipts by Enterprise Employment Size for the United States, All Industries: 2017 (release date: May 6, 2020).

[20] *Id.*

continue to work with their patients to choose the best treatment. For small rural hospitals that provide breakthrough devices to their patients, this proposed rule is a means for the device to be covered through the Medicare program.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2020, that threshold was approximately $156 million. This final rule would have no consequential effect on State, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this final rule does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

Executive Order 13771 (E.O. 13771), titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. The proposed rule, is being finalized as proposed, and is expected to impose no more than *de minimis* costs and thus be neither an E.O. 13771 regulatory action nor an E.O. 13771 deregulatory action.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

**List of Subjects in 42 CFR Part 405**

Administrative practice and procedure, Diseases, Health facilities, Health professions, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

## PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

■ 1. The authority for part 405 continues to read as follows:

**Authority:** 42 U.S.C. 263a, 405(a), 1302, 1320b–12, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr, and 1395ww(k).

■ 2. Section 405.201 is amended in paragraph (b) by adding a definition for ''Reasonable and necessary'' in alphabetical order to read as follows:

**§ 405.201 Scope of subpart and definitions.**

* * * * *

(b) * * *

*Reasonable and necessary* means that an item or service is considered—

(i) Safe and effective;

(ii) Except as set forth in § 411.15(o) of this chapter, not experimental or investigational; and

(iii) Appropriate for Medicare patients, including the duration and frequency that is considered appropriate for the item or service, in terms of whether it meets all of the following criteria:

(A) Furnished in accordance with accepted standards of medical practice for the diagnosis or treatment of the patient's condition or to improve the function of a malformed body member;

(B) Furnished in a setting appropriate to the patient's medical needs and condition;

(C) Ordered and furnished by qualified personnel;

(D) Meets, but does not exceed, the patient's medical need; and

(E) Is at least as beneficial as an existing and available medically appropriate alternative; or

(F) Not later than March 15, 2022, CMS will issue draft subregulatory guidance on the methodology of which commercial insurers are relevant based on the measurement of majority of covered lives. For national and local coverage determinations, which have insufficient evidence to meet paragraphs (b)(3)(i) through (v) of this section, CMS will consider coverage to the extent the items or services are covered by a majority of commercial insurers. As part of CMS' consideration, CMS will include in the national or local coverage determination its reasoning for its decision if coverage is different than the majority of commercial insurers.

* * * * *

■ 3. Subpart F, consisting of §§ 405.601–405.607, is added to read as follows:

**Subpart F—Medicare Coverage of Innovative Technology**

Sec.
405.601 Medicare coverage of innovative technology.
405.603 Medical device eligibility.
405.605 Coverage of items and services.
405.607 Coverage period.

### Subpart F—Medicare Coverage of Innovative Technology

**§ 405.601 Medicare coverage of innovative technology.**

(a) *Basis and scope.* Medicare coverage of innovative technology (MCIT) is a program that provides national, time-limited coverage under section 1862(a)(1)(A) of the Act for certain breakthrough medical devices. Manufacturer participation in the pathway for breakthrough device coverage is voluntary.

(b) *Definitions.* For the purposes of this subpart, the following definitions are applicable:

*Breakthrough device* means a device that receives such designation by the Food and Drug Administration (FDA) (section 515B(d)(1) of the FD&C Act (21 U.S.C. 360e–3(d)(1)).

*MCIT* stands for Medicare coverage of innovative technology.

**§ 405.603 Medical device eligibility.**

The MCIT pathway is available only to medical devices that meet all of the following:

(a) That are FDA-designated breakthrough devices.

(b) That were FDA market authorized on [Enter date 2 years prior to effective date of final rule] and thereafter.

(c) That are used according to their FDA approved or cleared indication for use.

(d) That are within a Medicare benefit category.

(e) That are not the subject of a Medicare national coverage determination.

(f) That are not otherwise excluded from coverage through law or regulation.

**§ 405.605 Coverage of items and services.**

Covered items and services furnished within the MCIT pathway may include any of the following, if not otherwise excluded from coverage and according to existing coverage and/or payment policies as applicable:

(a) The breakthrough device.

(b) Any reasonable and necessary procedures to implant and/or use the breakthrough device.

(c) Reasonable and necessary items and services to maintain the breakthrough device.

(d) Related care and services for the breakthrough device.

(e) Reasonable and necessary services to treat complications arising from use of the breakthrough device.

**§ 405.607 Coverage period.**

(a) *Start of the period.* The MCIT pathway begins on the date requested by the manufacturer in an email to CMS at any time opting in to the MCIT pathway provided the requested start date is no earlier than—

(1) The date the breakthrough device receives FDA market authorization; or

(2) The date requested by the manufacturer, provided that such a date is not later than 2 years after the date

described in paragraph (a)(1) of this section.

(b) *End of the period.* The MCIT pathway for a breakthrough device ends as follows:

(1) No later than 4 years from the date the breakthrough device received FDA market authorization.

(2) Prior to 4 years if a manufacturer withdraws the breakthrough device from the MCIT pathway.

(3) Prior to 4 years if the breakthrough device becomes the subject of a national coverage determination or otherwise becomes noncovered through law, regulation, or at the discretion of the Secretary subsequent to an FDA medical device safety communication or Warning Letter.

(4) Prior to 4 years if the FDA removes authorization of a device, the breakthrough device is removed from the MCIT pathway.

Dated: December 31, 2020.

**Seema Verma,**

*Administrator, Centers for Medicare & Medicaid Services.*

Dated: January 5, 2021.

**Alex M. Azar II,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2021–00707 Filed 1–12–21; 4:15 pm]

**BILLING CODE 4120–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Part 1

**[HHS–OS–2021–0001]**

**RIN 0991–AC18**

## Department of Health and Human Services Transparency and Fairness in Civil Administrative Enforcement Actions

**AGENCY:** Office of the Secretary, Department of Health and Human Services.

**ACTION:** Final rule.

**SUMMARY:** The Department of Health and Human Services is issuing regulations promoting transparency and fairness in civil enforcement actions. These regulations will help to ensure that regulated parties receive fair notice of laws and regulations they are subject to, and have an opportunity to contest an agency determination prior to the agency taking an action that has a legal consequence.

**DATES:** Effective January 12, 2021.

**FOR FURTHER INFORMATION CONTACT:** Brenna Jenny, Department of Health and Human Services, 200 Independence Avenue SW, Room 713F, Washington, DC 20201. Email: *Good.Guidance@hhs.gov.* Telephone: (202) 690–7741.

### I. Statutory and Regulatory Background

The primary legal authority supporting this rulemaking is 5 U.S.C. 301. That provision provides that the ''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.'' This statute authorizes an ''agency to regulate its own affairs,'' and issue rules, such as this one, that are ''rules of agency organization[,] procedure or practice.'' *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 309–10 (1979). Similarly, 42 U.S.C. 1302 provides that the Secretary ''shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [he] is charged'' under Chapter 7 of the Social Security Act. Chapter 7 contains, among other things, statutory provisions governing Medicare, Medicaid, and the Health Insurance Portability and Accountability Act (HIPAA).

The Administrative Procedure Act (''APA''), 5 U.S.C. 551 *et seq.,* specifies the process by which such regulations are promulgated. Department heads generally must prescribe regulations through notice-and-comment rulemaking, but there is an exception for ''rules of agency organization, procedure, or practice.'' The requirements for notice and comment prior to finalization also do not apply to regulations that involve ''a matter relating to agency management or personnel.'' 5 U.S.C. 553(a)(2).

Because this final rule only specifies procedures that agency personnel must follow or that will govern civil enforcement actions, it is exempt from the requirement for notice and comment prior to finalization. In determining whether notice-and-comment rulemaking is required, the ''critical feature is that [the rule] covers agency actions that do not themselves alter the rights or interests of the parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'' *Nat'l Sec. Counselors* v. *CIA,* 931 F. Supp. 2d 77, 106–07 (D.D.C. 2013) (quoting *Batterton* v. *Marshall,* 648 F.2d 694, 707 (D.C. Cir. 1980)). This rule is exempt from notice and comment because it does not ''put[ ] a stamp of approval or disapproval on a given type of behavior.'' *Am. Hosp. Assoc.* v. *Bowen,* 834 F.2d 1037, 1047 (D.C. Cir. 1987). What had been a regulatory violation prior to finalization of this rule still is; the Department of Health and Human Services (''HHS'' or ''the Department'') is only modifying the procedures governing civil enforcement actions and the Department's civil enforcement action practices. To be sure, these procedural modifications, like most rules of agency procedure or personnel, might have some impact on the public. But agency rules that impose ''derivative,'' ''incidental,'' or ''mechanical'' burdens upon regulated individuals are considered procedural, rather than substantive, and are therefore exempt from the notice-and-comment requirement. *Id.* at 1051. Moreover, to the extent this rule has effects on the public, it only provides additional protections to the public, rather than depriving the public of any rights or interests it previously had.

The APA requires that ''administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.'' *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974). The Freedom of Information Act amended the APA to advance this goal, and generally requires that agencies publish in the **Federal Register** their substantive rules of general applicability, statements of general policy, and interpretations of law that are generally applicable. 5 U.S.C. 552(a)(1)(D). Unless a party has actual and timely notice of the terms of a rule or policy, the Freedom of Information Act generally provides that a party may not be adversely affected by a rule or policy required to be published in the **Federal Register** that is not so published. 5 U.S.C. 552(a)(1)(flush language). This rule of agency procedure ensures that HHS actions comport with these requirements.

### II. Summary of Transparency and Fairness Regulations

To provide regulated parties with greater transparency and fairness in administrative actions, and consistent with the requirements of Executive Order 13892 of October 9, 2019, ''Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,'' 84 FR 55239 (Oct. 15, 2019), HHS is setting forth policies that promote transparency and fairness in civil enforcement actions that will apply to all divisions of HHS. The requirements in this rule amend 45 CFR part 1.

This rule is one component of the Department's broader regulatory reform initiative. The rule is designed to ensure accountability, fairness of how the Department uses guidance, proper use of guidance documents, and opportunities for third parties to be heard, and to safeguard the important principles underlying the United States administrative law system.

*A. Scope (45 CFR 1.1)*

The requirements established pursuant to this rule in §§ 1.2(b) and 1.6 through 1.9 apply to civil enforcement actions by any component of the Department. Sections 1.3 through 1.5 (as well as the definitions in § 1.2 that were added through the Good Guidance Practices final rule at 85 FR 78770 (Dec. 7, 2020), and that we will recodify in this rule at § 1.2(a)) will continue to apply to all guidance documents until FDA amends its good guidance practices regulation to be consistent with the HHS Good Guidance Practices rule, at which point §§ 1.2(a) and 1.3 through 1.5 shall apply to all divisions of HHS except FDA.

Nothing in this rule shall apply:

• To any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than procurement actions and actions involving the import or export of nondefense articles and services);

• To any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

• To any action related to detention, seizure, or destruction of counterfeit goods, pirated goods, or other goods that infringe intellectual property rights;

• To any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee; or

• In any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the Secretary of HHS, undermine the national security.

*B. Definitions (45 CFR 1.2)*

The definitions section at 45 CFR 1.2 is amended to include the following definitions at paragraph (b).

Civil Enforcement Action

HHS defines ''civil enforcement action'' to mean an action with legal consequence taken by the Department based on an alleged violation of the law. Such actions include administrative enforcement proceedings and enforcement adjudication (which is the administrative process undertaken by any component of the Department to resolve the legal rights and obligations of specific parties with regard to a particular enforcement issue pending before it) but do not include actions taken in the normal course of the Department's regulatory communications or decision-making, for example, decisions on product applications (such as approvals or denials/withdrawals of approval), claims authorizations, responses to citizen petitions, food or color additive petitions, or public health notifications.

Legal Consequence

HHS defines ''legal consequence'' as the result of an action that directly or indirectly affects substantive legal rights or obligations including by subjecting a regulated party to potential liability in an enforcement action. The meaning of this term is informed by the Supreme Court's discussion in *U.S. Army Corps of Engineers* v. *Hawkes Co.,* 136 S. Ct. 1807, 1813–16 (2016), and includes, for example, agency letters or orders establishing or increasing the probability of liability for regulated parties in a subsequent enforcement action, *Ipsen Biopharmaceuticals, Inc.* v. *Azar,* 943 F.3d 953, 956 (D.C. Cir. 2019); *Rhea Lana, Inc.* v. *Dep't of Labor,* 824 F.3d 1023, 1030 (D.C. Cir. 2016). It does not include a warning letter or other communication, such as one describing inspectional observations, that pursuant to agency policy is intended to provide notice to a regulated party and elicit voluntary compliance. Such warning letters and inspectional observations have no immediate regulatory implications for the entity, are an interim step in the agency's compliance communications with an entity, and are not final agency action that has legal consequences for a party. *See Orton Motor, Inc.* v. *HHS,* 884 F.3d 1205, 1215 (D.C. Cir. 2018); *Holistic Candlers & Consumers Ass'n* v. *FDA,* 664 F.3d 940 (D.C. Cir. 2012); *see also Hi-Tech Pharm., Inc.* v. *Hahn,* Civ. No. 19–1268(RBW), 2020 WL 3498588, *5 (D.D.C. June 29, 2020); *Lystn, LLC* v. *FDA,* No. 19–cv–1943–PAB–KLM, 2020 WL 248962, *5 (D. Colo. Jan. 16, 2020); *Cody Labs., Inc.* v. *Sebelius,* No. 10–CV–00147–ABJ, 2010 WL 3119279, *11 (D. Wyo. July 26, 2010), *aff'd,* 446 F. App'x 964, 969 (10th Cir. 2011); *Gomperts* v. *Azar,* No. 1:19–cv–00345–DCN, 2020 WL 3963864, *4–5 (D. Idaho July 13, 2020).

Unfair Surprise

HHS defines ''unfair surprise'' to mean a lack of reasonable certainty or fair warning, from the perspective of a reasonably prudent member of regulated industry, of what a legal standard administered by an agency requires, or the initiation of litigation by HHS following ''a very lengthy period of conspicuous inaction,'' in other words deliberate inaction, suggesting the agency previously had a different interpretation. *Christopher* v. *SmithKline Beecham Corp.,* 567 U.S. 142, 156 (2012). However, an agency does not create unfair surprise when it proceeds with a new interpretation that it established in notice-and-comment rulemaking. *See Martin* v. *Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 158 (1991) (identifying ''adequacy of notice to regulated parties'' as one factor relevant to the reasonableness of the agency's interpretation).

The definitions currently at 45 CFR 1.2 will be moved into a new paragraph (a). All definitions at paragraph (a) apply to all components of HHS until FDA amends its good guidance practices regulation, at which point the definitions at 45 CFR 1.2(a) shall apply to all divisions of HHS except FDA. The definitions at § 1.2(b) will apply to all components of the Department, including FDA.

*C. Proper Department Reliance on Guidance Documents (45 CFR 1.6)*

This rule reiterates the application of certain existing legal principles to HHS's use of guidance documents: When the Department takes a civil enforcement action or otherwise makes a determination based on an alleged violation of law that has legal consequence for a person or state, it must allege or establish the violation of law by applying statutes or regulations. HHS may not use guidance documents to impose binding requirements or prohibitions on persons outside of the executive branch except as authorized by law or expressly incorporated into a contract. Noncompliance with a standard or practice that is not in a statute or regulation and announced solely in a guidance document may not be treated as itself a violation of applicable statutes or regulations, unless expressly authorized by statute.

This rule also explains the appropriate circumstances when the Department may use a guidance document in civil enforcement actions. The Department may use a guidance document to explain the legal applicability of a statute or regulation with regard to prohibition of conduct, but when it does so, HHS may only use the guidance document to articulate the Department's understanding of how a statute or regulation applies to particular circumstances. Except when referring to a guidance document for historical facts, the Department may reference a guidance document in a civil enforcement action only if it has notified the public of such document to convey that understanding in advance. The Department must notify the public in advance of a guidance document through publication in the Department's guidance repository (as described in § 1.4 and available at *hhs.gov/guidance*).

*D. Fairness and Notice in Civil Enforcement Actions and Administrative Inspections (45 CFR 1.7)*

This rule would require the Department to only apply standards or practices that have been publicly stated in a manner that would not cause unfair surprise when HHS takes a civil enforcement action or otherwise makes a determination based on an alleged violation of law that has legal consequence for a person or state, unless a statutory exception applies. *See, e.g.,* 42 U.S.C. 1395hh(e). For purposes of this regulation, the Department would consider standards or practices to be publicly stated if available in paper publications or on the internet.

HHS avoids unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law. For example, the Department generally cannot retroactively impose liability on a party for conduct that violates a new agency interpretation. *But see* 42 U.S.C. 1395hh(e). The Department also may not alter its interpretation during an adjudicative proceeding if doing so would impose new liability on parties who have acted in good faith on the prior interpretation. *SmithKline Beecham,* 567 U.S. at 156 & n.15.

Section 7 of Executive Order 13892 requires that each agency that conducts civil administrative inspections must publish a rule of agency procedure governing such inspections, if such a rule does not already exist. The Department is adding a requirement at 45 CFR 1.7 that HHS shall only conduct civil administrative inspections according to published rules of agency procedure. While the Administrative Procedure Act exempts these subsequently issued rules of agency procedure themselves from notice-and-comment rulemaking, *see* 5 U.S.C. 553(b)(3)(A), each agency must make the rules governing its civil administrative inspections, including audits, publicly available and readily accessible, such as by posting them on a website.

*E. Fairness and Notice in Jurisdictional Determinations (45 CFR 1.8)*

The requirement for fairness and notice also extends to jurisdictional determinations. If the Department relies on a decision previously issued by an agency within the Department in an agency adjudication (*i.e.,* proceedings before and decided by the agency), administrative order, or agency document to assert a new or expanded claim of jurisdiction (*e.g.,* a claim to regulate a new subject matter or a new basis for liability, or a relinquishment of a claim of jurisdiction), the Department must give fair notice by publishing the initial decision in the **Federal Register** or the Department's guidance repository. *See* 45 CFR 1.4. The Department should not rely on the new claim of jurisdiction to take a civil enforcement action regarding conduct that occurred before such publication. A claim of jurisdiction is not ''new or expanded'' simply because it involves a new or novel set of facts so long as it is based on an established principle of general applicability.

If the Department intends to rely on a document arising out of litigation (other than a publicly published opinion of an adjudicator) such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future civil enforcement actions involving persons who were not parties to the litigation, the Department must also publish that document in the **Federal Register** or on the Department's guidance repository. Alongside publication of the document, the Department must also provide an explanation of the document's jurisdictional implications. Publication of a document discussed in this paragraph may either be in full or by citation, if the document is publicly available.

HHS is also proposing that if the Department seeks judicial deference to its interpretation of a document arising out of litigation (other than a publicly published opinion of an adjudicator) in order to establish a new or expanded claim of jurisdiction, HHS must, before seeking judicial deference, publish the document or a notice of availability in the **Federal Register** or on the Department's guidance repository, along with an explanation of the document's jurisdictional implications.

*F. Opportunity To Contest Agency Determinations (45 CFR 1.9)*

Providing regulated parties with the opportunity to be heard, including through informal oral or written communications, prior to the Department taking any civil enforcement action that has legal consequence is critical to ensuring that the Department operates with transparency and fairness. This rule will require that, before any component of the Department takes any civil enforcement action with respect to a particular entity that has legal consequence for that entity—including by issuing to such a person a notice of noncompliance or other similar notice that has immediate regulatory consequence or the immediate effect of subjecting the person to potential liability—the Department must afford that person an opportunity to be heard, either orally or in writing, as deemed appropriate at the Department's election. The rule will require HHS to provide the person with its proposed legal and factual determinations and then give the person a reasonable amount of time to respond to those determinations. The specific timeframe shall be in the discretion of the agency but must be long enough to provide a meaningful opportunity to be heard. Certain circumstances may warrant a time period of 30 days, while other circumstances may warrant a shorter period, such as 15 days or fewer, particularly where existing agency procedures already offer a shorter period in which to respond. Unless the Department withdraws the action, the Department must then respond in writing to the regulated party and articulate the final basis for the Department's action. This written response may be issued contemporaneous to the Department taking the action with legal consequence. We anticipate that generally, existing HHS procedures will already satisfy these standards, and where they do, those existing procedures will continue in effect unchanged. This rulemaking is not intended to preempt existing rules of agency procedure that are already consistent with this rule. Furthermore, where the Department takes an action based on a predicate finding that was reached following notice, an opportunity to be heard, and a written response, for example, where the Department revokes Medicare enrollment based on a prior exclusion or felony conviction, these procedural requirements are considered to have already been satisfied.

These procedures regarding fair notice and an opportunity to respond would not apply where the agency, in its discretion, determines there is a serious threat to health, safety, or similar emergency, or where a statute specifically authorizes proceedings that are inconsistent with this section, including proceedings without a prior opportunity to be heard. Where such a threat arises and a statute does not specifically authorize proceedings without a prior opportunity to be heard, HHS would still provide an affected entity with an opportunity to be heard and a written response as soon as practicable. In this context, a serious threat means that, as reasonably determined by the Department, there is a non-negligible likelihood of the threat materializing.

We anticipate that the exception from § 1.9 for actions taken in the context of threats to health, safety, or similar emergencies will apply broadly to public health agencies acting in furtherance of their missions. Actions will be considered to fall into this exception regardless of whether there is a showing of actual, imminent risk or harm, either to persons or animals. The agency has sole discretion to determine when an action falls into this exception. An agency may invoke this exception regardless of whether agency action is taken reactively (*e.g.,* to address an unsafe item currently on the market) or proactively (*e.g.,* to enforce regulations needed to protect public health prior to actual exposure by the public to unsafe items). Actions that fall into this exception include, for example, enforcing age restrictions or other controls around access to certain regulated products, enforcing manufacturer recordkeeping or reporting requirements, enforcing premarket requirements where there is an absence of or insufficient data concerning the product, protecting beneficiary data privacy or a federal healthcare program beneficiary from harm, and taking action to remove unapproved, misbranded, or adulterated human or animal products from the market.

Because of this exception, the procedures in § 1.9 generally will not impact, for example, the administrative detention process for foods, drugs, devices, and tobacco products (21 U.S.C. 334(g), (h)), the detention, refusal, and where authorized, destruction of imported products regulated by FDA (21 U.S.C. 381), disqualification (21 CFR parts 56, 58, 312, 511, 812), administrative detention, recall requests, import alerts, or other public notifications about food, drug, device, or tobacco products, or other actions related to investigating adulterated or misbranded products.

These procedures would also not apply to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, where a statute specifically precludes review of agency action, or to litigation before courts. Examples of situations where statutes specifically authorize differently structured proceedings include, but are not limited to, the hospital cost report appeals process (42 U.S.C. 1395oo), the individual benefit claims appeals process (42 U.S.C. 1395ff), and the process for the review of disallowances of Medicaid expenditures by the Secretary (42 U.S.C. 1316(e)). In such circumstances, the process and substantive standards governing review of claims arising under a relevant statute or regulation remain governed by those more specific procedures. The procedures would also not apply to any action related to a criminal investigation or prosecution, including undercover operations that may be used in a criminal investigation or prosecution, or any civil enforcement action either related to an investigation by the Department of Justice, or referred to the Department of Justice.

## III. Rulemaking Analyses and Notices

### *A. Executive Orders 12866 and 13563*

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 the regulation is necessary, to select regulatory approaches that maximize net benefits. The Department does not believe that this rulemaking is a significant regulatory action under these Executive Orders. This rule describes an update to the Department's current processes to ensure that it operates with transparency and fairness. The requirements in 45 CFR 1.6 through 1.9 relating to the proper use of guidance documents and fairness and notice in enforcement actions generally already exist in law. The requirements set forth in Section 6 of Executive Order 13892 and codified at 45 CFR 1.6 may exceed the requirements imposed by the Due Process clause of the Constitution and may impose a burden by delaying the time until HHS can take actions with legal consequence. However, this process will also offer important procedural safeguards and potentially reduce economic costs borne by regulated entities, which will have an opportunity to respond in writing before the Department takes an action that has (potentially costly) legal consequence.

The Department anticipates that the public, and, in particular, regulated parties, would benefit from greater efficiencies and more transparency in how the Department regulates, including facilitating smoother operations within HHS by clearly defining how guidance can be used.

### *B. Executive Order 13771*

This final rule is neither a regulatory nor a deregulatory action under Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' 82 FR 9339 (Feb. 3, 2017), because this rule is estimated to impose no more than de minimis costs on regulated entities.

### *C. Regulatory Flexibility Act*

The Department has examined the economic implications of this rule as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* The RFA requires an agency to describe the impact of a rulemaking on small entities by providing an initial regulatory flexibility analysis, unless the agency expects that the rule will not have a significant impact on a substantial number of small entities, provides a factual basis for this determination, and proposes to certify the statement. 5 U.S.C. 603(a), 605(b). The Department considers a proposed or final rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities. The Department anticipates that this rule will allow small entities to operate more efficiently, by increasing the transparency of government regulation. As a result, the Department has determined, and the Secretary certifies, that this final rule would not have a significant impact on the operations of a substantial number of small entities.

### *D. Executive Order 13132 (Federalism)*

Executive Order 13132, ''Federalism,'' establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments or has Federalism implications. The Department has determined that this final rule will not impose such costs or have any federalism implications.

### *E. Paperwork Reduction Act of 1995*

In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, 44 U.S.C. 3501–3521; 5 CFR part 1320, the

Department has reviewed this rule and has determined that it imposes no new collections of information.

**List of Subjects in 45 CFR Part 1**

Guidance, Government employess.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR Part I as set forth below:

## PART 1—TRANSPARENCY AND FAIRNESS IN CIVIL ADMINISTRATIVE ENFORCEMENT AND ADJUDICATION

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

**Authority:** 42 U.S.C. 1302, 5 U.S.C. 301, 551 *et seq.*

■ 2. Section 1.1 is revised to read as follows:

### § 1.1 Scope.

Sections 1.2(a) and 1.3 through 1.5 of this part shall apply to guidance documents issued by all components of the Department, until the Secretary amends the Food and Drug Administration's good guidance regulations at 21 CFR 10.115 to bring them into conformance with the requirements of this part, at which point, such amended regulations shall apply to the Food and Drug Administration, and §§ 1.2(a) and 1.3 through 1.5 shall apply to all divisions of the Department except the Food and Drug Administration. Sections 1.2(b) and 1.6 through 1.9 of this part shall apply to all components of the Department.

■ 3. Section 1.2 is amended by designating the existing text as paragraph (a) followed by the alphabetical ordered definitions, revising newly designated paragraph (a) introductory text, and adding paragraph (b).

The revision and addition read as follows:

### § 1.2 Definitions.

(a) The following definitions apply to all components of the Department until the Secretary amends the Food and Drug Administration's good guidance regulations at 21 CFR 10.115 to bring them into conformance with the requirements of §§ 1.3 through 1.5 of this part:

* * * * *

(b) The following definitions apply to all components of the Department:

*Civil enforcement action* means an action with legal consequence taken by the Department based on an alleged violation of the law. Such actions include administrative enforcement proceedings and enforcement adjudication (which is the administrative process undertaken by any component of the Department to resolve the legal rights and obligations of specific parties with regard to a particular enforcement issue pending before it) but do not include actions taken in the normal course of the Department's regulatory communications or decision-making, for example, decisions on product applications (such as approvals, denials, or withdrawals of approval), claims authorizations, citizen petitions, food or color additive petitions, or public health notifications.

*Legal consequence* means the result of an action that directly or indirectly affects substantive legal rights or obligations, including by subjecting a regulated party to potential liability in an enforcement action. This includes agency letters or orders establishing greater liability for regulated parties in a subsequent enforcement action, but excludes communications that have no immediate regulatory implications for a person or entity, such as letters (*e.g.,* warning letters) or inspectional observations that serve as an interim step in the agency's compliance communications with a person or entity or that are intended to encourage voluntary compliance.

*Unfair surprise* means a lack of reasonable certainty or fair warning, from the perspective of a reasonably prudent member of regulated industry, of what a legal standard administered by an agency requires.

■ 4. Section 1.6 is added to read as follows:

### § 1.6 Proper Department reliance on guidance documents.

(a) *Overview.* A civil enforcement action must have an appropriate legal basis. When the Department takes a civil enforcement action or makes a determination based on an alleged violation of law that has legal consequence for a person or state, it must allege or establish the violation of law by applying statutes or regulations.

(b) *Limitations on the use of guidance documents.* (1) The Department may not use guidance documents to impose binding requirements or prohibitions on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract.

(2) The Department may not treat noncompliance with a standard or practice announced solely in a guidance document as itself a violation of applicable statutes or regulations except as expressly authorized by law.

(3) If the Department uses a guidance document to explain the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the Department's understanding of how a statute or regulation applies to particular circumstances.

(4) The Department may cite to a guidance document in a civil enforcement action only if it has notified the public of such document in advance through publication, in the Department's guidance repository, as described in § 1.4.

■ 5. Section 1.7 is added to read as follows:

### § 1.7 Fairness and notice in civil enforcement actions and administrative inspections.

(a) When the Department takes a civil enforcement action, the Department may only apply standards or practices that have been publicly stated in a manner that would not cause unfair surprise.

(b) The Department must avoid unfair surprise when it imposes penalties and whenever it adjudges past conduct to have violated the law.

(c) The Department shall only conduct civil administrative inspections according to published rules of agency procedure.

■ 6. Section 1.8 is added to read as follows:

### § 1.8 Fairness and notice in jurisdictional determinations.

(a) If the Department relies on a decision in an agency adjudication, administrative order, or agency document to assert a new or expanded claim of jurisdiction (*e.g.,* a claim to regulate a new subject matter or a new basis for liability, or a relinquishment of a claim of jurisdiction), the Department must give fair notice by publishing the initial decision before the conduct over which jurisdiction is sought occurs. It must publish the initial decision in full or by citation, if publicly available, in the **Federal Register** or the Department's guidance repository described in § 1.4. A claim of jurisdiction is not ''new or expanded'' simply because it involves a new or novel set of facts so long as it is based on an established principle of general applicability.

(b) If the Department intends to rely on a document arising out of litigation (other than a publicly published opinion of an adjudicator), such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future civil enforcement actions involving persons who were not parties to the litigation, the Department must—

(1) Publish that document, either in full or by citation if publicly available, in the **Federal Register** or on the Department's guidance repository described in § 1.4, and

(2) Publish an explanation of the document's jurisdictional implications.

(c) Before seeking judicial deference to the Department's interpretation of a document arising out of litigation (other than a publicly published opinion of an adjudicator) in order to establish a new or expanded claim of jurisdiction in a different case, the Department must—

(1) Publish the document or a notice of availability in the **Federal Register** or on the Department's guidance repository described in § 1.4, and

(2) Publish an explanation of the document's jurisdictional implications.

■ 7. Section 1.9 is added to read as follows:

**§ 1.9 Opportunity to contest agency determination.**

(a) *Departmental overview.* Except as provided in paragraph (c) of this section, prior to the Department taking any civil enforcement action with respect to a particular entity that has legal consequence for that entity, including by issuing to such a person a notice of noncompliance, or other similar notice that has immediate regulatory consequence, but excluding communications that have no immediate regulatory implications for the entity, such as those that serve as an interim step in the agency's compliance communications with the entity or that are intended to encourage voluntary compliance, the Department shall provide—

(1) Written notice to the affected entity of the initial legal and factual determinations underpinning the initial adverse determination;

(2) An opportunity for the affected entity to respond in writing and, if determined appropriate by the Department, orally; and

(3) A written response from the Department to the affected entity after receiving a timely request from the affected entity under paragraph (a)(2) of this section.

(b) *Timing and content of written responses.* (1) The Department will select a meaningful amount of time in which the affected entity must submit a written response to the Department. This writing must be submitted within the time period specified by the Department, unless the Department concludes an extension is warranted, and state the reasons for the entity's disagreement with the Department's proposed action for purposes of requiring a response in accordance with paragraph (a)(3) of this section.

(2) The Department's written response must respond to the affected entity and articulate the basis for its final decision. This written response may be issued contemporaneous to the Department taking the action with legal consequence.

(c) *Exceptions.* The procedures in paragraphs (a) and (b) of this section do not apply where the Department, in its discretion, determines there is a serious threat to health, safety, or similar emergency, or where a statute specifically authorizes proceeding without a prior opportunity to be heard. In such event, HHS would still provide an affected entity with an opportunity to be heard and a written response as soon as practicable. The procedures in paragraphs (a) and (b) do not apply to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, to litigation before courts, or any action related to a criminal investigation or prosecution, including undercover operations that may be used in a criminal investigation or prosecution, or any civil enforcement action either related to an investigation by the Department of Justice, or referred to the Department of Justice.

Dated: January 7, 2021.

**Alex M. Azar II,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2021–00592 Filed 1–12–21; 4:15 pm]

BILLING CODE 4150–26–P

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## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 73

**[MB Docket No. 20–340; RM–11865; DA 20–1425; FRS 17287]**

## Television Broadcasting Services; Minneapolis, Minnesota.

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Media Bureau, Video Division (Bureau) has before it a Notice of Proposed Rulemaking issued in response to a petition for rulemaking filed by Multimedia Holdings Corporation (Multimedia), licensee of KARE, channel 11, Minneapolis, Minnesota, requesting the substitution of channel 31 for channel 11 at Minneapolis in the DTV Table of Allotments. The Bureau had instituted a freeze on the acceptance of rulemaking petitions by full power television stations requesting channel substitutions in May 2011 and waived the freeze to consider Multimedia's proposal to substitute channel 31 at Minneapolis. TEGNA, Inc., filed comments in support of the petition reaffirming its commitment to applying for channel 31. The Bureau believes the public interest would be served by the substitution and will permit the station to better serve its viewers, who have experienced reception problems with VHF channel 11.

**DATES:** Effective January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Joyce Bernstein, Media Bureau, at *Joyce.Bernstein@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order,* MB Docket No. 20–340; RM–11865; DA 20–1425, adopted December 2, 2020, and released December 2, 2020. The full text of this document is available for download at *https://www.fcc.gov/edocs.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional review Act, *see* 5 U.S.C. 801(a)(1)(A).

### List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

**Thomas Horan,**

*Chief of Staff, Media Bureau.*

### Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

## PART 73—Radio Broadcast Service

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336, and 339.

### § 73.622 [Amended]

■ 2. In § 73.622(i), amend the Post-Transition Table of DTV Allotments, under Minnesota, by removing channel 11 and adding channel 31 at Minneapolis.

[FR Doc. 2020–27277 Filed 1–13–21; 8:45 am]

**BILLING CODE 6712–01–P**

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## DEPARTMENT OF TRANSPORTATION

## National Highway Traffic Safety Administration

## 49 CFR Part 578

**[Docket No. NHTSA–2021–0001]**

**RIN 2127–AM32**

## Civil Penalties

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Interim final rule; request for comments; response to petition for rulemaking.

**SUMMARY:** On October 2, 2020, NHTSA received a petition for rulemaking from the Alliance for Automotive Innovation regarding when to apply an increase to the civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards and are unable to offset such a deficit with compliance credits. After carefully considering the issues raised, NHTSA has granted the petition and promulgates an interim final rule providing that the increase will go into effect beginning in model year 2022 in accordance with NHTSA's December 2016 rule on the same issue, except if the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is vacated. This interim final rule amends the relevant regulatory text accordingly and requests comment. This document also responds to a petition for reconsideration of NHTSA's July 2019 rule from the Institute for Policy Integrity at New York University School of Law.

**DATES:**

*Effective date:* This rule is effective January 14, 2021

*Comments:* Comments must be received by January 25, 2021.

**ADDRESSES:** You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery or Courier:* U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251
- *Instructions:* NHTSA has established a docket for this action. Direct your comments to Docket ID No. NHTSA–2021–0001. See the **SUPPLEMENTARY INFORMATION** section on ''Public Participation'' for more information about submitting written comments.
- *Docket:* All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the following location: Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The telephone number for the docket management facility is (202) 366–9324. The docket management facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Michael Kuppersmith, Office of Chief Counsel, NHTSA, email *michael.kuppersmith@dot.gov,* telephone (202) 366–2992, facsimile (202) 366–3820, 1200 New Jersey Ave. SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

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### A. Public Participation

NHTSA requests comment on this interim final rule. This section describes how you can participate in this process.

(1) How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the Docket number NHTSA–2021–0001 in your comments. Your comments must not be more than 15 pages long.[1] NHTSA established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments, and there is no limit on the length of the attachments. If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using the Optical Character Recognition (OCR) process, thus allowing the Agency to search and copy certain portions of your submissions.[2] Please note that pursuant to the Data Quality Act, in order for the substantive data to be relied upon and used by the Agency, it must meet the information quality standards set forth in the OMB and Department of Transportation (DOT) Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html.* DOT's guidelines may be accessed at *http://www.dot.gov/dataquality.htm.*

(2) Tips for Preparing Your Comments

[1] *See* 49 CFR 553.21

[2] Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

When submitting comments, please remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the **DATES** section above.

(3) How can I be sure that my comments were received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

(4) How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit your complete submission, including the information you claim to be confidential business information (CBI), to the NHTSA Chief Counsel. When you send a comment containing CBI, you should include a cover letter setting forth the information specified in our CBI regulation.[3] In addition, you should submit a copy from which you have deleted the claimed CBI to the Docket by one of the methods set forth above.

To facilitate social distancing due to COVID–19, NHTSA is treating electronic submission as an acceptable method for submitting CBI to the Agency under 49 CFR part 512. Any CBI submissions sent via email should be sent to an attorney in the Office of Chief Counsel at the address given above under **FOR FURTHER INFORMATION CONTACT**. Likewise, for CBI submissions via a secure file transfer application, an attorney in the Office of Chief Counsel must be set to receive a notification when files are submitted and have access to retrieve the submitted files. At this time, regulated entities should not send a duplicate hardcopy of their electronic CBI submissions to DOT headquarters.

Please note that these modified submission procedures are only to facilitate continued operations while maintaining appropriate social distancing due to COVID–19. Regular procedures for part 512 submissions will resume upon further notice, when NHTSA and regulated entities discontinue operating primarily in telework status.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

(5) How can I read the comments submitted by other people?

You may read the materials placed in the docket for this document (*e.g.,* the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. You may also read the materials at the NHTSA Docket Management Facility by going to the street addresses given above under **ADDRESSES**.

## B. Statutory and Regulatory Background

NHTSA sets[4] and enforces[5] corporate average fuel economy (CAFE) standards for the United States light-duty automobile fleet, and in doing so, assesses civil penalties against manufacturers that fall short of their compliance obligations and are unable to make up the shortfall with credits obtained for exceeding the standards.[6] The civil penalty amount for CAFE non-compliance was originally set by statute in 1975, and beginning in 1997, included a rate of $5.50 per each tenth of a mile per gallon (0.1) that a manufacturer's fleet average CAFE level falls short of its compliance obligation. This shortfall amount is then multiplied by the number of vehicles in that manufacturer's fleet.[7] The basic equation for calculating a manufacturer's civil penalty amount before accounting for credits, is as follows:

(penalty rate, in $ per 0.1 mpg per vehicle) × (amount of shortfall, in tenths of an mpg) × (# of vehicles in manufacturer's non-compliant fleet).

Starting with model year 2011, the CAFE program was amended by the Energy Independence and Security Act of 2007 (EISA) to provide for credit transfers among a manufacturer's various fleets.[8] Starting with that model year, the law also provided for trading between vehicle manufacturers, which has allowed vehicle manufacturers the opportunity to acquire credits from competitors rather than paying civil penalties for non-compliance. Credit purchases involve significant expenditures, and NHTSA believes that an increase in the penalty rate would correlate with an increase in such expenditures.

## C. Civil Penalties Inflation Adjustment Act Improvements Act of 2015

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Inflation Adjustment Act or 2015 Act), Public Law 114–74, Section 701, was signed into law. The 2015 Act required Federal agencies to make an initial ''catch-up'' adjustment to the ''civil monetary penalties,'' as defined, they administer through an interim final rule and then to make subsequent annual adjustments for inflation. The amount of increase for any ''catch-up'' adjustment to a civil monetary penalty pursuant to the 2015 Act was limited to 150 percent of the then-current penalty. Agencies were required to issue an interim final rule for the initial ''catch-up'' adjustment by July 1, 2016, without providing the opportunity for public comment ordinarily required under the Administrative Procedure Act.

The Director of the Office of Management and Budget (OMB) provided guidance to all Federal agencies in a February 24, 2016 memorandum.[9] For those penalties an agency determined to be ''civil monetary penalties,'' the memorandum provided guidance on how to calculate

[3] *See* 49 CFR part 512.

[4] 49 U.S.C. 32902. The authorities vested in the Secretary under chapter 329 of Title 49, U.S.C., have been delegated to NHTSA. 49 CFR 1.95(a).

[5] 49 U.S.C. 32911, 32912.

[6] Credits may be either *earned* (for over-compliance by a given manufacturer's fleet, in a given model year), *transferred* (from one fleet to another), or *purchased* (in which case, another manufacturer earned the credits by over-complying and chose to sell that surplus). 49 U.S.C. 32903.

[7] A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any given model year—a domestic passenger car fleet, an imported passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.

[8] Public Law 110–140, sec. 104.

[9] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.*

the initial adjustment required by the 2015 Act. The initial catch up adjustment is based on the change between the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October in the year the penalty amount was established or last adjusted by Congress and the October 2015 CPI–U. The February 24, 2016 memorandum contains a table with a multiplier for the change in CPI–U from the year the penalty was established or last adjusted to 2015. To arrive at the adjusted penalty, an agency must multiply the penalty amount when it was established or last adjusted by Congress, excluding adjustments under the 1990 Inflation Adjustment Act, by the multiplier for the increase in CPI–U from the year the penalty was established or adjusted as provided in the February 24, 2016 memorandum. The 2015 Act limits the initial inflationary increase to 150 percent of the current penalty. To determine whether the increase in the adjusted penalty is less than 150 percent, an agency must multiply the current penalty by 250 percent. The adjusted penalty is the lesser of either the adjusted penalty based on the multiplier for CPI–U in Table A of the February 24, 2016 memorandum or an amount equal to 250 percent of the current penalty. Ensuing guidance from OMB identifies the appropriate inflation multiplier for agencies to use to calculate the subsequent annual adjustments.[10]

The 2015 Act also gives agencies discretion to adjust the amount of a civil monetary penalty by less than otherwise required for the initial catch-up adjustment if an agency determines that increasing the civil monetary penalty by the otherwise required amount will have either a negative economic impact or if the social costs of the increased civil monetary penalty will outweigh the benefits.[11] In either instance, the agency must publish a notice, take and consider comments on this finding, and receive concurrence on this determination from the Director of OMB prior to finalizing a lower civil penalty amount.

### D. NHTSA's Actions to Date Regarding CAFE Civil Penalties

#### *1. Interim Final Rule*

On July 5, 2016, NHTSA published an interim final rule, adopting inflation adjustments for civil penalties under its administration, following the procedure and the formula in the 2015 Act. NHTSA did not analyze at that time whether the 2015 Act applied to all of its civil penalties, instead applying the inflation multiplier to increase all amounts found in its penalty schemes as a rote matter. One of the adjustments NHTSA made at the time was raising the civil penalty rate for CAFE non-compliance from $5.50 to $14 starting with model year 2015.[12] NHTSA also indicated in that interim final rule that the maximum penalty rate that the Secretary is permitted to establish for such violations would increase from $10 to $25, but did not codify this change in the regulatory text. NHTSA also raised the maximum civil penalty for other violations of EPCA, as amended, to $40,000.[13]

#### *2. Initial Petition for Reconsideration and Response*

The then-Alliance of Automobile Manufacturers and the Association of Global Automakers (since combined to form the Alliance for Automotive Innovation) jointly petitioned NHTSA for reconsideration of the CAFE penalty provisions issued in the interim final rule.[14] This petition raised concerns with the significant impact that the increased penalty rate would have on CAFE compliance costs, which they estimated to be at least $1 billion annually. Specifically, this petition identified the issue of retroactivity (applying the penalty increase associated with model years that have already been completed or for which a company's compliance plan had already been ''set''); which ''base year'' (*i.e.,* the year the penalty was established or last adjusted) NHTSA should use for calculating the adjusted penalty rate; and whether an increase in the penalty rate to $14 would cause a ''negative economic impact.''

In response to the joint petition, NHTSA issued a final rule on December 28, 2016.[15] In that rule, NHTSA agreed that raising the penalty rate for model years already fully complete would be inappropriate, given how courts generally disfavor the retroactive application of statutes and that doing so could not deter non-compliance, incentivize compliance, or lead to any improvements in fuel economy. NHTSA also agreed that raising the rate for model years for which product changes were infeasible due to lack of lead time did not seem consistent with Congress' intent that the CAFE program be responsive to consumer demand. Accordingly, NHTSA stated that it would not apply the inflation-adjusted penalty rate of $14 until model year 2019, as the Agency believed that would be the first year in which product changes could reasonably be made in response to the higher penalty rate.

#### *3. NHTSA Reconsideration*

Beginning in January 2017, NHTSA took a series of actions to delay the effective date of the December 2016 final rule as it, for the first time, assessed whether the CAFE civil penalty rate was subject to the 2015 Act.[16] As a result of a subsequent decision of the United States Court of Appeals for the Second Circuit, however, that December 2016 final rule was considered to be in force.[17] That decision by the Second Circuit did not affect NHTSA's authority to reconsider the applicability of the 2015 Act to the EPCA CAFE civil penalty provision through notice-and-

[10] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-11_0.pdf;* Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2017), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf;* Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf;* Memorandum from the Acting Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2020, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2019), available online at *https://www.whitehouse.gov/wp-content/uploads/2019/12/M-20-05.pdf;* Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020), available online at *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[11] Public Law 114–74, sec. 701(c).

[12] 81 FR 43524 (July 5, 2016). This interim final rule also updated the maximum civil penalty amounts for violations of all statutes and regulations administered by NHTSA and was not limited solely to penalties administered for CAFE violations.

[13] 81 FR 43524 (July 5, 2016).

[14] Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016, interim final rule raising the same concerns as those raised in the joint petition. Both petitions, along with a supplement to the joint petition, can be found in Docket ID NHTSA–2016–0075 at *www.regulations.gov.*

[15] 81 FR 95489 (December 28, 2016).

[16] 82 FR 8694 (January 30, 2017); 82 FR 15302 (March 28, 2017); 82 FR 29009 (June 27, 2017); 82 FR 32139 (July 12, 2017).

[17] Order, ECF No. 196, *NRDC* v. *NHTSA,* Case No. 17–2780 (2d Cir., Apr. 24, 2018); Opinion, ECF No. 205, *NRDC* v. *NHTSA,* Case No. 17–2780, at 44 (2d Cir., June 29, 2018) (''The Civil Penalties Rule, 81 FR 95,489, 95,489–92 (December 28, 2016), no longer suspended, is now in force.'').

comment rulemaking. Absent any further action, the rate would have increased beginning with model year 2019.[18]

In July 2019, NHTSA finalized a rule determining that the 2015 Act did not apply to the CAFE civil penalty rate. In line with its statutory role and pursuant to its previous guidance to all Federal Agencies, OMB provided guidance to NHTSA agreeing with this statutory interpretation.[19] The July 2019 rule also stated that, in the alternative, even if the 2015 Act applied, increasing the CAFE civil penalty rate would have a negative economic impact. As discussed in the July 2019 rule, OMB concurred with this negative economic impact determination, as required by the 2015 Act.[20] In either case, NHTSA concluded that the current CAFE civil penalty rate of $5.50 should be retained, instead of increasing to $14 beginning with model year 2019.

On August 31, 2020, the United States Court of Appeals for the Second Circuit issued a ruling vacating the July 2019 rule and announcing that the December 2016 rule is back in force. The Second Circuit denied panel rehearing on November 2, 2020. NHTSA stands by the reasoning set forth in its July 2019 rule, but recognizes that the Second Circuit's decision is currently binding and remains in effect absent a Supreme Court decision to the contrary.

### E. IPI Petition for Reconsideration

On September 9, 2019, the Institute for Policy Integrity at New York University School of Law (IPI) submitted a petition for reconsideration of NHTSA's July 2019 final rule. IPI argued that the rule was unreasonable and not in the public interest for ignoring and improperly weighing the costs and benefits.[21] IPI also alleged that the OMB letters NHTSA relied on were not presented for public comment, contained factual misstatements, and contradicted NHTSA's reasoning. Lastly, IPI challenged NHTSA's statutory interpretations.

### F. The Alliance Petition for Rulemaking

On October 2, 2020, the Alliance for Automotive Innovation (the Alliance) submitted a petition for rulemaking (Alliance Petition) to delay the applicability of the increased $14 CAFE civil penalty rate until model year 2022 for largely the same reasons NHTSA relied on in the December 2016 rule.[22] According to the Alliance Petition, ''Model Years 2019 and 2020 are effectively lapsed now,'' and ''[m]anufacturers are unable to change MY 2021 plans at this point.'' [23] The Alliance argued that applying the increased penalty to any non-compliances that are temporally impossible to avoid or cannot practically be remedied does not serve the statutory purposes of deterring prohibited conduct or incentivizing favored conduct. Doing so would effectively be punishing violators retroactively.

In addition to relying on the reasoning of the December 2016 rule, the Alliance Petition notes the significant economic impact suffered by the industry due to COVID–19. Accordingly, the Alliance Petition also cites Executive Order 13924, requiring Federal Agencies to take appropriate action, consistent with applicable law, to combat the economic emergency caused by COVID–19.[24] Several individual vehicle manufacturers submitted supplemental information to NHTSA further articulating the negative economic position they are in due to COVID–19 and the potential and significant adverse economic consequences of the increased civil penalty rate, particularly during this time of stress on the industry.

### G. NHTSA Response to Petitions

NHTSA granted the Alliance Petition and commenced this rulemaking action. Having carefully considered the issues raised by the petitioner and other available information, NHTSA issues this interim final rule and requests comment. If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is vacated, NHTSA's July 2019 rule keeping the CAFE civil penalty rate at $5.50 will be reinstated. If that decision is not vacated, however, the CAFE civil penalty rate will increase to $14 beginning with model year 2022, pursuant to the 2015 Act. NHTSA will make any subsequent annual adjustments as necessary and appropriate.[25]

Prior to granting the petition, NHTSA had to determine whether it had authority to issue the requested rule as a threshold matter. NHTSA notes first that it has authority to administer the CAFE program.[26] It is common practice for agencies—including NHTSA—to exercise their authority to administer programs they oversee.[27] NHTSA also

[18] *See* 81 FR 95489, 95492 (Dec. 28, 2016). Civil penalties are determined after the end of a model year, following NHTSA's receipt of final reports from the Environmental Protection Agency (EPA), *i.e.,* no earlier than April for the previous model year's non-compliance. *See* 77 FR 62624, 63126 (Oct. 15, 2012).

[19] July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA–2018–0017–0018 (OMB Non-Applicability Letter).

[20] July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA–2018–0017–0019 (OMB Negative Economic Impact Letter).

[21] IPI Petition, at 1–2.

[22] The Alliance also submitted a supplement to its petition on October 22, 2020 (Alliance Supplement).

[23] Alliance Petition, at 4.

[24] ''Executive Order on Regulatory Relief to Support Economic Recovery,'' E.O. 13924 (May 19, 2020).

[25] None of the annual inflation adjustment multipliers since the initial catch-up adjustment has been high enough to require a subsequent adjustment of the CAFE civil penalty rate. That is, if the catch-up adjustment to $14 had applied beginning in 2016, the rate would still be $14 through at least 2021.

[26] *See Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974) (''The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.''); *see also Friends of Boundary Waters Wilderness* v. *Bosworth,* 437 F.3d 815, 823–24 (8th Cir. 2006) (''Agencies given the authority to promulgate a quota are presumed to have the authority to adjust that quota.''); *S. California Edison Co.* v. *F.E.R.C.,* 415 F.3d 17, 22–23 (D.C. Cir. 2005) (''[O]f course, agencies may alter regulations. Agencies may even alter their own regulations *sua sponte,* in the absence of complaints, provided they have sufficient reason to do so and follow applicable procedures.''); *Ober* v. *Whitman,* 243 F.3d 1190, 1194–95 (9th Cir. 2001) (indicating that agencies have the inherent authority to exempt *de minimis* violations from regulation if not prohibited by statute); *Tate & Lyle, Inc.* v. *C.I.R.,* 87 F.3d 99, 104 (3d Cir. 1996) (''Inherent in the powers of an administrative agency is the authority to formulate policies and to promulgate rules to fill any gaps left, either implicitly or explicitly, by Congress.'') (citing *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984)); *Fla. Cellular Mobil Commc'ns Corp.* v. *F.C.C.,* 28 F.3d 191, 196 (D.C. Cir. 1994) (''If an agency is to function effectively, however, it must have some opportunity to amend its rules and regulations in light of its experience.''); *Rainbow Broad. Co.* v. *F.C.C.,* 949 F.2d 405, 409 (D.C. Cir. 1991) (''Agencies enjoy wide latitude when using rulemaking to change their own policies and the manner by which their policies are implemented.''); *Nat. Res. Def. Council, Inc.* v. *Sec. & Exch. Comm'n,* 606 F.2d 1031, 1056 (D.C. Cir. 1979) (''An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in [a]ny proceeding.'').

[27] 76 FR 22565, 22578 (Apr. 21, 2011) (''[A]n agency may reconsider its methodologies and application of its statutory requirements and may even completely reverse course, regardless of whether a court has determined that its original regulation is flawed, so long as the agency explains its bases for doing so.'') (citations omitted); 75 FR 6883, 6884 (Feb. 12, 2010) (''The Department [of Labor] has inherent authority to change its regulations in accordance with the Administrative Procedure Act (APA).''); 64 FR 60556, 60580 (Nov. 5, 1999) (NHTSA ''believe[s] that nothing in [the statute] derogates our inherent authority to make temporary adjustments in the requirements we adopt if, in our judgment, such adjustments are necessary or prudent to promote the smooth and effective achievement of the goals of the amendments.'').

has specific statutory authority to administer the program [28] and possesses the general authority—beyond its inherent authority—to do so efficiently and in the public interest.[29] NHTSA's obligation to administer the CAFE program consistent with law includes the statutory requirement to establish maximum feasible fuel economy standards through a balancing of competing factors, including economic practicability, and to do so at least eighteen months in advance for more stringent standards.[30] CAFE civil penalties are merely one component of this overall program.

Moreover, EPCA expressly details a procedure for NHTSA, as delegated by the Secretary, to increase the CAFE civil penalty rate.[31] EPCA's delegation necessarily implies that NHTSA also has authority to oversee the administration and enforcement of the rate more generally.[32] Indeed, NHTSA already promulgated a similar rule in December 2016 establishing the first model years to which the increased CAFE civil penalty rate would apply, which was not challenged and has been held to be operative twice by the Second Circuit. The 2015 Act also applies only to penalties that are ''assessed or enforced by an Agency pursuant to Federal law.'' [33] For the CAFE civil penalty rate to be covered under the 2015 Act, NHTSA must have authority to assess or enforce it, and thus inevitably the authority to oversee and administer it as appropriate. To the extent there is any statutory ambiguity, NHTSA is the expert agency on its CAFE program, has been given authority to administer the Federal fuel economy program, and has expert authority to interpret and apply the requirements of EPCA and EISA, including the civil penalty provisions.

If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is vacated, NHTSA's July 2019 rule will be reinstated, keeping the CAFE civil penalty rate at $5.50. But turning to the merits of the Alliance Petition, NHTSA will assume *arguendo* that the July 2019 rule remains vacated. Under those circumstances, NHTSA agrees with the petitioner that the reasoning of the Agency's December 2016 rule applies here. As NHTSA said then, ''[i]f all the vehicles for a model year have already been produced, then there is no way for their manufacturers to raise the fuel economy level of those vehicles in order to avoid higher penalty rates for non-compliance.'' [34] At the time, NHTSA noted that by November 2015, ''nearly all manufacturers subject to the CAFE standards had completed both model years 2014 and 2015, and no further vehicles in those model years were being produced in significant numbers.'' Likewise now, vehicles for model years 2019 and 2020 have largely if not entirely been produced already, many manufacturers are already selling model year 2021 vehicles, and since some manufacturers launch subsequent model year vehicles as early as the spring, it is reasonable to assume that model year 2022 vehicles will be launched in the coming months. Applying the increased civil penalty rate to violations in these model years ''would not result in additional fuel savings, and thus would seem to impose retroactive punishment without accomplishing Congress' specific intent in establishing the civil penalty provision of the Energy Policy and Conservation Act ('EPCA').'' [35]

As NHTSA explained previously, ''the purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards.'' [36] And more generally, one of the stated purposes of the 2015 Act is to ''maintain the deterrent effect of civil monetary penalties and promote compliance with the law.'' [37] NHTSA agrees with the petitioner that it would be inappropriate to apply the adjustment to model years that could have no deterrence effect and promote no additional compliance with the law.[38]

In addition to failing to serve the purpose of the statutory framework and the regulatory scheme, applying the increased civil penalty rate to completed or largely completed model years would raise serious retroactivity concerns. As NHTSA explained in the December 2016 rule, and in various other contexts, ''[r]etroactivity is not favored in the law.'' [39] NHTSA does not believe that it is appropriate to impose a higher civil penalty rate for model years when doing so would not have incentivized improvements to fuel economy—one of the core purposes of EPCA.[40] Moreover, as NHTSA noted in the December 2016 rule, ''[t]he decision not to apply the increased penalties retroactively is similar to the approach taken by various other [F]ederal [a]gencies in implementing the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.'' [41] For instance, a fellow DOT agency concluded that applying an inflation adjustment when a penalty had been proposed but not finalized ''would not induce further compliance'' and would

[28] *See, e.g.,* 49 U.S.C. 32902, 32912. The Secretary's authority under EPCA is delegated to NHTSA. 49 CFR 1.95(a), (j) (delegating authority to NHTSA to exercise the authority vested in the Secretary under chapter 329 of title 49 of the U.S. Code and certain sections of the Energy Independence and Security Act of 2007, Public Law 110–140); *see also* 49 CFR 1.94(c). Moreover, NHTSA's regulations provide that ''[t]he Administrator may initiate any further rulemaking proceedings that he finds necessary or desirable.'' 49 CFR 553.25.

[29] *See* 49 U.S.C. 302(a) (stating the Secretary of Transportation is governed by the transportation policy described in part in 49 U.S.C. 13101(b), which provides that oversight of the modes of transportation ''shall be administered and enforced to carry out the policy of this section and to promote the public interest''); 49 U.S.C. 322(a) (''The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.''); 49 U.S.C. 105(c)(2) (directing the NHTSA Administrator to ''carry out . . . additional duties and powers prescribed by the Secretary''); 49 CFR 1.81(a)(3) (''Except as prescribed by the Secretary of Transportation, each Administrator is authorized to . . . [e]xercise the authority vested in the Secretary to prescribe regulations under 49 U.S.C. 322(a) with respect to statutory provisions for which authority is delegated by other sections in this part.'').

[30] 49 U.S.C. 32902(a), (f), (g)(2).

[31] *See* 49 U.S.C. 32912(c).

[32] *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain,* 89 Geo. L.J. 833, 876 (2001) (''All administrative agencies have certain powers inherent in their status as units of the executive branch; all executive officers have inherent authority to interpret the law.'' (footnote omitted)).

[33] 28 U.S.C. 2461 note, sec. 3(2)(B).

[34] 81 FR 95489, 95490 (Dec. 28, 2016).

[35] 81 FR 95489, 95490 (Dec. 28, 2016).

[36] 81 FR 95489, 95490 (Dec. 28, 2016) (citing 49 CFR 578.2) (section addressing penalties states that a ''purpose of this part is to effectuate the remedial impact of civil penalties and to foster compliance with the law''); see generally, 49 U.S.C. 32911–32912; *United States* v. *General Motors,* 385 F. Supp. 598, 604 (D.D.C. 1974), vacated on other grounds, 527 F.2d 853 (D.C. Cir. 1975) (''The policy of the Act with regard to civil penalties is clearly to discourage noncompliance'').

[37] 28 U.S.C. 2461 note, sec. 2(b)(2).

[38] NHTSA's proposal to retain the $5.50 rate was published weeks before the Second Circuit's decision vacating the indefinite delay of the December 2016 rule. Accordingly, manufacturers were aware of NHTSA's tentative reconsideration decision and could begin planning accordingly, despite the December 2016 rule being in force.

[39] 81 FR 95489, 95490 n.8 (Dec. 28, 2016). The Supreme Court has stated that ''congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.'' *Landgraf* v. *USI Film Products,* 511 U.S. 244, 280 (1994) (citing *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204, 208 (1988)).

[40] The 2015 Act provides that any increases to civil monetary penalties only apply to penalties that ''are assessed after the date the increase takes effect.'' 28 U.S.C. 2461 note, sec. 6. Therefore, at a minimum, any adjustment to the CAFE civil penalty rate would not apply to any penalties that have already been assessed.

[41] *See, e.g.,* Department of Justice, interim final rule with request for comments: Civil Monetary Penalties Inflation Adjustment, 81 FR 42491 (June 30, 2016) (applying increased penalties only to violations after November 2, 2015, the date of the Act's enactment); Federal Aviation Administration, interim final rule: Revisions to Civil Penalty Inflation Adjustment Tables, 81 FR 43463 (July 5, 2016) (applying increased penalties only to violations after August 1, 2016).

thus be contrary to the goals of its specific enforcement statute.[42] Accordingly, the agency announced it would not retroactively adjust the proposed penalty amounts for violations that predated the inflation adjustments.

For similar reasons—and applying the same reasoning as in the December 2016 rule—NHTSA concludes that it would be inappropriate to apply the increased civil penalty rate to model year 2021 as well. In the December 2016 rule, NHTSA recognized the reality of the timeline for the design, development, and production of new vehicles: ''because of industry design, development, and production cycles, vehicle designs (including drivetrains, which are where many fuel economy improvements are made) are often fixed years in advance, making adjustments to fleet fuel economy difficult without a lead time of multiple years.'' [43] At the time of the recent judicial decision indicating that the increase would go into effect, the industry plans for what remains of model year 2020 and model year 2021 were ''fixed and inalterable.'' [44] Accordingly, ''it is too late at this juncture to make significant changes to those plans and avoid non-compliances.'' [45]

NHTSA's decision here also takes account of the industry's serious reliance interests, having made design, development, and production plans based on the $5.50 rate. And reliance upon that rate was reasonable, as NHTSA reconsidered application of the 2015 Act by proposing in 2018 that the 2015 Act did not apply and finalizing the proposal in 2019.[46] The Director of the Office of Management and Budget—the Agency charged with overseeing implementation of the 2015 Act—also issued guidance concurring with NHTSA that the 2015 Act did not apply to the CAFE penalty rate with the final rule, further increasing the reasonableness of such reliance.

The Alliance Petition observes that ''[m]anufacturers long ago made their technology choices, locked in suppliers and production requirements, developed credit purchase/sales strategies, and have largely begun to implement their planned production runs for Model Year 2021''—all with the $5.50 rate in effect.[47] The issue of credits is particularly noteworthy as manufacturers can apply credits well beyond one or two model years. Manufacturers can choose to carry back credits to apply to any of three model years before they are earned or carry them forward to apply to any of the five model years after they are earned. With such a long window of potential applicability, it is likely that manufacturers make long-term plans in determining how to acquire and apply credits. Increasing the rate is likely to lead to an increase in the price of credits, many of which have already been planned around and negotiated and contracted for. For example, in a recent securities filing, Fiat Chrysler Automobiles N.V. stated that it ''has accrued estimated amounts for any probable CAFE penalty based on the $5.50 rate,'' but if the rate was applied to model year 2019, ''FCA may need to accrue additional amounts due to increased CAFE penalties and additional amounts owed under certain agreements for the purchase of regulatory emissions credits'' and ''[t]he amounts accrued could be up to €500 million [nearly $600 million].'' [48] To disregard the industry's serious reliance interests would be unfair and improper.[49]

Accounting for the timeline of vehicle development comports with NHTSA's broader approach to establishing fuel economy standards. As NHTSA explained in the December 2016 rule, NHTSA ''includes product cadence in its assessment of CAFE standards, by limiting application of technology in its analytical model to years in which vehicles are refreshed or redesigned.'' [50] Not only does this consideration function within the industry's long-established development cycle, ''NHTSA believes that this approach facilitates continued fuel economy improvements over the longer term by accounting for the fact that manufacturers will seek to make improvements when and where they are most cost-effective.'' [51]

In the December 2016 rule, NHTSA also analogized the need to provide appropriate lead time for an increase in the civil penalty rate to the EPCA provision requiring that when NHTSA amends a fuel economy standard to make it more stringent, NHTSA must promulgate the standard ''at least 18 months before the beginning of the model year to which the amendment applies.'' [52] As NHTSA explained:

The 18 months' notice requirement for increases in fuel economy standards represents a congressional acknowledgement of the importance of advance notice to vehicle manufacturers to allow them the lead time necessary to adjust their product plans, designs, and compliance plans to address changes in fuel economy standards. Similarly here, affording manufacturers lead time to adjust their products and compliance plans helps them to account for such an increase in the civil penalty amount. In this unique case, the 18-month lead time for increases in the stringency of fuel economy standards provides a reasonable proxy for appropriate advance notice of the application of substantially increased—here nearly tripled—civil penalties.[53]

Similarly, EPCA provides that an increase in the CAFE civil penalty rate prescribed through the statutory process can also only take effect ''for the model year beginning at least 18 months after the regulation stating the higher amount becomes final.'' [54]

As in the December 2016 rule, NHTSA acknowledges that—while none of the individual manufacturers that submitted supplemental information indicated this to be the case—it is conceivable that some manufacturers might be able to change production volumes of certain lower- or higher-fuel-economy models for model years that have not happened yet, which could help them to reduce or avoid CAFE non-compliance penalties. However, NHTSA noted then and reiterates here that compelling such a change by immediately adjusting the civil penalty rate to apply to design decisions that are already locked in would contravene a fundamental purpose of the CAFE program—namely, the statutory requirement that fuel economy standards be attribute-based and thus responsive to consumer demand.[55] Affording some lead time to manufacturers mitigates the concern that manufacturers will be forced to disregard consumer demand, for example by having to restrict the availability of vehicles that consumers want.

The Alliance Petition was submitted on October 2, 2020, and requested that the adjustment apply beginning in model year 2022. While NHTSA accepts that the petitioner believes that timeline provides a sufficient and reasonable

[42] 81 FR 41453, 41454 (June 27, 2016) (Federal Motor Carrier Safety Administration).

[43] 81 FR 95489, 95490 (Dec. 28, 2016).

[44] 81 FR 95489, 95490 (Dec. 28, 2016).

[45] 81 FR 95489, 95490 (Dec. 28, 2016).

[46] 83 FR 13904 (Apr. 2, 2018); 84 FR 36007 (July 26, 2019).

[47] Alliance Petition, at 4.

[48] FCA N.V. Interim Report, 6–K (Current report) EX–99.1, at 41 (Sept. 30, 2020).

[49] *See, e.g., Encino Motorcars LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009).

[50] 81 FR 95489, 95491 (Dec. 28, 2016).

[51] 81 FR 95489, 95491 (Dec. 28, 2016).

[52] 49 U.S.C. 32902(a)(2).

[53] 81 FR 95489, 95491 (Dec. 28, 2016).

[54] *See* 49 U.S.C. 32912(c)(1)(D).

[55] *See* 49 U.S.C. 32902(b)(3).

lead time under the circumstances for its industry members to adjust reasonably to the increased penalty rate and, in this interim final rule, postpones the increased rate until that model year, NHTSA also seeks comment on whether it should provide 18 months of lead time before the increase becomes effective. Since NHTSA treats model years as commencing in October of the calendar year prior to the model year, an 18-month lead time would have the $14 penalty rate apply to the 2023 model year under this approach. Such an approach would be consistent with the December 2016 rule's application of the adjustment beginning in model year 2019.

NHTSA also recognizes the significant negative economic consequences caused by the global outbreak of COVID–19. On May 19, 2020, President Trump issued Executive Order (E.O.) 13924, ''Regulatory Relief to Support Economic Recovery,'' ordering agencies to address the economic emergency caused by the pandemic ''by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility.'' [56] Where such measures are made temporarily, agencies must evaluate whether those measures would ''promote economic recovery if made permanent.''

The Alliance Petition provided information about the significant negative economic impact on the automotive sector caused by COVID–19. All domestic auto factories were closed by April 2020, for the first time since World War II, for approximately eight weeks.[57] One analyst described the second quarter of 2020 as ''likely to be the toughest in modern history'' for the automotive sector, as companies ''grappled with close to a zero revenue environment for a few months.'' [58] Market projections as of September 2020 indicate that domestic vehicle sales for all of 2020 will be down by as much as 26 percent from 2019.[59] And beyond the immediate economic hit, this negative economic impact is expected to have effects beyond 2020. One market analyst predicts that the auto sector recovery will take several years and that the market will not reach the sales that were previously projected for 2020 until at least 2025.[60] The analyst also notes that because of the COVID–19 effects on sales and revenue, manufacturers have been forced to delay capital-intensive product actions to conserve resources, with the greatest impact to showrooms in calendar years 2023 and 2024.[61]

NHTSA also received information from five individual vehicle manufacturers supplementing the Alliance Petition: Mercedes-Benz AG, Jaguar Land Rover North America, LLC, FCA US LLC, Ford Motor Company, and Ferrari North America, Inc.[62] Each cited the ongoing pandemic in concluding that applying the increased CAFE civil penalty rate prior to model year 2022 would present a substantial hardship.

Mercedes-Benz indicated that since March of this year, it has experienced pandemic-related disruption of supply chains, production, and work force, which has caused unforeseen financial loss for the company and has created a tenuous financial climate. Jaguar Land Rover indicated that due to the pandemic, it had to close showrooms and manufacturing plants, and pause engineering work for months, resulting in reduced sale revenue and the prevention of investment in future fuel-efficient technology product programs. FCA and Ford detailed similar negative economic impacts to their companies. Each company argued that a decision to apply the civil penalty of $14 vehicles prior to MY 2022 would only aggravate their financial hardships during this economic emergency. These economic consequences are on top of those NHTSA already projected for the increase from $5.50 to $14, including the significant increase in costs to manufacturers, increased unemployment, adverse effects on competition, and increases in automobile imports.[63] And these impacts come at a time where NHTSA data shows that the number of fleets with credit shortfalls has substantially increased, while the number of fleets generating credit surpluses has decreased, indicating that more manufacturers—particularly domestic manufacturers—are expected to need to pay penalties going forward.[64] The financial burden on domestic manufacturers is exacerbated by the statutory prohibition against the use of credits acquired by another automaker or transferred from another fleet to offset any non-compliance with the domestic passenger car minimum standard.[65] Manufacturers have already begun to realize this impact: One manufacturer paid over $77 million in civil penalties for failing to meet the minimum domestic passenger car standard for model year 2016 and over $79 million in model year 2017, the highest civil penalties assessed in the history of the CAFE program. Ferrari stated that applying the $14 rate before model year 2022 would save no fuel, instead serving only as a wealth transfer to the manufacturers that have surplus CAFE credits. Other facets of the CAFE program, such as credit transfer caps, credit adjustment factors, availability and price of tradeable credits, and credit banking, are causing similar economic pressures.[66]

Based on the available information, NHTSA believes that applying the adjustment to the CAFE civil penalty rate beginning in model year 2019 ''may inhibit economic recovery,'' while applying the adjustment beginning in model year 2022 is an appropriate action to take ''for the purpose of promoting job creation and economic growth.'' [67]

If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is vacated, NHTSA's July 2019 rule will be reinstated, keeping the CAFE civil penalty rate at $5.50. Regardless, NHTSA will continue to apply the $5.50 civil penalty rate for violations that occur prior to model year 2022. If the July 2019 rule remains vacated, per the Second Circuit's ruling, the rate will be adjusted to $14 beginning in model year 2022 under this interim final rule for all of the foregoing reasons. And if

[56] 85 FR 31353, 31354 (May 22, 2020).

[57] Alliance Petition, at 5 (citing ALLIANCE FOR AUTOMOTIVE INNOVATION, READING THE METER: SEPTEMBER 30, 2020, *https://www.autosinnovate.org/wp-content/uploads/2020/10/Meter-State-of-the-Industry-9-30-2020.pdf* at page 16).

[58] Alliance Petition, at 5 (citing Michael Wayland, Five Things Investors are Watching as GM and Ford Report Coronavirus-Ravaged Earnings, CNBC (July 28, 2020 8:27 a.m.), *https://www.cnbc.com/2020/07/28/what-to-watch-for-as-gm-and-ford-report-coronavirus-ravaged-earnings.html*).

[59] Alliance Petition, at 5 (citing ALLIANCE FOR AUTOMOTIVE INNOVATION, READING THE METER: SEPTEMBER 23, 2020, *https://www.autosinnovate.org/wp-content/uploads/2020/09/Meter-State-of-the-Industry-9-23-2020.pdf* at pages 2–3).

[60] Alliance Petition, at 5 (citing IHS MARKIT, IHS MARKIT MONTHLY AUTOMOTIVE UPDATE—AUGUST 2020 (Aug. 14, 2020)).

[61] Alliance Petition, at 5 (citing IHS MARKIT, AUTOMOTIVE COVID–19 RECOVERY SERIES: THE OEM LANDSCAPE—FOCUS ON US (Sept. 8, 2020)).

[62] The companies have requested confidential treatment for some of the business information included in each of their individual submissions, pursuant to 49 CFR part 512. The publicly available portions of their submissions can be found in the docket for this action at *www.regulations.gov.*

[63] 84 FR 36007, 36023–36029 (July 26, 2019).

[64] 84 FR 36007, 36029 (July 26, 2019); *see also* Alliance Supplement, at 1–2.

[65] 84 FR 36007, 36029 (July 26, 2019); 49 U.S.C. 32903(f)(2), (g)(4); 49 CFR 536.9.

[66] *See* Alliance Supplement, at 2–4.

[67] 85 FR 31353, 31354 (May 22, 2020).

NHTSA's determination in the July 2019 rule that the CAFE civil penalty rate is not a ''civil monetary penalty'' under the 2015 Act is not restored, NHTSA expects to make subsequent annual adjustments to the rate as appropriate, pursuant to the 2015 Act and in accordance with EPCA and EISA.[68] As it did in the December 2016 rule, ''NHTSA believes this approach appropriately harmonizes the two congressional directives of adjusting civil penalties to account for inflation and maintaining attribute-based, consumer-demand-focused standards, applied in the context of the presumption against retroactive application of statutes'' and particularly ''in the unique context of multi-year vehicle product cycles.'' [69]

Either the Second Circuit's vacatur of the July 2019 final rule or the promulgation of this interim final rule is sufficient to render IPI's petition for reconsideration of the July 2019 final rule moot, since NHTSA's July 2019 final rule is no longer operative. To the extent that the petition is not moot, it is denied. As IPI noted, many of the arguments raised in its petition were already presented to NHTSA in its comments to the April 2018 NPRM.[70] NHTSA adequately responded to these comments in the July 2019 final rule and reaffirms those points here.[71] In accord with OMB's government-wide guidance on implementing the statute, NHTSA sought clarifying guidance from OMB and, as required by the 2015 Act, NHTSA requested OMB's concurrence in its ''negative economic impact'' determination. OMB's interpretations were consistent with those presented in NHTSA's NPRM, on which IPI commented. And OMB's guidance did not contain any material misstatements that undercut NHTSA's determinations in the July 2019 final rule.

## H. Interim Final Rule and Public Comment

Pursuant to the 2015 Act and 5 U.S.C. 553(b)(3)(B), NHTSA finds that good cause exists for immediate implementation of this interim final rule without prior notice and comment because it would be impracticable to delay publication of this rule for notice and comment, public comment is unnecessary, and doing so is in the public interest. As explained above, manufacturers have a compelling need for ample advance notice of an increase to the CAFE civil penalty rate in order to modify their design, development, and production plans accordingly, in order for the inflation adjustment to have its statutorily-intended effect, and as a matter of fairness. It would be impracticable to follow notice-and-comment procedures, further delaying a decision on when the rate should be adjusted. That would leave in place an increased rate applicable to model years 2019 and 2020, which are complete, as well as model year 2021, which is underway. To the extent any manufacturers would have been able to adjust their production volumes in response to an increased penalty rate, NHTSA cannot effectively compel them to do so because it would disregard consumer demand, in contravention of NHTSA's statutory duties. Thus, there is good cause for an immediate effective date to avoid any retroactive application of an increased rate to model years for which manufacturers could not plan to accommodate.

Public comment is also unnecessary. The 2015 Act provides that the first adjustment shall be made through an interim final rulemaking. Because this action is establishing the parameters of NHTSA's first adjustment of the CAFE civil penalty rate, NHTSA is utilizing the process provided by the 2015 Act. NHTSA also notes that pursuant to the 2015 Act, its initial catch-up adjustment was promulgated through an interim final rule without public comment and, more significantly, the December 2016 rule on which this action is largely based was also promulgated without public comment.

The public interest also counsels towards NHTSA's issuance of an interim final rule. As discussed above, the automotive industry has faced unprecedented economic challenges arising from the COVID–19 national emergency situation.[72] The entire manufacturing base was effectively shut down mere months ago, and the industry still faces severe supply chain constraints that have reduced automobile production. Similarly, the general economic difficulties facing the nation have significantly reduced vehicle sales, reducing revenue for manufacturers. Applying the adjustment to the CAFE civil penalty rate beginning in model year 2019 will result in serious harm, including increased penalties for manufacturers with no corresponding societal gain and could very well inhibit economic recovery by reducing the capital manufacturers would have to invest in their product. Applying the adjustment beginning in model year 2022 is an appropriate action to take to avoid serious harm and ''for the purpose of promoting job creation and economic growth.'' [73]

Issuing an interim final rule now while the COVID–19 emergency is ongoing is particularly in the public interest, and consistent with the Executive order to promote the economic recovery. For these reasons, NHTSA finds that notice-and-comment before the interim final rule is promulgated would be impracticable, is unnecessary in this situation, and is contrary to the public interest. NHTSA is nonetheless providing an opportunity for interested parties to comment on the interim final rule.[74]

For these reasons, the Agency has also determined that it has good cause under 5 U.S.C. 553(d)(3) and 5 U.S.C. 808(2) to issue this rule with an immediate effective date. In addition, a delayed effective in not required under 5 U.S.C 553(d)(2) because it ''relieves a restriction'' by allowing additional time before the higher penalty rate begins to apply.

## I. Rulemaking Analyses and Notices

### *1. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures*

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document has been considered a ''significant regulatory action'' under Executive Order 12866. NHTSA also believes that this rulemaking is ''economically significant,'' as the Agency believes that the difference in the amount of penalties received by the government as a result of this rule, classified as ''transfers,'' are likely to exceed $100 million in at least one of the years affected by this rulemaking. As noted above, the Agency believes this rule will have a limited effect, in any, on the composition of the fleet, as model years 2019 and 2020 are complete and model year 2021 is

[68] *See* Public Law 114–74, Sec. 701(b)(2).

[69] 81 FR 95489, 95491 (Dec. 28, 2016).

[70] IPI Petition, at 2.

[71] *See, e.g.,* 84 FR 36007, 36016, 36023, 36030 (July 26, 2019); *see also* 49 CFR 553.35(c) (''The Administrator does not consider repetitious petitions.'').

[72] *See* ''Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak,'' Presidential Proclamation 9994 (Mar. 13, 2020), available online at *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.*

[73] 85 FR 31353, 31354 (May 22, 2020).

[74] Shortly prior to publication of this interim final rule, NHTSA received two letters regarding this rulemaking. Both letters are included in the docket for this matter and will be treated as comments for appropriate consideration.

already well under way.[75] If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is not vacated, NHTSA would have no discretion in whether to make the adjustment to $14 and thus no regulatory impact analysis is required. If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is vacated, NHTSA's July 2019 rule keeping the CAFE civil penalty rate at $5.50 will be reinstated, and as noted in that rule, it has no economic impact because it merely maintains the existing penalty rate.

*2. Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). Because this is an interim final rule, no regulatory flexibility analysis is required. In any event, no regulatory flexibility analysis is required if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities.

Even though this is an interim final rule for which no regulatory flexibility analysis is required, NHTSA has considered the impacts of this notice under the Regulatory Flexibility Act and does not believe that this rule would have a significant economic impact on a substantial number of small entities. NHTSA requests comment on the economic impact of this interim final rule on small entities.

The Small Business Administration's (SBA) regulations define a small business in part as a ''business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.'' 13 CFR 121.105(a). SBA's size standards were previously organized according to Standard Industrial Classification (''SIC'') Codes. SIC Code 336211 ''Motor Vehicle Body Manufacturing'' applied a small business size standard of 1,000 employees or fewer. SBA now uses size standards based on the North American Industry Classification System (''NAICS''), Subsector 336—Transportation Equipment Manufacturing. This action is expected to affect manufacturers of motor vehicles. Specifically, this action affects manufacturers from NAICS codes 336111—Automobile Manufacturing, and 336112—Light Truck and Utility Vehicle Manufacturing, which both have a small business size standard threshold of 1,500 employees.

Though civil penalties collected under 49 CFR 578.6(h)(1) and (2) apply to some small manufacturers, low volume manufacturers can petition for an exemption from the Corporate Average Fuel Economy standards under 49 CFR part 525. This would lessen the impacts of this rulemaking on small business by allowing them to avoid liability for penalties under 49 CFR 578.6(h)(2). Small organizations and governmental jurisdictions will not be significantly affected as the price of motor vehicles and equipment ought not change as the result of this rule.

*3. Executive Order 13132 (Federalism)*

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the [N]ational [G]overnment and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the Agency may not issue a regulation with federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

This rule 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, as specified in Executive Order 13132.

The reason is that this rule will generally apply to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive order do not apply.

*4. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because this rule is not expected to include a Federal mandate, no unfunded mandate assessment will be prepared.

*5. National Environmental Policy Act*

The National Environmental Policy Act of 1969 (NEPA)[76] directs that Federal agencies proposing ''major Federal actions significantly affecting the quality of the human environment'' must, ''to the fullest extent possible,'' prepare ''a detailed statement'' on the environmental impacts of the proposed action (including alternatives to the proposed action).[77] However, as a threshold question, Federal agencies must assess whether NEPA applies to a particular proposed activity or decision.[78] If an agency determines that NEPA is inapplicable, no further analysis is required pursuant to NEPA or the Council on Environmental Quality's (CEQ) NEPA implementing regulations.[79]

In assessing whether NEPA applies, NHTSA has considered ''[w]hether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute.''[80] In particular, NHTSA has considered the Congressional intent with regard to both EPCA (as amended by EISA) and the 2015 Act. As quoted above from the December 2016 rule, ''the purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards.''[81] And more

[75] NHTSA reaffirms the position on economic analysis taken its July 2019 rule. 84 FR 36007, 36030 (July 26, 2019).

[76] 42 U.S.C. 4321–4347.

[77] 42 U.S.C. 4332.

[78] 40 CFR 1501.1(a).

[79] 40 CFR parts 1500–1508. NHTSA has not yet revised its own NEPA implementing regulations (49 CFR part 520) to conform with CEQ's recently revised regulations. *See* 40 CFR 1507.3. However, where an agency's existing NEPA procedures are inconsistent with the CEQ's regulations, the CEQ regulations control. 40 CFR 1507.3(a). If NEPA is inapplicable under 40 CFR 1501.1(a), then NHTSA's own NEPA implementing regulations, promulgated pursuant to NEPA and CEQ guidelines, similarly do not apply.

[80] 40 CFR 1501.1(a)(3).

[81] 81 FR at 95490.

generally, one of the stated purposes of the 2015 Act is to ''maintain the deterrent effect of civil monetary penalties and promote compliance with the law.'' [82] Further, as part of the statutory scheme established by EPCA and the 2015 Act, Congress requires NHTSA to account for such issues as lead time, consumer demand, and negative economic impacts of its actions (especially in light of COVID–19 and the Executive order to combat the economic emergency caused by it). Assuming *arguendo* that NHTSA is obligated to raise the civil penalty rate to $14, the aforementioned factors, as well as legal doctrines of retroactivity and fairness, all point to the necessity of delaying effectiveness until at least model year 2022. Consideration of environmental impacts is inconsistent with these obligations and Congressional intent, and no further analysis pursuant to NEPA is required.

Still, NHTSA ''may prepare an environmental assessment on any action in order to assist agency planning and decision making.'' [83] When a Federal agency prepares an environmental assessment, the CEQ NEPA implementing regulations require it to (1) ''[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact'' and (2) ''[b]riefly discuss the purpose and need for the proposed action, alternatives . . . , and the environmental impacts of the proposed action and alternatives, and include a listing of [a]gencies and persons consulted.'' [84] Generally, based on the environmental assessment, the agency must make a determination to prepare an environmental impact statement or ''prepare a finding of no significant impact if the [a]gency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.'' [85] Although NHTSA concludes that a NEPA analysis is not required, this section may serve as the Agency's Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for this interim final rule.

## I. Purpose and Need

This interim final rule sets forth the purpose of and need for this action. In response to the Alliance Petition, NHTSA considered whether it is appropriate, pursuant to the Inflation Adjustment Act and EPCA (as amended by EISA), to increase the CAFE civil penalty rate beginning in model year 2022. The Alliance Petition cited cost, retroactivity, and lead time as reasons why a delay in effectiveness until model year 2022 is required. NHTSA considered the findings of this EA prior to deciding that the adjusted rate will go into effect beginning in model year 2022.

## II. Alternatives

NHTSA considered a range of alternatives for this action, including the No Action Alternative of adjusting the CAFE civil penalty rate from $5.50 to $14 beginning in model year 2019 (as originally established by the December 2016 final rule), and the alternatives of applying the adjustment beginning in model years 2020, 2021, 2022, and 2023. This EA describes the potential environmental impacts associated with the various model years in comparison with each other.

Upon consideration of the information presented in this EA, NHTSA is deciding to apply the adjustment beginning in model year 2022 in this interim final rule. NHTSA is seeking comment on whether to instead apply the increase beginning in model year 2023, and commenters should consider NEPA in their discussions of such an approach.

## III. Environmental Impacts of the Action and Alternatives

NHTSA considered a range of alternatives for when to apply the inflation adjustment in the CAFE civil penalty rate from $5.50 to $14. For the reasons explained in the preamble, NHTSA anticipates no differences in environmental impacts associated with the alternatives of applying the adjustment beginning in model years 2019, 2020, 2021, or 2022. Vehicles for model years 2019 and 2020 have largely if not entirely been produced already, and many manufacturers are already selling model year 2021 vehicles. Since some manufacturers launch subsequent model year vehicles as early as the spring, it is reasonable to assume that model year 2022 vehicles will be launched in the coming months. It is impossible for manufacturers to change the design and manufacture of vehicles that are already on the market, and the logistical realities of the industry make it infeasible for manufacturers to change course in the middle of a model year that is already underway or just prior to the start of a model year. Imposing a higher penalty on manufacturers for vehicles that, at this point, cannot be manufactured with improved fuel economy and for which adjustment in production volumes costs manufacturers significantly more compared to the higher civil penalty rate would have no environmental benefit—only incurring costs to those manufacturers (which are likely to be passed on to consumers). In fact, imposing those costs on manufacturers now may make it even harder financially for those manufacturers to make further gains in fuel economy in the future, with less capital to invest in fuel-saving technology, design, marketing of the benefits, and production.

While this interim final rule adjusts the CAFE civil penalty rate beginning no earlier than model year 2022, NHTSA is seeking comment on whether to apply the adjustment beginning in model year 2023. Based on the information included in NHTSA's Final EA in its July 2019 rule, NHTSA tentatively expects that applying the adjustment beginning in model year 2023 would have a minimal environmental impact. NHTSA seeks comments on the environmental impacts of applying the adjustment beginning in model year 2023.

## IV. Agencies and Persons Consulted

NHTSA and DOT have consulted with OMB and the U.S. Department of Justice and provided other Federal agencies with the opportunity to review and provide feedback on this rulemaking.

## V. Conclusion

NHTSA has reviewed the information presented in this EA and concludes that the alternatives to adjust the CAFE civil penalty rate beginning in model years 2019, 2020, 2021, or 2022 all would have the same environmental impacts on the quality of the human environment (or the differences among alternatives would be *de minimis*). Given the practical realities of the design and production process, the environmental impact of adjusting the CAFE civil penalty rate in model year 2022 is expected to be negligible as compared to the No Action Alternative. NHTSA has not made a final decision on whether to apply the adjustment beginning in model year 2023 and seeks comments on the environmental impacts of that alternative.

## VI. Finding of No Significant Impact

I have reviewed this EA. Based on the EA, I conclude that implementation of any of the action alternatives through model year 2022 (including the interim final rule) will not have a significant effect on the human environment and that a ''finding of no significant impact''

[82] 28 U.S.C. 2461 note, sec. 2(b)(2).

[83] 40 CFR 1501.5(b).

[84] 40 CFR 1501.5(c).

[85] 40 CFR 1501.6(a).

is appropriate. This statement constitutes the Agency's ''finding of no significant impact,'' and an environmental impact statement will not be prepared.[86] NHTSA will review comments regarding applying the adjustment beginning in model year 2023 as appropriate.

*6. Executive Order 12778 (Civil Justice Reform)*

This rule does not have a preemptive or retroactive effect—specifically, it modifies a regulation to avoid having a retroactive effect. Judicial review of a rule based on this interim final rule may be obtained pursuant to 5 U.S.C. 702.

*7. Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1980, NHTSA states that there are no requirements for information collection associated with this rulemaking action.

*8. Privacy Act*

Please note that anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

*9. Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this action as a ''major rule,'' as defined by 5 U.S.C. 804(2). For the reasons explained above, NHTSA finds that notice and public comment are impracticable, unnecessary, and contrary to the public interest. NHTSA will submit a rule report to each House of the Congress and to the Comptroller General of the United States.

**List of Subjects in 49 CFR Part 578**

Imports, Motor vehicle safety, Motor vehicles, Penalties, Rubber and rubber products, Tires.

In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

## PART 578—CIVIL AND CRIMINAL PENALTIES

■ 1. The authority citation for 49 CFR part 578 continues to read as follows:

**Authority:** Pub. L. 101–410, 104 Stat. 890; Pub. L. 104–134, 110 Stat. 1321; Pub. L. 109–59, 119 Stat. 1144; Pub. L. 114–74, 129 Stat. 584; Pub. L. 114–94, 129 Stat. 1312; 49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115; delegation of authority at 49 CFR 1.81, 1.95.

■ 2. Amend § 578.6 by revising paragraph (h) to read as follows:

**§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.**

* * * * *

(h) *Automobile fuel economy.* (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than $43,280 for each violation. A separate violation occurs for each day the violation continues.

(2) Except as provided in 49 U.S.C. 32912(c), beginning with model year 2022, a manufacturer that violates a standard prescribed for a model year under 49 U.S.C. 32902 is liable to the United States Government for a civil penalty of $14, plus any adjustments for inflation that occurred or may occur (for model years before model year 2022), multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

(i) Calculated under 49 U.S.C. 32904(a)(1)(A) or (B) for automobiles to which the standard applies manufactured by the manufacturer during the model year;

(ii) Multiplied by the number of those automobiles; and

(iii) Reduced by the credits available to the manufacturer under 49 U.S.C. 32903 for the model year.

*Note 1 to paragraph (h)(2):* If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is vacated, 49 CFR 578.6(h)(2), revised October 1, 2019, would apply to all model years, instead of paragraph (h)(2) of this section. In such instance, NHTSA would amend this section in accordance with such vacatur.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95, and 501.5.

**James Clayton Owens,**

*Deputy Administrator.*

[FR Doc. 2021–00278 Filed 1–12–21; 11:15 am]

BILLING CODE 4910–59–P

[86] 40 CFR 1501.6(a).

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## SURFACE TRANSPORTATION BOARD

### 49 CFR Part 1022

**[Docket No. EP 716 (Sub-No. 6)]**

### Civil Monetary Penalties—2021 Adjustment

**AGENCY:** Surface Transportation Board.

**ACTION:** Final rule.

**SUMMARY:** The Surface Transportation Board (Board) is issuing a final rule to implement the annual inflationary adjustment to its civil monetary penalties, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

**DATES:** This final rule is effective January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Sarah Fancher at (202) 245–0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), enacted as part of the Bipartisan Budget Act of 2015, Public Law 114–74, sec. 701, 129 Stat. 584, 599–601, requires agencies to adjust their civil penalties for inflation annually, beginning on July 1, 2016, and no later than January 15 of every year thereafter. In accordance with the 2015 Act, annual inflation adjustments are to be based on the percent change between the Consumer Price Index for all Urban Consumers (CPI–U) for October of the previous year and the October CPI–U of the year before that. Penalty level adjustments should be rounded to the nearest dollar.

**II. Discussion**

The statutory definition of civil monetary penalty covers various civil penalty provisions under the Rail (Part A); Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Part B); and Pipeline Carriers (Part C) provisions of the Interstate Commerce Act, as amended. The Board's civil (and criminal) penalty authority related to rail transportation appears at 49 U.S.C. 11901–11908. The Board's penalty authority related to motor carriers, water carriers, brokers, and freight forwarders appears at 49 U.S.C. 14901–14916. The Board's penalty authority related to pipeline carriers appears at 49 U.S.C. 16101–16106.[1] The Board has regulations at 49 CFR part 1022 that codify the method set forth in the 2015 Act for annually adjusting for inflation the civil monetary penalties within the Board's jurisdiction.

As set forth in this final rule, the Board is amending 49 CFR part 1022 to

[1] The Board also has various criminal penalty authority, enforceable in a federal criminal court. Congress has not, however, authorized federal agencies to adjust statutorily prescribed criminal penalty provisions for inflation, and this rule does not address those provisions.

make an annual inflation adjustment to the civil monetary penalties in conformance with the requirements of the 2015 Act. The adjusted penalties set forth in the rule will apply only to violations that occur after the effective date of this regulation.

In accordance with the 2015 Act, the annual adjustment adopted here is calculated by multiplying each current penalty by the cost-of-living adjustment factor of 1.01182, which reflects the percentage change between the October 2020 CPI–U (260.388) and the October 2019 CPI–U (257.346). The table at the end of this decision shows the statutory citation for each civil penalty, a description of the provision, the adjusted statutory civil penalty level for 2020, and the adjusted statutory civil penalty level for 2021.

## III. Final Rule

The final rule set forth at the end of this decision is being issued without notice and comment pursuant to the rulemaking provision of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), which does not require that process ''when the agency for good cause finds'' that public notice and comment are ''unnecessary.'' Here, Congress has mandated that the agency make an annual inflation adjustment to its civil monetary penalties. The Board has no discretion to set alternative levels of adjusted civil monetary penalties, because the amount of the inflation adjustment must be calculated in accordance with the statutory formula. Given the absence of discretion, the Board has determined that there is good cause to promulgate this rule without soliciting public comment and to make this regulation effective immediately upon publication.

## IV. Regulatory Flexibility Statement

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because the Board has determined that notice and comment are not required under the APA for this rulemaking, the requirements of the RFA do not apply.

## V. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as a non-major rule, as defined by 5 U.S.C. 804(2).

## VI. Paperwork Reduction Act

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

## List of Subjects in 49 CFR Part 1022

Administrative practice and procedures, Brokers, Civil penalties, Freight forwarders, Motor carriers, Pipeline carriers, Rail carriers, Water carriers.

*It is ordered:*

1. The Board amends its rules as set forth in this decision. Notice of the final rule will be published in the **Federal Register**.

2. This decision is effective on January 14, 2021.

Decided Date: January 11, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, and Primus.

**Tammy Lowery,**

*Clearance Clerk.*

For the reasons set forth in the preamble, part 1022 of title 49, chapter X, of the Code of Federal Regulations is amended as follows:

## PART 1022—CIVIL MONETARY PENALTY INFLATION ADJUSTMENT

■ 1. Revise the authority citation for part 1022 to read as follows:

**Authority:** 5 U.S.C. 551–557; 28 U.S.C. 2461 note; 49 U.S.C. 11901, 14901, 14903, 14904, 14905, 14906, 14907, 14908, 14910, 14915, 14916, 16101, 16103.

■ 2. Revise § 1022.4(b) to read as follows:

### § 1022.4 Cost-of-living adjustments of civil monetary penalties.

* * * * *

(b) The cost-of-living adjustment required by the statute results in the following adjustments to the civil monetary penalties within the jurisdiction of the Board:

TABLE 1 TO PARAGRAPH (b)

| U.S. code citation | Civil monetary penalty description | Adjusted penalty amount 2020 | Adjusted penalty amount 2021 |
|---|---|---|---|
| **Rail Carrier Civil Penalties** | | | |
| 49 U.S.C. 11901(a) | Unless otherwise specified, maximum penalty for each knowing violation under this part, and for each day. | $8,128 | $8,224 |
| 49 U.S.C. 11901(b) | For each violation under § 11124(a)(2) or (b) | 813 | 823 |
| 49 U.S.C. 11901(b) | For each day violation continues | 42 | 42 |
| 49 U.S.C. 11901(c) | Maximum penalty for each knowing violation under §§ 10901–10906. | 8,128 | 8,224 |
| 49 U.S.C. 11901(d) | For each violation under §§ 11123 or 11124(a)(1) | 162–813 | 164–823 |
| 49 U.S.C. 11901(d) | For each day violation continues | 81 | 82 |
| 49 U.S.C. 11901(e)(1), (4) | For each violation under §§ 11141–11145, for each day | 813 | 823 |
| 49 U.S.C. 11901(e)(2), (4) | For each violation under § 11144(b)(1), for each day | 162 | 164 |
| 49 U.S.C. 11901(e)(3)–(4) | For each violation of reporting requirements, for each day | 162 | 164 |
| **Motor and Water Carrier Civil Penalties** | | | |
| 49 U.S.C. 14901(a) | Minimum penalty for each violation and for each day | 1,112 | 1,125 |
| 49 U.S.C. 14901(a) | For each violation under §§ 13901 or 13902(c) | 11,125 | 11,257 |
| 49 U.S.C. 14901(a) | For each violation related to transportation of passengers | 27,813 | 28,142 |
| 49 U.S.C. 14901(b) | For each violation of the hazardous waste rules under § 3001 of the Solid Waste Disposal Act. | 22,251–44,501 | 22,514–45,027 |
| 49 U.S.C. 14901(d)(1) | Minimum penalty for each violation of household good regulations, and for each day. | 1,625 | 1,644 |

TABLE 1 TO PARAGRAPH (b)—Continued

| U.S. code citation | Civil monetary penalty description | Adjusted penalty amount 2020 | Adjusted penalty amount 2021 |
|---|---|---|---|
| 49 U.S.C. 14901(d)(2) | Minimum penalty for each instance of transportation of household goods if broker provides estimate without carrier agreement. | 16,258 | 16,450 |
| 49 U.S.C. 14901(d)(3) | Minimum penalty for each instance of transportation of household goods without being registered. | 40,640 | 41,120 |
| 49 U.S.C. 14901(e) | Minimum penalty for each violation of a transportation rule | 3,251 | 3,289 |
| 49 U.S.C. 14901(e) | Minimum penalty for each additional violation | 8,128 | 8,224 |
| 49 U.S.C. 14903(a) | Maximum penalty for undercharge or overcharge of tariff rate, for each violation. | 162,568 | 164,490 |
| 49 U.S.C. 14904(a) | For first violation, rebates at less than the rate in effect | 325 | 329 |
| 49 U.S.C. 14904(a) | For all subsequent violations | 407 | 412 |
| 49 U.S.C. 14904(b)(1) | Maximum penalty for first violation for undercharges by freight forwarders. | 813 | 823 |
| 49 U.S.C. 14904(b)(1) | Maximum penalty for subsequent violations | 3,251 | 3,289 |
| 49 U.S.C. 14904(b)(2) | Maximum penalty for other first violations under § 13702 | 813 | 823 |
| 49 U.S.C. 14904(b)(2) | Maximum penalty for subsequent violations | 3,251 | 3,289 |
| 49 U.S.C. 14905(a) | Maximum penalty for each knowing violation of § 14103(a), and knowingly authorizing, consenting to, or permitting a violation of § 14103(a) or (b). | 16,258 | 16,450 |
| 49 U.S.C. 14906 | Minimum penalty for first attempt to evade regulation | 2,226 | 2,252 |
| 49 U.S.C. 14906 | Minimum amount for each subsequent attempt to evade regulation | 5,562 | 5,628 |
| 49 U.S.C. 14907 | Maximum penalty for recordkeeping/reporting violations | 8,128 | 8,224 |
| 49 U.S.C. 14908(a)(2) | Maximum penalty for violation of § 14908(a)(1) | 3,251 | 3,289 |
| 49 U.S.C. 14910 | When another civil penalty is not specified under this part, for each violation, for each day. | 813 | 823 |
| 49 U.S.C. 14915(a)(1)–(2) | Minimum penalty for holding a household goods shipment hostage, for each day. | 12,919 | 13,072 |
| 49 U.S.C. 14916(c)(1) | Maximum penalty for each knowing violation under § 14916(a) for unlawful brokerage activities. | 11,125 | 11,257 |
| **Pipeline Carrier Civil Penalties** | | | |
| 49 U.S.C. 16101(a) | Maximum penalty for violation of this part, for each day | 8,128 | 8,224 |
| 49 U.S.C. 16101(b)(1), (4) | For each recordkeeping violation under § 15722, each day | 813 | 823 |
| 49 U.S.C. 16101(b)(2), (4) | For each inspection violation liable under § 15722, each day | 162 | 164 |
| 49 U.S.C. 16101(b)(3)–(4) | For each reporting violation under § 15723, each day | 162 | 164 |
| 49 U.S.C. 16103(a) | Maximum penalty for improper disclosure of information | 1,625 | 1,644 |

[FR Doc. 2021–00755 Filed 1–13–21; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 229

**[Docket No. 210108–0005]**

**RIN 0648–BJ72**

### List of Fisheries for 2021

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) publishes its final List of Fisheries (LOF) for 2021, as required by the Marine Mammal Protection Act (MMPA). The LOF for 2021 reflects new information on interactions between commercial fisheries and marine mammals. NMFS must classify each commercial fishery on the LOF into one of three categories under the MMPA based upon the level of mortality and serious injury of marine mammals that occurs incidental to each fishery. The classification of a fishery on the LOF determines whether participants in that fishery are subject to certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan (TRP) requirements.

**DATES:** The effective date of this final rule is February 16, 2021.

**ADDRESSES:** Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Jaclyn Taylor, Office of Protected Resources, 301–427–8402; Allison Rosner, Greater Atlantic Region, 978–281–9328; Jessica Powell, Southeast Region, 727–824–5312; Dan Lawson, West Coast Region, 206–526–4740; Suzie Teerlink, Alaska Region, 907–586–7240; Diana Kramer, Pacific Islands Region, 808–725–5167. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### What is the List of Fisheries?

Section 118 of the MMPA requires NMFS to place all U.S. commercial fisheries into one of three categories based on the level of incidental mortality and serious injury of marine mammals occurring in each fishery (16 U.S.C. 1387(c)(1)). The classification of a fishery on the LOF determines whether participants in that fishery may be required to comply with certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements. NMFS must reexamine the LOF annually, considering new information in the Marine Mammal Stock Assessment Reports (SARs) and other relevant sources, and publish in the **Federal Register** any necessary changes to the LOF after notice and opportunity for public comment (16 U.S.C. 1387 (c)(1)(C)).

**How does NMFS determine in which category a fishery is placed?**

The definitions for the fishery classification criteria can be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2). The criteria are also summarized here.

**Fishery Classification Criteria**

The fishery classification criteria consist of a two-tiered, stock-specific approach that first addresses the total impact of all fisheries on each marine mammal stock and then addresses the impact of individual fisheries on each stock. This approach is based on consideration of the rate, in numbers of animals per year, of incidental mortalities and serious injuries of marine mammals due to commercial fishing operations relative to the potential biological removal (PBR) level for each marine mammal stock. The MMPA (16 U.S.C. 1362 (20)) defines the PBR level as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (OSP). This definition can also be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2).

*Tier 1:* Tier 1 considers the cumulative fishery mortality and serious injury for a particular stock. If the total annual mortality and serious injury of a marine mammal stock, across all fisheries, is less than or equal to 10 percent of the PBR level of the stock, all fisheries interacting with the stock will be placed in Category III (unless those fisheries interact with other stock(s) for which total annual mortality and serious injury is greater than 10 percent of PBR). Otherwise, these fisheries are subject to the next tier (Tier 2) of analysis to determine their classification.

*Tier 2:* Tier 2 considers fishery-specific mortality and serious injury for a particular stock.

*Category I:* Annual mortality and serious injury of a stock in a given fishery is greater than or equal to 50 percent of the PBR level (*i.e.,* frequent incidental mortality and serious injury of marine mammals).

*Category II:* Annual mortality and serious injury of a stock in a given fishery is greater than 1 percent and less than 50 percent of the PBR level (*i.e.,* occasional incidental mortality and serious injury of marine mammals).

*Category III:* Annual mortality and serious injury of a stock in a given fishery is less than or equal to 1 percent of the PBR level (*i.e.,* a remote likelihood of or no known incidental mortality and serious injury of marine mammals).

Additional details regarding how the categories were determined are provided in the preamble to the final rule implementing section 118 of the MMPA (60 FR 45086; August 30, 1995).

Because fisheries are classified on a per-stock basis, a fishery may qualify as one category for one marine mammal stock and another category for a different marine mammal stock. A fishery is typically classified on the LOF at its highest level of classification (*e.g.,* a fishery qualifying for Category III for one marine mammal stock and for Category II for another marine mammal stock will be listed under Category II). Stocks driving a fishery's classification are denoted with a superscript ''1'' in Tables 1 and 2.

**Other Criteria That May Be Considered**

The tier analysis requires a minimum amount of data, and NMFS does not have sufficient data to perform a tier analysis on certain fisheries. Therefore, NMFS has classified certain fisheries by analogy to other fisheries that use similar fishing techniques or gear that are known to cause mortality or serious injury of marine mammals, or according to factors discussed in the final LOF for 1996 (60 FR 67063; December 28, 1995) and listed in the regulatory definition of a Category II fishery. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, NMFS will determine whether the incidental mortality or serious injury is ''occasional'' by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fishermen reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator for Fisheries (50 CFR 229.2).

Further, eligible commercial fisheries not specifically identified on the LOF are deemed to be Category II fisheries until the next LOF is published (50 CFR 229.2).

**How does NMFS determine which species or stocks are included as incidentally killed or injured in a fishery?**

The LOF includes a list of marine mammal species and/or stocks incidentally killed or injured in each commercial fishery. The list of species and/or stocks incidentally killed or injured includes ''serious'' and ''non-serious'' documented injuries as described later in the *List of Species and/or Stocks Incidentally Killed or Injured in the Pacific Ocean* and *List of Species and/or Stocks Incidentally Killed or Injured in the Atlantic Ocean, Gulf of Mexico, and Caribbean* sections. To determine which species or stocks are included as incidentally killed or injured in a fishery, NMFS annually reviews the information presented in the current SARs and injury determination reports. SARs are brief reports summarizing the status of each stock of marine mammals occurring in waters under U.S. jurisdiction, including information on the identity and geographic range of the stock, population statistics related to abundance, trend, and annual productivity, notable habitat concerns, and estimates of human-caused mortality and serious injury (M/SI) by source. The SARs are based upon the best available scientific information and provide the most current and inclusive information on each stock's PBR level and level of interaction with commercial fishing operations. The best available scientific information used in the SARs and reviewed for the 2021 LOF generally summarizes data from 2013–2017. NMFS also reviews other sources of new information, including injury determination reports, bycatch estimation reports, observer data, logbook data, stranding data, disentanglement network data, fishermen self-reports (*i.e.,* MMPA mortality/injury reports), and anecdotal reports from that time period. In some cases, more recent information may be available and used in the LOF.

For fisheries with observer coverage, species or stocks are generally removed from the list of marine mammal species and/or stocks incidentally killed or injured if no interactions are documented in the 5-year timeframe summarized in that year's LOF. For fisheries with no observer coverage and for observed fisheries with evidence indicating that undocumented interactions may be occurring (*e.g.,* fishery has low observer coverage and stranding network data include evidence of fisheries interactions that cannot be attributed to a specific fishery) species and stocks may be retained for longer than 5 years. For these fisheries, NMFS will review the other sources of information listed above and use its discretion to decide when it is appropriate to remove a species or stock.

**Where does NMFS obtain information on the level of observer coverage in a fishery on the LOF?**

The best available information on the level of observer coverage and the spatial and temporal distribution of observed marine mammal interactions is presented in the SARs. Data obtained from the observer program and observer coverage levels are important tools in estimating the level of marine mammal mortality and serious injury in commercial fishing operations. Starting with the 2005 SARs, each Pacific and Alaska SAR includes an appendix with detailed descriptions of each Category I and II fishery on the LOF, including the observer coverage in those fisheries. For Atlantic fisheries, this information can be found in the LOF Fishery Fact Sheets. The SARs do not provide detailed information on observer coverage in Category III fisheries because, under the MMPA, Category III fisheries are not required to accommodate observers aboard vessels due to the remote likelihood of mortality and serious injury of marine mammals. Fishery information presented in the SARs' appendices and other resources referenced during the tier analysis may include: Level of observer coverage; target species; levels of fishing effort; spatial and temporal distribution of fishing effort; characteristics of fishing gear and operations; management and regulations; and interactions with marine mammals. Copies of the SARs are available on the NMFS Office of Protected Resources website at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.* Information on observer coverage levels in Category I, II, and III fisheries can be found in the fishery fact sheets on the NMFS Office of Protected Resources' website: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables.* Additional information on observer programs in commercial fisheries can be found on the NMFS National Observer Program's website: *https://www.fisheries.noaa.gov/national/fisheries-observers/national-observer-program.*

**How do I find out if a specific fishery is in Category I, II, or III?**

The LOF includes three tables that list all U.S. commercial fisheries by Category. Table 1 lists all of the commercial fisheries in the Pacific Ocean (including Alaska); Table 2 lists all of the commercial fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean; and Table 3 lists all U.S. authorized commercial fisheries on the high seas. A fourth table, Table 4, lists all commercial fisheries managed under applicable TRPs or take reduction teams (TRT).

**Are high seas fisheries included on the LOF?**

Beginning with the 2009 LOF, NMFS includes high seas fisheries in Table 3 of the LOF, along with the number of valid High Seas Fishing Compliance Act (HSFCA) permits in each fishery. As of 2004, NMFS issues HSFCA permits only for high seas fisheries analyzed in accordance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). The authorized high seas fisheries are broad in scope and encompass multiple specific fisheries identified by gear type. For the purposes of the LOF, the high seas fisheries are subdivided based on gear type (*e.g.,* trawl, longline, purse seine, gillnet, troll, etc.) to provide more detail on composition of effort within these fisheries. Many fisheries operate in both U.S. waters and on the high seas, creating some overlap between the fisheries listed in Tables 1 and 2 and those in Table 3. In these cases, the high seas component of the fishery is not considered a separate fishery, but an extension of a fishery operating within U.S. waters (listed in Table 1 or 2). NMFS designates those fisheries in Tables 1, 2, and 3 with an asterisk (*) after the fishery's name. The number of HSFCA permits listed in Table 3 for the high seas components of these fisheries operating in U.S. waters does not necessarily represent additional effort that is not accounted for in Tables 1 and 2. Many vessels/participants holding HSFCA permits also fish within U.S. waters and are included in the number of vessels and participants operating within those fisheries in Tables 1 and 2.

HSFCA permits are valid for 5 years, during which time Fishery Management Plans (FMPs) can change. Therefore, some vessels/participants may possess valid HSFCA permits without the ability to fish under the permit because it was issued for a gear type that is no longer authorized under the most current FMP. For this reason, the number of HSFCA permits displayed in Table 3 is likely higher than the actual U.S. fishing effort on the high seas. For more information on how NMFS classifies high seas fisheries on the LOF, see the preamble text in the final 2009 LOF (73 FR 73032; December 1, 2008). Additional information about HSFCA permits can be found at *https://www.fisheries.noaa.gov/permit/high-seas-fishing-permits.*

**Where can I find specific information on fisheries listed on the LOF?**

Starting with the 2010 LOF, NMFS developed summary documents, or fishery fact sheets, for each Category I and II fishery on the LOF. These fishery fact sheets provide the full history of each Category I and II fishery, including: When the fishery was added to the LOF; the basis for the fishery's initial classification; classification changes to the fishery; changes to the list of species and/or stocks incidentally killed or injured in the fishery; fishery gear and methods used; observer coverage levels; fishery management and regulation; and applicable TRPs or TRTs, if any. These fishery fact sheets are updated after each final LOF and can be found under ''How Do I Find Out if a Specific Fishery is in Category I, II, or III?'' on the NMFS Office of Protected Resources' website: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries,* linked to the ''List of Fisheries Summary'' table. NMFS is developing similar fishery fact sheets for each Category III fishery on the LOF. However, due to the large number of Category III fisheries on the LOF and the lack of accessible and detailed information on many of these fisheries, the development of these fishery fact sheets is taking significant time to complete. NMFS began posting Category III fishery fact sheets online with the LOF for 2016.

**Am I required to register under the MMPA?**

Owners of vessels or gear engaging in a Category I or II fishery are required under the MMPA (16 U.S.C. 1387(c)(2)), as described in 50 CFR 229.4, to register with NMFS and obtain a marine mammal authorization to lawfully take non-endangered and non-threatened marine mammals incidental to commercial fishing operations. Owners of vessels or gear engaged in a Category III fishery are not required to register with NMFS or obtain a marine mammal authorization.

**How do I register, renew and receive my Marine Mammal Authorization Program authorization certificate?**

NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program (MMAP), with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Participants in these fisheries are automatically registered under the MMAP and are not required to submit registration or renewal materials.

In the Pacific Islands, West Coast, and Alaska regions, NMFS will issue vessel or gear owners an authorization certificate via U.S. mail or with their state or Federal license or permit at the time of issuance or renewal. In the Greater Atlantic and Southeast Regions, NMFS will issue vessel or gear owners an authorization certificate via U.S. mail automatically at the beginning of each calendar year.

Vessel or gear owners who participate in fisheries in these regions and have not received authorization certificates by the beginning of the calendar year, or with renewed fishing licenses, must contact the appropriate NMFS Regional Office (see **FOR FURTHER INFORMATION**). Authorization certificates may also be obtained by visiting the MMAP website *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-authorization-program#obtaining-a-marine-mammal-authorization-certificate.*

The authorization certificate, or a copy, must be on board the vessel while it is operating in a Category I or II fishery, or for non-vessel fisheries, in the possession of the person in charge of the fishing operation (50 CFR 229.4(e)). Although efforts are made to limit the issuance of authorization certificates to only those vessel or gear owners that participate in Category I or II fisheries, not all state and Federal license or permit systems distinguish between fisheries as classified by the LOF. Therefore, some vessel or gear owners in Category III fisheries may receive authorization certificates even though they are not required for Category III fisheries.

Individuals fishing in Category I and II fisheries for which no state or Federal license or permit is required must register with NMFS by contacting their appropriate Regional Office (see **ADDRESSES**).

In recognition of logistical challenges with certificate issuance related to the ongoing COVID–19 pandemic, the MMAP certificate issued in 2020 remains in effect, valid through December 31, 2021, for vessel or gear owners participating in all Category I and II fisheries as of the final 2021 LOF. 2020 certificates may be retained or replacements downloaded from *https://go.usa.gov/xArUW.* Vessel or gear owners participating in previous Category III fisheries reclassified as a Category II fishery in this final 2021 LOF can obtain their MMAP certificate on our website *https://go.usa.gov/xArUW.*

**Am I required to submit reports when I kill or injure a marine mammal during the course of commercial fishing operations?**

In accordance with the MMPA (16 U.S.C. 1387(e)) and 50 CFR 229.6, any vessel owner or operator, or gear owner or operator (in the case of non-vessel fisheries), participating in a fishery listed on the LOF must report to NMFS all incidental mortalities and injuries of marine mammals that occur during commercial fishing operations, regardless of the category in which the fishery is placed (I, II, or III) within 48 hours of the end of the fishing trip or, in the case of non-vessel fisheries, fishing activity. ''Injury'' is defined in 50 CFR 229.2 as a wound or other physical harm. In addition, any animal that ingests fishing gear or any animal that is released with fishing gear entangling, trailing, or perforating any part of the body is considered injured, regardless of the presence of any wound or other evidence of injury, and must be reported.

Mortality/injury reporting forms and instructions for submitting forms to NMFS can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-authorization-program#reporting-a-death-or-injury-of-a-marine-mammal-during-commercial-fishing-operations* or by contacting the appropriate regional office (see **FOR FURTHER INFORMATION**). Forms may be submitted via any of the following means: (1) Online using the electronic form; (2) emailed as an attachment to *nmfs.mireport@noaa.gov;* (3) faxed to the NMFS Office of Protected Resources at 301–713–0376; or (4) mailed to the NMFS Office of Protected Resources (mailing address is provided on the postage-paid form that can be printed from the web address listed above). Reporting requirements and procedures are found in 50 CFR 229.6.

**Am I required to take an observer aboard my vessel?**

Individuals participating in a Category I or II fishery are required to accommodate an observer aboard their vessel(s) upon request from NMFS. MMPA section 118 states that the Secretary is not required to place an observer on a vessel if the facilities for quartering an observer or performing observer functions are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; thereby authorizing the exemption of vessels too small to safely accommodate an observer from this requirement. However, U.S. Atlantic Ocean, Caribbean, or Gulf of Mexico large pelagics longline vessels operating in special areas designated by the Pelagic Longline Take Reduction Plan implementing regulations (50 CFR 229.36(d)) will not be exempted from observer requirements, regardless of their size. Observer requirements are found in 50 CFR 229.7.

**Am I required to comply with any marine mammal TRP regulations?**

Table 4 provides a list of fisheries affected by TRPs and TRTs. TRP regulations are found at 50 CFR 229.30 through 229.37. A description of each TRT and copies of each TRP can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams.* It is the responsibility of fishery participants to comply with applicable take reduction regulations.

**Where can I find more information about the LOF and the MMAP?**

Information regarding the LOF and the MMAP, including registration procedures and forms; current and past LOFs; descriptions of each Category I and II fishery and some Category III fisheries; observer requirements; and marine mammal mortality/injury reporting forms and submittal procedures; may be obtained at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries,* or from any NMFS Regional Office at the addresses listed below:

NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930–2298, Attn: Allison Rosner;

NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, Attn: Jessica Powell;

NMFS, West Coast Region, Long Beach Office, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213, Attn: Dan Lawson;

NMFS, Alaska Region, Protected Resources, P.O. Box 22668, 709 West 9th Street, Juneau, AK 99802, Attn: Suzie Teerlink; or

NMFS, Pacific Islands Regional Office, Protected Resources Division, 1845 Wasp Blvd., Building 176, Honolulu, HI 96818, Attn: Diana Kramer.

**Sources of Information Reviewed for the 2021 LOF**

NMFS reviewed the marine mammal incidental mortality and serious injury information presented in the SARs for all fisheries to determine whether changes in fishery classification are warranted. The SARs are based on the best scientific information available at the time of preparation, including the level of mortality and serious injury of marine mammals that occurs incidental to commercial fishery operations and the PBR levels of marine mammal stocks. The information contained in the SARs is reviewed by regional Scientific Review Groups (SRGs) representing Alaska, the Pacific (including Hawaii), and the U.S. Atlantic, Gulf of Mexico, and Caribbean. The SRGs were established by the MMPA to review the science that informs the SARs, and to advise NMFS on marine mammal population status, trends, and stock structure, uncertainties in the science, research needs, and other issues.

NMFS also reviewed other sources of new information, including marine mammal stranding and entanglement data, observer program data, fishermen self-reports, reports to the SRGs, conference papers, FMPs, and ESA documents.

The LOF for 2021 was based on, among other things, stranding data; fishermen self-reports; and SARs, primarily the 2019 SARs, which are based on data from 2013–2017. The SARs referenced in this LOF include: 2016 (82 FR 29039; June 27, 2017), 2018 (84 FR 28489; June 19, 2019), and 2019 (84 FR 65353; November 27, 2019). The SARs are available at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.*

**Comments and Responses**

NMFS received nine comment letters on the proposed LOF for 2021 (85 FR 59258; September 21, 2020). Comments were received from members of the public, Atlantic Offshore Lobstermen's Association (AOLA), Freezer Longline Coalition (FLC), Hawaii Longline Association (HLA), Maine Lobstermen's Association (MLA), Massachusetts Division of Marine Fisheries (MA DMF), Marine Mammal Commission (Commission) and Whale Safe USA. Responses to substantive comments are below; comments on actions not related to the LOF are not included.

*General Comments*

*Comment 1:* A commenter recommends that NMFS require Category III fisheries to accommodate observers aboard vessels in order to expand data collection on marine mammal bycatch in fisheries.

*Response:* MMPA section 118 requires individuals participating in a Category I or II fishery to accommodate an observer aboard their vessel(s) upon request from NMFS. In addition, MMPA section 118(d)(7) provides NMFS, with the consent by the vessel owner, the ability to place an observer on board a vessel participating in Category III fisheries (50 CFR 229.7(d)). The MMPA and implementing regulations (50 CFR 229.6) also include a marine mammal mortality and injury reporting requirement for all Category I, II and III fisheries. Any vessel owner or operator participating in a fishery listed on the LOF must report to NMFS all incidental mortalities and injuries of marine mammals that occur during commercial fishing operations within 48 hours of the end of the fishing trip.

*Comments on Commercial Fisheries in the Pacific Ocean*

*Comment 2:* FLC recommends NMFS reclassify the AK Bering Sea, Aleutian Islands (BSAI) Pacific cod longline fishery from a Category II to Category III. They note that the following marine mammal stocks are included on the list of species/stocks incidentally killed or injured in the BSAI Pacific cod longline fishery: Killer whale (Eastern North Pacific AK resident); killer whale (Gulf of Alaska, BSAI transient); Northern fur seal (Eastern Pacific); spotted seal (AK) and Steller sea lion (Western U.S). FLC provides evidence that from 2013 through 2017 the only marine mammal stock incidentally killed or injured in the BSAI Pacific cod longline fishery was the Western U.S. stock of Steller sea lions and these did not result in annual M/SI greater than 1 percent of the stock's PBR level.

FLC also states that the BSAI Pacific cod longline fishery is currently classified as a Category II based on a killer whale M/SI in 2012. They note that this M/SI is assigned to both the resident and transient stocks of killer whales and is outside the 5 year timeframe (2013–2017) of the 2021 LOF. Therefore, FLC recommends that the BSAI Pacific cod longline fishery be reclassified as a Category III fishery.

*Response:* NMFS reviewed the information provided and agrees with FLC. One killer whale (Gulf of Alaska, BSAI transient stock) M/SI was driving the Category II classification of the BSAI Pacific cod longline fishery. This killer whale M/SI occurred in 2012, and no additional M/SI have been observed or reported for the 2013–2017 data analysis timeframe for this fishery. Therefore, NMFS reclassifies the AK BSAI Pacific cod longline fishery from a Category II to a Category III fishery in this final rule. NMFS also removes both the Eastern North Pacific AK resident stock and Gulf of Alaska, BSAI transient stock of killer whales from the list of species and/or stocks incidentally killed or injured in the BSAI Pacific cod longline fishery.

*Comment 3:* FLC recommends NMFS re-evaluate how a single marine mammal M/SI is assigned to multiple stocks when stock ranges overlap. They state that the M/SI should be distributed between stocks based on the relative proportion of the population of the two stocks combined.

As noted in the 2016 SAR (Muto *et al.,* 2017), the 2012 killer whale M/SI in the BSAI Pacific cod longline fishery was assigned to both the resident and transient stocks of killer whale, given no genetic samples were collected and the overlap in the range of the two stocks in Alaska waters. FLC further states that NMFS attributes the single M/SI to both stocks equally. However, the probability of encountering either stock is not 100 percent, but proportional to the relative population of the stocks throughout the range. The commenter notes that revising the single M/SI between both killer whale stocks (based on probability of encounter) would distribute the single 2012 M/SI in the BSAI Pacific cod longline fishery from 100 percent for both stocks to 80 percent to the resident stock and 20 percent to the transient stock.

*Response:* The SARs are drafted according to NMFS' ''Guidelines for Preparing Stock Assessment Reports Pursuant to the 1994 Amendments to the MMPA'' (NMFS 2016, 02–204–01). This provides directives for consistently assigning M/SI to stocks, including times when the M/SI is documented in an area of overlapping stocks. Because there were no data to indicate specific stock or reliable data that could be used to partition the 2012 killer whale M/SI, the M/SI was assigned to both stocks as prescribed by NMFS' ''Guidelines for Preparing Stock Assessment Reports Pursuant to the 1994 Amendments to the MMPA''.

*Comment 4:* FLC requests that NMFS update the LOF fishery fact sheet for the Category II BSAI Pacific cod longline fishery. The LOF fishery fact sheet for the BSAI Pacific cod longline fishery has an incorrect description for the observer coverage in both the catcher processor and catcher vessel longline sectors. The description of observer coverage included in the LOF fishery fact sheet is outdated and does not reflect the Observer Program structuring for catcher processor and catcher vessels sectors since 2012.

*Response:* NMFS thanks FLC for bringing to our attention that the observer coverage information in the AK BSAI Pacific cod longline fishery fact sheet on NMFS' website needs updating. The fishery fact sheets summarize LOF classification information for the public and we will review and correct this error.

*Comment 5:* The Commission restates a previous comment and recommends NMFS reclassify both the Category II SE Alaska salmon drift gillnet and Yakutat salmon set gillnet fisheries as Category I fisheries. The Commission previously noted that the 2016 SAR for the Southeast Alaska stock of harbor porpoise reported a population-size estimate of 975 and an estimated minimum population size (Nmin) of 896, which produced a PBR of 8.9 animals. That 2016 SAR also reported a total annual M/SI estimate of 34 animals for the two fisheries combined. The Commission states that the estimated annual M/SI has not changed, and although the stock's PBR increased to 12 in the 2019 SAR, fishery-related M/SI still exceed PBR by nearly threefold.

The Commission states that the clearer case can be made for reclassifying the Category II SE Alaska salmon drift gillnet fishery as a Category I fishery. They note that the estimated annual harbor porpoise M/SI in the SE Alaska salmon drift gillnet fishery included the 2019 SAR is 12 animals which equals PBR for the stock and exceeds the Category I classification threshold of 50 percent of PBR. The Commission continues to state that this M/SI estimate is based on data collected in salmon management areas 6–8 in 2012 and 2013, and is a conservative estimate since salmon management areas 6–8 comprise only a small portion of the total area surveyed.

The Commission notes that is more difficult to address the harbor porpoise M/SI in Category II Yakutat salmon set gillnet because there is a geographical disconnect between where observer data was collected and the population surveys were conducted. Thus, the comparison of the estimated annual M/SI does not provide a meaningful basis for classifying this fishery, given the likely population structure found in the Southeast Alaska (SEAK) harbor porpoise stock, as described in the 2019 SAR. Therefore, the Commission reiterates its recommendation that NMFS reclassify the SE Alaska salmon drift gillnet as a Category I fishery.

*Response:* This comment has been addressed previously (see 85 FR 21079, April 16, 2020). The PBR level for the SEAK harbor porpoise stock was estimated based on a survey that covered only a portion of the currently-recognized distribution of this stock, and it included commercial fishery M/SI that occurred far north of the surveyed areas. Over the last year, NMFS has made substantial progress in analyzing genetic data to resolve stock structure of harbor porpoise in Southeast Alaska. Once finalized, the analysis of these data will be helpful in addressing management concerns related to SEAK harbor porpoise and effects from commercial fishing. NMFS continues to pursue options for additional observer coverage to collect more recent and more geographically comprehensive data on mortality in Alaska's state fisheries, and we will prioritize observation of the Southeast Alaska drift gillnet fishery. For the 2021 LOF, NMFS retains the Category II classification for the Yakutat salmon set gillnet and SE Alaska salmon drift gillnet fisheries until more data are available.

*Comment 6:* HLA restates a previous comment recommending NMFS remove the Main Hawaiian Islands (MHI) insular and Northwestern Hawaiian Islands (NWHI) stocks of false killer whales from the list of species and/or stocks incidentally killed or injured in the Category I Hawaii deep-set longline fishery. HLA notes that (a) the False Killer Whale Take Reduction Plan (FKWTRP) closed the deep-set longline fishery for almost the entire range of the MHI insular stock, (b) since this change was made in 2013 there have been no false killer whale interactions in the fishery, and (c) there has never been a deep-set longline fishery interaction in the very small area of the stocks' range where the fishery operates. The commenter also states that no information has been presented to the False Killer Whale TRT or the Pacific Scientific Review Group suggesting any false killer whale interactions in the deep-set fishery can reliably be attributed to the Insular or NWHI stocks of false killer whales. HLA requests that NMFS remove the MHI insular and NWHI stocks of false killer whales from the list of species and/or stocks incidentally killed or injured in the Category I Hawaii deep-set longline fishery.

*Response:* This comment has been addressed previously (see 84 FR 22051, May 16, 2019; 85 FR 21079, April 16, 2020). The MHI insular stock of false killer whales have been documented via telemetry to move far enough offshore to reach longline fishing areas (Bradford *et al.,* 2015). The MHI insular, Hawaii pelagic, and NWHI stocks have partially overlapping ranges. MHI insular false killer whales have been satellite tracked as far as 115 km from the MHI, while pelagic stock animals have been tracked to within 11 kilometers (km) of the MHI and throughout the NWHI. Thus, M/SI of false killer whales of unknown stock within the stock overlap zones must be prorated to MHI insular, pelagic, or NWHI stocks. Annual bycatch estimates are prorated using a process outlined in detail in the SARs, which account for M/SI that occur within the MHI-pelagic or NWHI-pelagic overlap zones.

For observed fisheries with evidence indicating that undocumented interactions may be occurring (*e.g.,* fishery has evidence of fisheries interactions that cannot be attributed to a specific fishery, and stranding network data include evidence of fisheries interactions that cannot be attributed to a specific fishery), stocks may be retained on the LOF for longer than 5 years. For these fisheries, NMFS will review the other sources of relevant information to determine when it is appropriate to remove a species or stock from the LOF. As described in the 2019 LOF (84 FR 22051, May 16, 2019), six false killer whale M/SI incidental to the deep-set longline fishery were observed inside the exclusive economic zone (EEZ) around Hawaii, including three that occurred close to the outer boundary of the Main Hawaiian Islands Longline Fishing Prohibited Area, in close proximity to the outer boundary of the MHI Insular false killer whale stocks' range. Also, MHI Insular false killer whale range overlaps with areas that are open to deep-set longline fishing and MHI Insular false killer whales have been documented with injuries consistent with fisheries interactions that have not been attributed to a specific fishery (Baird *et al.,* 2014). Additionally, in August 2020, NMFS reopened the Southern Exclusion Zone to Hawaii deep-set longline fishing (85 FR 50959, August 19, 2020).

In addition to the SARs, NMFS also reviews other sources of new information for the LOF, including injury determination reports, bycatch estimation reports, and observer data. In some cases, more recent information may be available and used in the LOF. In January 2019, there was an observed mortality of a false killer whale incidental to the Hawaii deep-set longline fishery that occurred within the range of the NWHI stock. Therefore, NMFS retains both the MHI insular and NWHI false killer whale stocks on the list of species and/or stocks incidentally killed or injured in the Category I Hawaii deep-set longline fishery.

*Comment 7:* HLA restates a previous comment opposing the inclusion of the Hawaii stocks of *Kogia* species (pygmy or dwarf sperm whales) on the list of species and/or stocks incidentally killed or injured in the Category I HI deep-set longline fishery. HLA requests that NMFS remove *Kogia* species from the list of species and/or stocks incidentally killed or injured in the deep-set longline fishery because SARs for the two stock does not include M/SI in the deep-set fishery.

*Response:* This comment has been addressed previously (see 84 FR 22051, May 16, 2019). The 2021 LOF generally summarizes data from 2013–2017, and in addition to the SARs, the LOF also reviews other sources of information, including injury determination reports and observer data. In February 2014, there was an observed interaction with a pygmy sperm whale (*Kogia breviceps*) in the Category I HI deep-set longline fishery. Therefore, NMFS retains *Kogia* on the list of species and/or stocks incidentally killed or injured in the Category I HI deep-set longline fishery.

*Comment 8:* HLA recommends NMFS remove the Central North Pacific humpback whale stock from the list of species and/or stocks incidentally killed or injured in the Category II HI shallow-set longline fishery. HLA states that the proposed 2021 LOF includes the Central North Pacific stock of humpback whales on the list of species and/or stocks incidentally killed or injured from the Category II HI shallow-set longline fishery, but the most recent SAR does not identify M/SI in the shallow-set fishery. The HI shallow-set longline fishery has 100 percent observer coverage and therefore, the Central North Pacific stock of humpback whale stock should be removed the list of species and/or stocks incidentally killed or injured in the Category II HI shallow-set longline fishery.

*Response:* In addition to the M/SI included in the SARs, the LOF references data from injury determination reports, bycatch estimation reports, observer data, logbook data, stranding data, disentanglement network data, fishermen self-reports, and anecdotal reports. In March 2015, there was an observed humpback whale, Central North Pacific stock, injury in the Category II Hawaii shallow-set longline fishery. The injury was determined to be non-serious. Due to the observed injury, the Central North Pacific stock of humpback whale is retained on the list of species and/or stocks incidentally killed or injured in the Category II HI shallow-set longline fishery.

*Comment 9:* The Commission recommends that NMFS reclassify the Category III Hawaii troll fishery as a Category II fishery. The Commission states that NMFS proposed to reclassify the Category III Hawaii charter vessel fishery, which is primarily a troll fishery, and the HI trolling, rod and reel fisheries as Category II fisheries in the 2012 LOF (76 FR 37716, June 28, 2011). In the proposed rule, NMFS based the proposed change on reports of hooking spotted dolphins, and information on the prevalence of vessels from these fisheries targeting Pantropical spotted dolphin pods. NMFS estimated that M/SI would be, at a minimum, approximately 2 percent of PBR, justifying the Category II classifications for both fisheries. The Commission notes the final 2012 LOF (76 FR 73912, November 29, 2011) did not finalize the fishery proposed reclassifications.

The Commission states that implementing regulations allow for NMFS, in the absence of reliable estimates of the M/SI, to determine whether M/SI occurs 'not at all or with a remote likelihood' (Category III), 'occasionally' (Category II), or 'frequently' based on analogy to similar fisheries. This is the approach NMFS took this approach in 2012 proposed LOF.

The Commission also notes that the case for reclassifying the troll fisheries as Category II fisheries has strengthened since serious injuries due to hooking or entanglement in fishing line have been documented, and reliable estimates of rates of troll vessels fishing in and through spotted dolphin groups have been published (Baird and Webster, 2020). In addition, the spotted dolphin stock considered in 2011, was later split into four stocks (three insular and one pelagic) in the 2013 SAR, and each of the insular stocks is likely to have a smaller PBR than the estimates used in 2012 proposed LOF. Given NMFS's assessment in 2012 proposed LOF that interactions were likely 'occasional', combined with more recent information, the Commission recommends that NMFS reclassify the Category III Hawaii troll fishery as a Category II fishery.

*Response:* As noted by the Commission, there are four stocks of pantropical spotted dolphins in the Hawaii Islands region: Oahu stock, 4-Islands stock, Hawaii Island stock, and Hawaii pelagic stock. In 2014, one pantropical spotted dolphin from the Hawaii Island stock was observed hooked above the jaw and trailing 8–10 feet of fishing line (Bradford and Lyman, 2018). In 2017, a spotted dolphin from the 4-Islands stock was observed with a band of debris around its rostrum preventing it from opening its mouth (Bradford and Lyman, 2019). Both of these injuries are considered serious injuries and the responsible fishery is not known for either case. In addition, of the four pantropical spotted dolphin stocks, only the Hawaii pelagic stock has a minimum population estimate and resulting PBR.

Without known M/SI attributed to the HI troll fishery, and a minimum population estimate and PBR for only one of the four stocks, we evaluated classification of the fishery by analogy. However, in reviewing available data, there are no documented mortalities or injuries of pantropical spotted dolphins in similar fisheries. There are no current data on interactions with pantropical dolphins (or other dolphin species) in any other Pacific Ocean commercial troll fisheries. In other stocks of pantropical dolphins, the only documented fishery-related M/SI in the Northern Gulf of Mexico stock of pantropical are incidental to the pelagic longline fishery (2015 SAR). The Western North Atlantic stock of pantropical spotted dolphins' total annual estimated fishery-related M/SI is presumed to be zero, as there were no reports of mortalities or serious injuries (2019 SAR). There are no documented interactions with pantropical spotted dolphins in commercial troll fisheries on the high seas (2020 LOF). Therefore, the HI troll fishery cannot be classified by analogy to other fisheries that use similar fishing techniques that are known to cause mortality or serious injury of pantropical spotted dolphins.

The mentioned study, (Baird and Webster, 2020) presented findings on the magnitude and nature of associations between fishing vessels and pantropical spotted dolphin stocks. The study did not estimate mortality or injury rates incidental to fisheries. Results of the study indicated that there is a high frequency of associations between troll and rod and reel fishing, and pantropical spotted dolphins, and in particular with the Hawaii Island stock. This information suggests hookings and/or entanglements may occur, and the fishing technique of trolling through groups and repositioning presents a heightened risk of hooking or entanglement to pantropical spotted dolphins. However, this information alone does not provide sufficient evidence with which to conclude that spotted dolphins are being seriously injured or killed on an ''occasional basis'' as necessary for a Category II fishery classification. Therefore, NMFS is retaining the Category III classification of the Hawaii troll fishery.

*Comments on Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean*

*Comment 10:* MLA states that NMFS has the flexibility to consider a variety of criteria, such as differences in gear and fishing techniques, and the distribution of endangered stocks relative to individual fisheries when classifying fisheries on the LOF. The commenter notes that the Maine state waters lobster fishery is managed and enforced by the state of Maine. While the Federal waters portion of the Maine lobster fishery is managed through the Atlantic States Marine Fisheries Commission as part of Lobster Management Area 1, it is also subject to further regulation and enforcement by the state of Maine through the Lobster Management Policy Councils. In addition, Maine's state and Federal waters lobstermen must declare a lobster zone and are required to fish the majority of gear in their home zone, limiting the spatial footprint of where individual lobstermen can set gear. MLA states that this requirement differentiates the Maine lobster fishery from all other lobster fisheries throughout the Northeast and mid-Atlantic.

*Response:* NMFS agrees that the Agency has the flexibility to separate out individual fisheries where it is appropriate; however, the commenter has not presented adequate information to substantiate any difference in risk that Maine state and Federal lobster fisheries pose to North Atlantic right whales, or other large whale species, that would warrant a current change in classification for these fisheries. As stated in the 2020 Final LOF (85 FR 21079, April 16, 2020), fisheries are classified based on the gear types used, how the gear is fished, and the behavior of the fishery related to the risk to marine mammals. Multiple states participate in the Northeast/mid-Atlantic American lobster trap/pot fishery, using a wide variety of gear and gear configurations throughout a large portion of coastal waters. While we recognize this variety within the fishery at large, there are not clear boundaries to divide gear use across the wider area as suggested by this comment. Importantly, the state of Maine does not use unique gear configurations from other states and gear configurations within Maine's waters are not uniform or divided across the geographic boundaries (*i.e.,* exemption lines) that MLA has identified. Further, gear marking and right whale monitoring efforts throughout Maine waters are insufficient to determine that the gear or area presents a different risk to large whales. Below we provide further detail as to why the information presented by the MLA is insufficient for the requested changes. At this time, we do not have enough information to suggest Maine's fisheries should be split from the Northeast/mid-Atlantic American lobster trap/pot fishery, because the gear used in Maine waters is not unique from other states.

While NMFS appreciates the state of Maine's efforts to manage the footprint of where individual lobstermen may set their gear, NMFS must look at the risk that the gear itself poses to large whales, particularly North Atlantic right whales. Current Maine state lobster management does not represent unique gear characteristics (*e.g.,* the use of weak rope exclusively or exclusion of vertical lines). In non-exempted waters, risk reduction can be calculated based on implemented changes to gear configurations, and if that risk reduction is substantial enough, NMFS could revisit the fishery classification in a future LOF.

*Comment 11:* MLA states that the NMFS Category I Northeast/mid-Atlantic American lobster trap/pot fishery does not accurately capture marine mammal interactions and risk. MLA recommends NMFS classify Maine's state and Federal water's lobster fisheries as unique fisheries, separate from the Category I Northeast/mid-Atlantic American lobster trap/pot fishery.

The commenter notes that in the absence of sufficient data to properly classify all fisheries, the MMPA provides that NMFS may evaluate other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fishermen reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator for Fisheries. MLA further states that there are several factors with disparity among the Northeast and mid-Atlantic lobster fisheries, as well as significant differences in potential overlap with North Atlantic right whales. These differences among the lobster fisheries include: Fishing techniques, gear used, seasons and areas fished, fishermen's observations of right whales and distribution of marine mammals. MLA alleges that based on these factors, the lobster fishery prosecuted close to shore in Maine is significantly different than lobster fisheries which occur in offshore Lobster Management Area 3 or off of New Jersey.

MLA also alleges that Maine's state and Federal lobster fisheries do not meet the criteria of a Category I fishery under the MMPA. MLA recommends NMFS reclassify the Maine state waters lobster fishery as Category III fishery since there are no documented serious injuries or mortalities with this fishery, and NMFS determined that regulating the waters exempt from the Atlantic Large Whale Take Reduction Plan (ALWTRP) would have no significant benefit to large whales. MLA also recommends NMFS reclassify the Maine Federal waters lobster fishery as Category II fishery. MLA alleges there are no documented M/SI in the Maine Federal lobster fishery, but the Category II classification may be warranted under an abundance of precaution that a future interaction could occur due to the offshore migration of North Atlantic right whales.

MLA states that according to the 2019 North Atlantic right whale SAR, PBR is 0.8, and M/SI for commercial fisheries is 5.55. MLA's further analysis shows zero M/SI attributed to the Maine lobster fishery over this most recent 5 year period, while there were six documented cases in Canadian trap/pot fisheries. In addition, MLA alleges, there has been only one right whale entangled in Maine lobster gear in April 2002, and the entanglement was determined to be a non-serious injury. Maine gear was involved in a second case in 2004, but it was not the primary entangling gear in this case. The commenter states that there are four additional trap/pot entanglement cases that resulted in right whale M/SI for which a fishery was not determined and, therefore, for which the Maine lobster fishery cannot be completely ruled out. However, a close look at these cases reveals that the entangling gear is no longer fished, efforts to trace registration numbers to U.S. fishery were unsuccessful, or a Maine fishery was explicitly ruled out.

*Response:* NMFS uses the classification criteria described in the preamble to classify fisheries as Category I, Category II, or Category III. As noted, a fishery is classified under Category I if the annual M/SI of a stock in a given fishery is greater than or equal to 50 percent of the stock's PBR level. Additional details regarding categorization of fisheries is provided in the preamble to the final rule implementing section 118 of the MMPA (60 FR 45086; August 30, 1995).

As noted in the section of this rule and the LOF proposed rule describing how NMFS determines which species or stocks are included as incidentally killed or injured in a fishery, for fisheries with no observer coverage and for observed fisheries with evidence indicating that undocumented interactions may be occurring (*e.g.,* fishery has evidence of fisheries interactions that cannot be attributed to a specific fishery, and stranding network data include evidence of fisheries interactions that cannot be attributed to a specific fishery), stocks may be retained on the LOF for longer than 5 years. For these fisheries, NMFS will review the other sources of relevant information to determine when it is appropriate to remove a species or stock from the LOF.

At this time, we consider it appropriate to retain North Atlantic right whales as a species listed as driving the classification of the Northeast/mid-Atlantic lobster trap/pot fishery given that PBR is 0.8 and the further detail provided below, which reiterates responses provided in the 2020 Final LOF (85 FR 21079, April 16, 2020).

The commenter cites four cases of unknown entanglements they believe explicitly rule out Maine lobster fisheries from the origin of entanglement. However, the evidence presented is not sufficient to draw these conclusions. In one of the commenter's cited cases (E43–12/RW 4193), red tracers were identified in the recovered gear. Red tracers are indicative of the gear marking scheme required for the ALWTRP Northern Inshore Trap/Pot fishery management area, a management area that overlaps Maine, New Hampshire, and Massachusetts state waters. Therefore, it cannot be ruled out that the entanglement may have occurred off the coast of Maine in non-exempt waters. An additional case from 2011, previously noted in our 2020 Final LOF response to comments (85 FR 21079, April 16, 2020) but not mentioned in MLA's comment, also included recovered gear with these red tracers, though the location of that entanglement remains unknown (E11–11/RW 4040). Therefore, Maine lobster trap/pot fisheries cannot be ruled out as the potential origin for entanglements with undetermined origins.

We also note that two additional entanglements have been identified as Massachusetts lobster trap/pot entanglements (E36–16/RW 3623 and E25–09). This is relevant to the discussion since Maine state and Federal lobster fisheries are functionally equivalent to gear found in these entanglements; and, therefore, gear fished in Maine presents similar risks.

While floating groundline is prohibited in ALWTRP non-exempt management areas, there are waters along the east coast (including off the coast of Maine) that are exempted from this ALWTRP requirement. Therefore, the recovery of floating groundline from an entanglement does not explicitly rule out Maine lobster fisheries. For example, in case E25–10/RW 3911, the gear analysis found ''wire mesh is likely the remains of wire traps that parted off from themselves. This wire mesh, along with the 7/16 inch poly and associated gangions, is consistent with gear used in trap/pot fisheries conducted along the east coast of the U.S. and Canada'' (NMFS 2010 Large Whale Entanglement Report), which is consistent with some gear fished in exempted waters. Additionally, unless a rope diameter is explicitly prohibited in an area, rope diameter does not rule out the potential for an entanglement to have occurred in Maine waters, even if it does not represent the majority's normal fishing practices. Therefore, the 9/16 inch float rope that was recovered from E01–09/RW 3311, again, does not explicitly rule out Maine lobster fisheries.

With this request, the commenter is also not taking into consideration the high percentage of unidentified entanglements that are both first sighted in the U.S. and in Canada. Over the past 5 years, there have been 4.15 M/SI entanglements documented annually where the origin of the entanglement is unknown (Hayes *et al.,* 2020).

The sample size of recovered gear from entanglements is small and much of the retrieved gear is unmarked and cannot be attributed to a particular location. Currently, the state of Maine does not require gear marking in ALWTRP exempted areas. The lack of marks on retrieved gear may indicate the current marking scheme is inadequate, or that entanglements are occurring in areas where gear is not currently marked, such as international waters or current exempted areas. The state is currently pursuing a gear marking regime in these exempted waters that may provide additional data about entanglement risk in these areas in the future.

The commenter alleges ''There are zero instances of Maine lobster gear associated with a right whale serious injury or mortality in any data set, and only one known entanglement where Maine lobster was the primary entangling gear in 2002 resulting in non-serious injury determination.'' We recognize that there has only been one confirmed mortality (in 2012) in identified U.S. trap/pot gear in the past decade. Those cases where we could identify lobster gear from right whale entanglements during the past 10 years were determined to result in non-serious injuries. However, there have been a number of life-threatening entanglements since 2010 that have resulted in a non-serious injury due to disentanglement intervention. (Henry *et al.,* 2019). According to NMFS' ''Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals (NMFS 2015, 02–238–01),'' cases that would have been serious injuries prior to disentanglement are not counted against PBR in the SAR, but they are included in the recorded takes for the LOF and associated management measures. Aerial surveys, whale watching boats, the presence of other fisheries, and the presence and associated outreach by a disentanglement team contribute to the higher reporting of entanglement sightings in certain areas (*i.e.,* Massachusetts) than in Maine state and offshore waters; we cannot conclude that risk is nonexistent in other areas where entanglements are not observed. With 85 percent of all observed right whales exhibiting entanglement scars, it is likely that entanglements are indeed occurring in areas where entanglements have not yet been observed and/or reported.

NMFS will continue to annually evaluate marine mammal interactions and risk posed by a variety of gear types and fisheries through the LOF process. As stated previously, should information suggest that unique gear characteristics have lowered the risk of interaction in a particular geographically unique portion of a fishery, NMFS will evaluate to determine if the risk reduction is sufficient for separating the fishery out from the broader, current, classification of the Category I Northeast/mid-Atlantic American lobster trap/pot fishery.

As stated above, we find that there is insufficient information to suggest that Maine's fisheries should be split from the Northeast/mid-Atlantic American lobster trap/pot fishery because the gear used in Maine waters and the manner in which the gear is used are not unique from other states. Further, we maintain that entanglement data indicate that the gear used across this fishery remains a risk to right whales. Should Maine fisheries make significant changes to their gear configurations that differentiate these fisheries from other state and Federal lobster trap/pot fisheries, such as eliminating vertical lines, NMFS will reconsider this decision.

*Comment 12:* AOLA expresses concern that data used in the LOF do not represent the current conditions of the Category I Northeast/mid-Atlantic American lobster trap/pot fishery nor marine mammal stocks. The commenter notes that the primary information used in the 2021 LOF comes from 2019 SARs, which are based on data from 2013–2017. Yet since 2013, the northwest Atlantic has undergone considerable climatic changes that have influenced the distributions of marine mammals and their prey. AOLA further states that the 2014 ALWTRP regulations as well as the American lobster fishery management plan regulations, reduced vertical lines and enhanced gear marking in the fishery. AOLA requests NMFS incorporate more timely data and recent information into the 2021 LOF.

*Response:* NMFS agrees that the best available scientific information is important for assessing the risk fisheries pose to marine mammal stocks. NMFS uses the best available scientific information to prepare the annual LOF. This includes relying on the SARs, which are peer reviewed by the U.S. Atlantic, Gulf of Mexico, and Caribbean Scientific Review Group. The MMPA established this SRG, along with two others, to review the science that informs the SARs, and to advise NMFS on marine mammal population status, trends, and stock structure, uncertainties in the science, research needs, and other issues. We recognize that this peer review process takes additional time to ensure that the best available are used to inform the LOF. However, the SARs generally provide the most current and inclusive information on each stock's PBR level and level of interaction with commercial fishing operations; there may also be more recent reports that include bycatch estimates.

*Comment 13:* AOLA expresses concern with how NMFS assigns M/SI when the origin of entanglement is unknown. AOLA states to that according to the 2019 North Atlantic right whale SAR the 5-year mean estimated M/SI from entanglements is 5.55. Of those, 0.2 were attributed to U.S. fisheries, 1.2 to Canadian fisheries, and the remaining 4.15 were undetermined. The commenter notes that NMFS splits undetermined North Atlantic right whale M/SI evenly between the two countries. However, 86 percent of known entanglements were in Canadian gear. AOLA recommends NMFS split undetermined North Atlantic right whale M/SI between the two countries based on the percentage of known entanglements from each country and this prorated distribution of M/SI should be used when classifying fisheries on the LOF.

*Response:* For determining a fishery's classification on the LOF, NMFS must assess the M/SI with respect to a stock's PBR. See response to comment #11 above about M/SI of right whales that is attributed to the Northeast/mid-Atlantic American lobster trap/pot fishery.

With respect to the current unknown North Atlantic right whale M/SI being assumed to be divided between both Canada and U.S. equally, this was a scenario that NMFS generated to support ALWTRT deliberations and is not used for classifying fisheries on the MMPA LOF. Given the additional regulatory requirements for Category I and II fisheries, NMFS uses known M/SI that can be attributed to a specific fishery for LOF analysis.

*Comment 14:* AOLA expresses concern over the perceived lack of parity when assessing the impacts of fisheries on marine mammals. AOLA understands that with limited observer coverage and data gaps there is a level of subjectivity into the LOF classification process; however, the process should be equal among fisheries. The commenter notes that the Northeast/mid-Atlantic American lobster trap/pot fishery is classified as a Category I fishery for North Atlantic right whales, yet there has been only one confirmed mortality in American lobster trap/pot gear in the past decade (2012) and no documented serious injuries (as stated in the 2020 LOF final rule). In the 2020 LOF final rule, NMFS cites all U.S. undetermined M/SI, potential M/SI prevented by intervention, and North Atlantic right whale entanglement scarring rates as data used for the Category I classification of the Northeast/mid-Atlantic American lobster trap/pot fishery. AOLA recommends NMFS take a more equitable approach when assessing entanglement risk across fisheries, countries, and non-fishery sources, and also notes this would assist in assuring fishermen are treated fairly.

*Response:* The LOF is the annual process NMFS conducts to place all U.S. commercial fisheries into one of three categories based on the level of incidental mortality and serious injury of marine mammals occurring in each fishery. See response to comment #11 above about how cases that would have been serious injuries prior to disentanglement are not counted against PBR in the SAR, but are included in the LOF classification process.

For fisheries with no observer coverage and for observed fisheries with evidence indicating that undocumented interactions may be occurring (*e.g.,* fishery has low observer coverage and stranding network data include evidence of fisheries interactions that cannot be attributed to a specific fishery), NMFS uses the best available data to inform the LOF; thus, data older than 5 years may be used to retain a fishery classification or the list of species and stocks killed/injured incidental to a fishery. For these fisheries, NMFS will review the other sources of information listed above and use its discretion to decide when it is appropriate to remove a species or stock.

The assessment of large whale M/SI in fisheries with limited observer coverage remains a considerable challenge compared to other gear types that interact with pinniped or small cetaceans. In fisheries with sufficient observer coverage, NMFS extrapolates annual M/SI estimates for bycaught species. However, large whale fishery interaction assessments are dependent on direct counts of entangled whales, not the fishery per se. This observed count of entanglements is not representative of total fishery-related M/SI that goes undetected or unattributed to a particular cause, and therefore represents the minimum M/SI. A method to assign cause to these unknown, as well as undetected mortalities, while addressing country entanglement of origin, is currently under development (Hayes *et al.,* 2020). When these estimations become available, NMFS will solicit public comment through the SAR publication process.

*Comment 15:* MA DMF recommends NMFS reclassify the Massachusetts state waters lobster trap/pot fishery as its own non-Category I fishery, separate from the Category I Northeast/mid-Atlantic American lobster trap/pot fishery based on the gear restrictions and large whale conservation programs that are unique to Massachusetts. They note that the state of Massachusetts has a number of actions currently in place, as well as a number of additional actions that will be in place for the 2021 fishing season, that distinguish the Massachusetts state lobster trap/pot fishery as unique from the rest of the Category I Northeast/mid-Atlantic American lobster trap/pot fishery. MA DMF states that they are the only state lobster trap/trap fishery implementing the following actions either currently or in the future: (1) Lobster trap/pot fishery closure from February 1st to April 30th (currently in place for the Massachusetts Bay Restricted Area, proposed closure of all state waters beginning February 1, 2021); (2) dynamic extension of the lobster trap/pot fishery closure to ensure safe passage of right whales from our waters prior to fixed gear being set (currently in place for the Massachusetts Bay Restricted Area, proposed for all state waters beginning February 1, 2021); (3) ban use of vertical buoy lines greater than ⅜ inch diameter (proposed to begin February 1, 2021); (4) ban fishing single traps by the majority of its active fleet (proposed to begin January 1, 2022); (5) universal requirement of 1,700 pound breaking strength line or equivalent contrivance (proposed to begin February 1, 2021); (6) permitting and regulatory scheme designed to reduce participation and effort over time (currently in place); and (7) demonstrated substantial decline in the number of participants and the number of buoy lines deployed (currently in place). Based on these mitigation efforts, MA DMF recommends NMFS reclassify the Massachusetts state waters lobster trap/pot fishery as its own non-Category I fishery.

*Response:* NMFS appreciates the actions the state of Massachusetts has taken, and continues to take, to help conserve and protect North Atlantic right whales. However, the current implemented measures are not enough to suggest Massachusetts's state waters lobster trap/pot fishery should be split from the Category I Northeast/mid-Atlantic American lobster trap/pot fishery. At this time, NMFS retains the Category I classification for the Northeast/Mid-Atlantic American lobster trap/pot fishery, which includes the state waters of Massachusetts. Additional detail on how gear would be considered unique to differentiate it from other state lobster and trap/pot fisheries is included in response to Comment #11. NMFS looks forward to seeing what measures the state of Massachusetts will finalize and implement for the state lobster trap/pot fishery in the future. Should major changes to lobster gear and fishing practices be required and implemented for all Massachusetts state lobster fishing gear, making this gear unique and easily identified from other state and Federal gear, NMFS will re-evaluate the status of this fishery and consider it in a future proposed LOF.

*Comment 16:* Whale Safe USA requests NMFS maintain the Category I classifications for Northeast/Mid-Atlantic American lobster trap/pot fishery and Northeast sink gillnet fishery.

*Response:* As stated above in response to Comments #11 and 15, NMFS retains the Category I classification of the Northeast/Mid-Atlantic American lobster trap/pot fishery. Additionally, no data is currently available to suggest state fisheries should be separated from the Category I Northeast sink gillnet fishery, therefore NMFS retains the Category I classification for the Northeast sink gillnet fishery.

**Summary of Changes From the Proposed Rule**

NMFS reclassifies the AK BSAI Pacific cod longline fishery from a Category II to Category III fishery. NMFS also removes both the Eastern North Pacific AK resident stock and Gulf of Alaska, BSAI transient stock of killer whales from the list of species and/or stocks incidentally killed or injured in the BSAI Pacific cod longline fishery.

NMFS updates the MMAP certificate process for calendar year 2021. MMAP certificates issued in 2020 remain in effect, valid through December 31, 2021, for vessel or gear owners participating in all Category I and II fisheries as of the final 2021 LOF.

**Summary of Changes to the LOF for 2021**

The following summarizes changes to the LOF for 2021, including the classification of fisheries, fisheries listed, the estimated number of vessels/persons in a particular fishery, and the species and/or stocks that are incidentally killed or injured in a particular fishery. NMFS re-classifies two fisheries in the LOF for 2021. NMFS also makes changes to the estimated number of vessels/persons and list of species and/or stocks killed or injured in certain fisheries. The classifications and definitions of U.S. commercial fisheries for 2021 are identical to those provided in the LOF for 2020 with the changes discussed below. State and regional abbreviations used in the following paragraphs include: AK (Alaska), CA (California), HI (Hawaii), OR (Oregon), WA (Washington), and WNA (Western North Atlantic).

**Commercial Fisheries in the Pacific Ocean**

*Classification of Fisheries*

NMFS reclassifies the AK Bering Sea, Aleutian Islands Pacific cod pot fishery from a Category III to a Category II fishery.

NMFS reclassifies the AK BSAI Pacific cod longline fishery from at Category II to Category III fishery.

*Fishery Name and Organizational Changes*

NMFS adds a superscript ''1'' to the CA/OR/WA stock of minke whale indicating it is driving the Category II classification of the CA thresher shark/swordfish drift gillnet (≥14 in mesh) fishery.

*Number of Vessels/Persons*

NMFS updates the estimated number of vessels/persons in the Pacific Ocean (Table 1) as follows:

Category I

- HI deep-set longline fishery from 145 to 143 vessels/persons;

Category II

- HI shallow-set longline fishery from 18 to 11 vessels/persons;
- American Samoa longline fishery from 15 to 13 vessels/persons; and

Category III

- American Samoa bottomfish handline fishery from fewer than 30 to fewer than 20 vessels/persons.

*List of Species and/or Stocks Incidentally Killed or Injured in the Pacific Ocean*

NMFS adds the Aleutian Islands stock of harbor seal to the list of species/stocks incidentally killed or injured in the Category II AK Bering Sea, Aleutian Islands rockfish trawl fishery.

NMFS adds three stocks to the list of species/stocks incidentally killed or injured in the Category II AK Bering Sea, Aleutian Islands Pacific cod pot fishery: (1) Bristol Bay stock of harbor seal, (2) Western North Pacific stock of humpback whale, and (3) Central North Pacific stock of humpback whale.

NMFS adds both the Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient stock, and West Coast Transient stock, of killer whales to the list of species/stocks incidentally killed or injured in the Category II CA Dungeness crab pot fishery.

NMFS adds two stocks to the list of species/stocks incidentally killed or injured in the Category III CA squid purse seine fishery: (1) CA/OR/WA stock of Risso's dolphin and (2) U.S. stock of California sea lion.

NMFS adds the Cook Inlet stock of harbor seal to the list of species/stocks incidentally killed or injured in the Category III AK Gulf of Alaska halibut longline fishery.

NMFS adds the Aleutian Islands stock of harbor seal to the list of species/stocks incidentally killed or injured in the Category III AK Bering Sea, Aleutian Islands Atka mackerel trawl fishery.

NMFS adds the U.S. stock of California sea lion to the list of species/stocks incidentally killed or injured in the Category III WA/OR/CA shrimp trawl fishery.

NMFS adds two stocks to the list of species/stocks incidentally killed or injured in the Category III WA/OR/CA groundfish trawl fishery: (1) California breeding stock of northern elephant seal and (2) CA/OR/WA stock of northern right whale dolphin.

NMFS adds to the Western North Pacific stock of humpback whale to the list of species/stocks incidentally killed or injured in the Category III AK/WA/OR/CA commercial passenger fishing vessel fishery. NMFS removes three stocks from the list of species/stocks incidentally killed or injured in the Category II AK Bering Sea, Aleutian Islands pollock trawl fishery: (1) Alaska stock of ringed seal, (2) Central North Pacific stock of humpback whale and (3) Western North Pacific stock of humpback whale.

NMFS removes the Alaska stock of ringed seal from the list of species/stocks incidentally killed or injured in the Category II AK Bering Sea, Aleutian Islands Pacific cod longline fishery.

NMFS removes the Western U.S. stock of Steller sea lion from the list of species/stocks incidentally killed or injured in the Category II AK Gulf of Alaska sablefish longline fishery.

NMFS removes the Alaska stock of ringed seal from the list of species/stocks incidentally killed or injured in the Category III AK Bering Sea, Aleutian Islands Pacific cod trawl fishery.

NMFS removes the Alaska stock of harbor seal from the list of species/stocks incidentally killed or injured in the Category III AK Gulf of Alaska flatfish trawl fishery.

## Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean

### *Fishery Name and Organizational Changes and Clarification*

NMFS adds a superscript ''1'' to the following four stocks to indicate they are driving the Category II classification of the Northeast trawl fishery: (1) Western North Atlantic stock of Risso's dolphin, (2) Western North Atlantic stock of long-finned pilot whale, (3) Western North Atlantic offshore stock of bottlenose dolphin, and (4) Western North Atlantic stock of gray seal.

NMFS clarifies the fishery description of the Category II Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery. NMFS clarifies that this fishery targets shrimp species with various gear types, but mainly utilizes skimmer or otter trawls. These gear types likely entangle marine mammals, particularly bottlenose dolphins, in very similar ways. The common entangling mechanism of these gear types are the ''lazy'' or ''easy'' line.

NMFS clarifies the fishery description of the Category I Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline fishery. NMFS clarifies that the fishery does not target bluefin tuna, shortfin mako sharks and other shark species.

As discussed in the proposed rule, NMFS clarifies its response to Comment #14 in the 2020 Final LOF (85 FR 21079; April 16, 2020). In Comment #14, MLA notes ''there has been only one right whale entangled in Maine gear in April 2002, and the entanglement was determined to be a non-serious injury. There are two additional non-serious injury entanglement cases that involved Maine lobster gear. However, Maine lobster gear was not the primary entangling gear in these cases.'' In the 2020 Final LOF, NMFS' response in part to this comment stated: ''We recognize that there has only been one confirmed mortality (in 2012) in American lobster gear in the past decade. All other documented lobster interactions were determined to result in non-serious injuries. However, there have been a number of entanglements for which interventions occurred because these entanglements were determined to be resulting in serious injuries (Henry *et al.,* 2019).''

NMFS clarifies part of the response to Comment #14 to state: We recognize there has been only one confirmed mortality (in 2012) in the past decade in U.S. Northern inshore/nearshore trap/pot gear which could be gear from the Northeast/Mid-Atlantic American lobster trap/pot fishery or the Atlantic mixed species trap/pot fishery. All other documented lobster interactions were determined to result in non-serious injuries. However, there have been a number of entanglements for which interventions occurred because these entanglements were determined to be resulting in serious injuries (Henry *et al.,* 2019).

### *Number of Vessels/Persons*

NMFS updates the estimated number of vessels/persons in the Atlantic Ocean, Gulf of Mexico, and Caribbean (Table 2) as follows:

Category I

- Mid-Atlantic gillnet fishery from 3,950 to 4,020 vessels/person;
- Northeast sink gillnet fishery from 3,163 to 4,072 vessels/persons;

Category II

- Chesapeake Bay inshore gillnet fishery from 248 to 265 vessels/persons;
- Northeast bottom trawl fishery from 2,238 to 968 vessels/persons;
- Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery from 4,950 to 10,824 vessels/persons;
- Atlantic mixed species trap/pot fishery from 3,332 to 3,493 vessels/persons;
- Mid-Atlantic menhaden purse seine fishery from 19 to 17 vessels/persons;
- Virginia pound net fishery from 26 to 20 vessels/persons;

Category III

- Caribbean gillnet fishery from >991 to 127 vessels/persons;
- Caribbean mixed species trap/pot fishery from >501 to 154 vessels/persons;
- Caribbean spiny lobster trap/pot fishery from >197 to 40 vessels/persons; and
- Caribbean haul/beach seine fishery from 15 to 38 vessels/person.

NMFS notes there is variability in the estimated number of vessels/persons in the Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery. This variability is due to multiple permitting agencies, differences in fishery management, and artifacts with available data sets. A complete explanation of the variability is available in the Environmental Impact Statement to Reduce the Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fisheries (November 4, 2019).

### *List of Species and/or Stocks Incidentally Killed or Injured in the Atlantic Ocean, Gulf of Mexico, and Caribbean*

NMFS adds the Mobile Bay, Bonsecour Bay stock of bottlenose dolphin to the list of species/stocks incidentally killed or injured in the Category II Gulf of Mexico gillnet fishery.

NMFS adds the Western North Atlantic offshore stock of bottlenose dolphin to the list of species/stocks incidentally killed or injured in the Category II mid-Atlantic mid-water trawl (including pair trawl) fishery.

NMFS adds the Puerto Rico and U.S. Virgin Islands stock of bottlenose dolphin to the list of species/stocks incidentally killed or injured in Category III Caribbean mixed species trap/pot fishery.

Following consultation with the U.S. Fish and Wildlife Service, NMFS adds the Antillean subspecies (Puerto Rico stock) of West Indian manatee to the list of species/stocks incidentally killed or injured in Category III Caribbean haul/beach seine fishery.

NMFS removes the Western North Atlantic offshore stock of bottlenose dolphin from the list of species/stocks incidentally killed or injured in the Category III Gulf of Maine, U.S. mid-

Atlantic tuna, shark, swordfish hook-and line/harpoon fishery.

**Commercial Fisheries on the High Seas**

*Number of Vessels/Persons*

NMFS updates the estimated number of HSFCA permits for high seas fisheries (Table 3) as follows:

Category I

- Atlantic highly migratory species longline fishery from 53 to 45 HSFCA permits;
- Western Pacific pelagic longline (HI deep-set component) fishery from 145 to 143 HSFCA permits;

Category II

- South Pacific tuna purse seine fishery from 33 to 26 HSFCA permits;
- South Pacific tuna longline fishery from 2 to 3 HSFCA permits;
- Western Pacific pelagic longline (HI shallow-set component) fishery from 18 to 11 HSFCA permits;
- Atlantic highly migratory species handline/pole and line fishery from 2 to 1 HSFCA permits;
- Pacific highly migratory species handline/pole and line fishery from 41 to 43 HSFCA permits;
- South Pacific albacore troll handline/pole and line fishery from 11 to 10 HSFCA permits;
- South Pacific albacore troll fishery from 17 to 18 HSFCA permits;
- Western Pacific pelagic troll fishery from 5 to 4 HSFCA permits;

Category III

- Northwest Atlantic bottom longline fishery from 3 to 2 HSFCA permits;
- Pacific highly migratory species longline fishery from 108 to 105 HSFCA permits; and
- Pacific highly migratory species troll fishery from 119 to 111 HSFCA permits.

**List of Fisheries**

The following tables set forth the list of U.S. commercial fisheries according to their classification under section 118 of the MMPA. Table 1 lists commercial fisheries in the Pacific Ocean (including Alaska), Table 2 lists commercial fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean, Table 3 lists commercial fisheries on the high seas, and Table 4 lists fisheries affected by TRPs or TRTs.

In Tables 1 and 2, the estimated number of vessels or persons participating in fisheries operating within U.S. waters is expressed in terms of the number of active participants in the fishery, when possible. If this information is not available, the estimated number of vessels or persons licensed for a particular fishery is provided. If no recent information is available on the number of participants, vessels, or persons licensed in a fishery, then the number from the most recent LOF is used for the estimated number of vessels or persons in the fishery. NMFS acknowledges that, in some cases, these estimates may be inflations of actual effort. For example, the State of Hawaii does not issue fishery-specific licenses, and the number of participants reported in the LOF represents the number of commercial marine license holders who reported using a particular fishing gear type/method at least once in a given year, without considering how many times the gear was used. For these fisheries, effort by a single participant is counted the same whether the fisherman used the gear only once or every day. In the Mid-Atlantic and New England fisheries, the numbers represent the potential effort for each fishery, given the multiple gear types for which several state permits may allow. Changes made to Mid-Atlantic and New England fishery participants will not affect observer coverage or bycatch estimates, as observer coverage and bycatch estimates are based on vessel trip reports and landings data. Tables 1 and 2 serve to provide a description of the fishery's potential effort (state and Federal). If NMFS is able to extract more accurate information on the gear types used by state permit holders in the future, the numbers will be updated to reflect this change. For additional information on fishing effort in fisheries found on Table 1 or 2, contact the relevant regional office (contact information included above in Where can I find more information about the LOF and the MMAP? section).

For high seas fisheries, Table 3 lists the number of valid HSFCA permits currently held. Although this likely overestimates the number of active participants in many of these fisheries, the number of valid HSFCA permits is the most reliable data on the potential effort in high seas fisheries at this time. As noted previously in this LOF, the number of HSFCA permits listed in Table 3 for the high seas components of fisheries that also operate within U.S. waters does not necessarily represent additional effort that is not accounted for in Tables 1 and 2. Many vessels holding HSFCA permits also fish within U.S. waters and are included in the number of vessels and participants operating within those fisheries in Tables 1 and 2.

Tables 1, 2, and 3 also list the marine mammal species and/or stocks incidentally killed or injured (seriously or non-seriously) in each fishery based on SARs, injury determination reports, bycatch estimation reports, observer data, logbook data, stranding data, disentanglement network data, fishermen self-reports (*i.e.,* MMAP reports), and anecdotal reports. The best available scientific information included in these reports is based on data through 2017. This list includes all species and/or stocks known to be killed or injured in a given fishery, but also includes species and/or stocks for which there are anecdotal records of a mortality or injury. Additionally, species identified by logbook entries, stranding data, or fishermen self-reports (*i.e.,* MMAP reports) may not be verified. In Tables 1 and 2, NMFS has designated those species/stocks driving a fishery's classification (*i.e.,* the fishery is classified based on mortalities and serious injuries of a marine mammal stock that are greater than or equal to 50 percent (Category I), or greater than 1 percent and less than 50 percent (Category II), of a stock's PBR) by a ''1'' after the stock's name.

In Tables 1 and 2, there are several fisheries classified as Category II that have no recent documented mortalities or serious injuries of marine mammals, or fisheries that did not result in a mortality or serious injury rate greater than 1 percent of a stock's PBR level based on known interactions. NMFS has classified these fisheries by analogy to other Category I or II fisheries that use similar fishing techniques or gear that are known to cause mortality or serious injury of marine mammals, as discussed in the final LOF for 1996 (60 FR 67063; December 28, 1995), and according to factors listed in the definition of a ''Category II fishery'' in 50 CFR 229.2 (*i.e.,* fishing techniques, gear types, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fishermen reports, stranding data, and the species and distribution of marine mammals in the area). NMFS has designated those fisheries listed by analogy in Tables 1 and 2 by adding a ''2'' after the fishery's name.

There are several fisheries in Tables 1, 2, and 3 in which a portion of the fishing vessels cross the EEZ boundary and therefore operate both within U.S. waters and on the high seas. These fisheries, though listed separately on Table 1 or 2 and Table 3, are considered the same fisheries on either side of the EEZ boundary. NMFS has designated those fisheries in each table with an asterisk (*) after the fishery's name.

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

| Fishery description | Estimated # of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| **Category I** | | |
| *Longline/Set Line Fisheries:* | | |
| HI deep-set longline * ^ | 143 | Bottlenose dolphin, HI Pelagic.<br>False killer whale, HI Pelagic [1].<br>False killer whale, MHI Insular [1].<br>False killer whale, NWHI.<br>Humpback whale. Central North Pacific.<br>Kogia *spp.* (Pygmy or dwarf sperm whale), HI.<br>Pygmy killer whale, HI.<br>Risso's dolphin, HI.<br>Rough-toothed dolphin, HI.<br>Short-finned pilot whale, HI.<br>Striped dolphin, HI. |
| **Category II** | | |
| *Gillnet Fisheries:* | | |
| CA thresher shark/swordfish drift gillnet (≥14 in mesh) * | 14 | Bottlenose dolphin, CA/OR/WA offshore.<br>California sea lion, U.S.<br>Dall's porpoise, CA/OR/WA.<br>Gray whale, Eastern North Pacific.<br>Humpback whale, CA/OR/WA.<br>Long-beaked common dolphin, CA.<br>Minke whale, CA/OR/WA [1].<br>Northern elephant seal, CA breeding.<br>Northern right-whale dolphin, CA/OR/WA.<br>Pacific white-sided dolphin, CA/OR/WA.<br>Risso's dolphin, CA/OR/WA.<br>Short-beaked common dolphin, CA/OR/WA.<br>Short-finned pilot whale, CA/OR/WA [1].<br>Sperm Whale, CA/OR/WA [1]. |
| CA halibut/white seabass and other species set gillnet (>3.5 in mesh). | 37 | California sea lion, U.S.<br>Gray whale, Eastern North Pacific.<br>Harbor seal, CA.<br>Humpback whale, CA/OR/WA [1].<br>Long-beaked common dolphin, CA.<br>Northern elephant seal, CA breeding.<br>Sea otter, CA.<br>Short-beaked common dolphin, CA/OR/WA. |
| CA yellowtail, barracuda, and white seabass drift gillnet (mesh size ≥3.5 in and <14 in) [2]. | 22 | California sea lion, U.S.<br>Long-beaked common dolphin, CA.<br>Short-beaked common dolphin, CA/OR/WA. |
| AK Bristol Bay salmon drift gillnet [2] | 1,862 | Beluga whale, Bristol Bay.<br>Gray whale, Eastern North Pacific.<br>Harbor seal, Bering Sea.<br>Northern fur seal, Eastern Pacific.<br>Pacific white-sided dolphin, North Pacific.<br>Spotted seal, AK.<br>Steller sea lion, Western U.S. |
| AK Bristol Bay salmon set gillnet [2] | 979 | Beluga whale, Bristol Bay.<br>Gray whale, Eastern North Pacific.<br>Harbor seal, Bering Sea.<br>Northern fur seal, Eastern Pacific.<br>Spotted seal, AK. |
| AK Kodiak salmon set gillnet | 188 | Harbor porpoise, GOA [1].<br>Harbor seal, GOA.<br>Humpback whale, Central North Pacific.<br>Humpback whale, Western North Pacific.<br>Sea otter, Southwest AK.<br>Steller sea lion, Western U.S. |
| AK Cook Inlet salmon set gillnet | 736 | Beluga whale, Cook Inlet.<br>Dall's porpoise, AK.<br>Harbor porpoise, GOA.<br>Harbor seal, GOA.<br>Humpback whale, Central North Pacific [1].<br>Sea otter, South central AK.<br>Steller sea lion, Western U.S. |
| AK Cook Inlet salmon drift gillnet | 569 | Beluga whale, Cook Inlet.<br>Dall's porpoise, AK. |

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

| Fishery description | Estimated # of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| | | Harbor porpoise, GOA[1].<br>Harbor seal, GOA.<br>Steller sea lion, Western U.S. |
| AK Peninsula/Aleutian Islands salmon drift gillnet[2] | 162 | Dall's porpoise, AK.<br>Harbor porpoise, GOA.<br>Harbor seal, GOA.<br>Northern fur seal, Eastern Pacific. |
| AK Peninsula/Aleutian Islands salmon set gillnet[2] | 113 | Harbor porpoise, Bering Sea.<br>Northern sea otter, Southwest AK.<br>Steller sea lion, Western U.S. |
| AK Prince William Sound salmon drift gillnet | 537 | Dall's porpoise, AK.<br>Harbor porpoise, GOA[1].<br>Harbor seal, GOA.<br>Northern fur seal, Eastern Pacific.<br>Pacific white-sided dolphin, North Pacific.<br>Sea otter, South central AK.<br>Steller sea lion, Western U.S.[1] |
| AK Southeast salmon drift gillnet | 474 | Dall's porpoise, AK.<br>Harbor porpoise, Southeast AK.<br>Harbor seal, Southeast AK.<br>Humpback whale, Central North Pacific[1].<br>Pacific white-sided dolphin, North Pacific.<br>Steller sea lion, Eastern U.S. |
| AK Yakutat salmon set gillnet[2] | 168 | Gray whale, Eastern North Pacific.<br>Harbor Porpoise, Southeastern AK.<br>Harbor seal, Southeast AK.<br>Humpback whale, Central North Pacific (Southeast AK). |
| WA Puget Sound Region salmon drift gillnet (includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line-Treaty Indian fishing is excluded). | 154 | Dall's porpoise, CA/OR/WA.<br>Harbor porpoise, inland WA[1].<br>Harbor seal, WA inland. |
| *Trawl Fisheries:* | | |
| AK Bering Sea, Aleutian Islands flatfish trawl | 32 | Bearded seal, AK.<br>Gray whale, Eastern North Pacific.<br>Harbor porpoise, Bering Sea.<br>Harbor seal, Bering Sea.<br>Humpback whale, Western North Pacific[1].<br>Killer whale, AK resident[1].<br>Killer whale, GOA, AI, BS transient[1].<br>Northern fur seal, Eastern Pacific.<br>Ringed seal, AK.<br>Ribbon seal, AK.<br>Spotted seal, AK.<br>Steller sea lion, Western U.S.[1].<br>Walrus, AK. |
| AK Bering Sea, Aleutian Islands pollock trawl | 102 | Bearded Seal, AK.<br>Beluga whale, Bristol Bay.<br>Beluga whale, Eastern Bering Sea.<br>Beluga whale, Eastern Chukchi Sea.<br>Harbor seal, AK.<br>Northern fur seal, Eastern Pacific.<br>Ribbon seal, AK.<br>Spotted seal, AK.<br>Steller sea lion, Western U.S.[1]. |
| AK Bering Sea, Aleutian Islands rockfish trawl | 17 | Harbor seal, Aleutian Islands.<br>Killer whale, ENP AK resident[1].<br>Killer whale, GOA, AI, BS transient[1].<br>Ribbon seal, AK. |
| *Pot, Ring Net, and Trap Fisheries:* | | |
| AK Bering Sea, Aleutian Islands Pacific cod pot | 59 | Harbor seal, Bristol Bay.<br>Humpback whale, Central North Pacific.<br>Humpback whale, Western North Pacific. |
| CA coonstripe shrimp pot | 14 | Gray whale, Eastern North Pacific.<br>Harbor seal, CA.<br>Humpback whale, CA/OR/WA. |
| CA spiny lobster | 186 | Bottlenose dolphin, CA/OR/WA offshore.<br>Humpback whale, CA/OR/WA[1].<br>Gray whale, Eastern North Pacific.<br>Southern sea otter. |
| CA spot prawn pot | 23 | Gray whale, Eastern North Pacific. |

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

| Fishery description | Estimated # of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| | | Humpback whale, CA/OR/WA [1]. |
| | | Long-beaked common dolphin, CA. |
| CA Dungeness crab pot | 501 | Blue whale, Eastern North Pacific [1]. |
| | | Gray whale, Eastern North Pacific. |
| | | Humpback whale, CA/OR/WA [1]. |
| | | Killer whale, Eastern North Pacific GOA, BSAI transient. |
| | | Killer whale, West Coast transient. |
| OR Dungeness crab pot | 342 | Gray whale, Eastern North Pacific. |
| | | Humpback whale, CA/OR/WA [1]. |
| WA/OR/CA sablefish pot | 155 | Humpback whale, CA/OR/WA [1]. |
| WA coastal Dungeness crab pot | 197 | Gray whale, Eastern North Pacific. |
| | | Humpback whale, CA/OR/WA [1]. |
| *Longline/Set Line Fisheries:* | | |
| AK Gulf of Alaska sablefish longline | 295 | Sperm whale, North Pacific. |
| | | Steller sea lion, Eastern U.S. |
| HI shallow-set longline * ^ | 11 | Blainville's beaked whale, HI. |
| | | Bottlenose dolphin, HI Pelagic. |
| | | False killer whale, HI Pelagic [1]. |
| | | Humpback whale, Central North Pacific. |
| | | Risso's dolphin, HI. |
| | | Rough-toothed dolphin, HI. |
| | | Striped dolphin, HI. |
| American Samoa longline [2] | 13 | False killer whale, American Samoa. |
| | | Rough-toothed dolphin, American Samoa. |
| | | Short-finned pilot whale, unknown. |
| HI shortline [2] | 9 | None documented. |
| **Category III** | | |
| *Gillnet Fisheries:* | | |
| AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet. | 1,778 | Harbor porpoise, Bering Sea. |
| AK Prince William Sound salmon set gillnet | 29 | Harbor seal, GOA. |
| | | Humpback whale, Central North Pacific. |
| | | Sea otter, South central AK. |
| | | Steller sea lion, Western U.S. |
| AK roe herring and food/bait herring gillnet | 920 | None documented. |
| CA set gillnet (mesh size <3.5 in) | 296 | None documented. |
| HI inshore gillnet | 36 | Bottlenose dolphin, HI. |
| | | Spinner dolphin, HI. |
| WA Grays Harbor salmon drift gillnet (excluding treaty Tribal fishing). | 24 | Harbor seal, OR/WA coast. |
| WA/OR Mainstem Columbia River eulachon gillnet | 15 | None documented. |
| WA/OR lower Columbia River (includes tributaries) drift gillnet. | 110 | California sea lion, U.S. |
| | | Harbor seal, OR/WA coast. |
| WA Willapa Bay drift gillnet | 82 | Harbor seal, OR/WA coast. |
| | | Northern elephant seal, CA breeding. |
| *Miscellaneous Net Fisheries:* | | |
| AK Cook Inlet salmon purse seine | 83 | Humpback whale, Central North Pacific. |
| AK Kodiak salmon purse seine | 376 | Dall's porpoise, AK. |
| | | Humpback whale, Central North Pacific. |
| | | Humpback whale, Western North Pacific. |
| AK Southeast salmon purse seine | 315 | Humpback whale, Central North Pacific. |
| AK roe herring and food/bait herring beach seine | 10 | None documented. |
| AK roe herring and food/bait herring purse seine | 356 | None documented. |
| AK salmon beach seine | 31 | None documented. |
| AK salmon purse seine (Prince William Sound, Chignik, Alaska Peninsula). | 936 | Harbor seal, GOA. |
| | | Harbor seal, Prince William Sound. |
| WA/OR sardine purse seine | 42 | None documented. |
| CA anchovy, mackerel, sardine purse seine | 65 | California sea lion, U.S. |
| | | Harbor seal, CA. |
| CA squid purse seine | 80 | California sea lion, U.S. |
| | | Long-beaked common dolphin, CA. |
| | | Risso's dolphin, CA/OR/WA. |
| | | Short-beaked common dolphin, CA/OR/WA. |
| CA tuna purse seine * | 10 | None documented. |
| WA/OR Lower Columbia River salmon seine | 10 | None documented. |
| WA/OR herring, smelt, squid purse seine or lampara | 130 | None documented. |
| WA salmon purse seine | 75 | None documented. |
| WA salmon reef net | 11 | None documented. |

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

| Fishery description | Estimated # of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| HI lift net | 17 | None documented. |
| HI inshore purse seine | <3 | None documented. |
| HI throw net, cast net | 23 | None documented. |
| HI seine net | 24 | None documented. |
| *Dip Net Fisheries:* | | |
| CA squid dip net | 115 | None documented. |
| *Marine Aquaculture Fisheries:* | | |
| CA marine shellfish aquaculture | unknown | None documented. |
| CA salmon enhancement rearing pen | >1 | None documented. |
| CA white seabass enhancement net pens | 13 | California sea lion, U.S. |
| HI offshore pen culture | 2 | None documented. |
| WA salmon net pens | 14 | California sea lion, U.S.<br>Harbor seal, WA inland waters. |
| WA/OR shellfish aquaculture | 23 | None documented. |
| *Troll Fisheries:* | | |
| WA/OR/CA albacore surface hook and line/troll | 705 | None documented. |
| CA halibut hook and line/handline | unknown | None documented. |
| CA white seabass hook and line/handline | unknown | None documented. |
| AK Bering Sea, Aleutian Islands groundfish hand troll and dinglebar troll. | unknown | None documented. |
| AK Gulf of Alaska groundfish hand troll and dinglebar troll | unknown | None documented. |
| AK salmon troll | 1,908 | Steller sea lion, Eastern U.S.<br>Steller sea lion, Western U.S. |
| American Samoa tuna troll | 13 | None documented. |
| CA/OR/WA salmon troll | 4,300 | None documented. |
| HI troll | 2,117 | Pantropical spotted dolphin, HI. |
| HI rod and reel | 322 | None documented. |
| Commonwealth of the Northern Mariana Islands tuna troll | 40 | None documented. |
| Guam tuna troll | 432 | None documented. |
| *Longline/Set Line Fisheries:* | | |
| AK Bering Sea, Aleutian Islands Greenland turbot longline | 4 | Killer whale, AK resident. |
| AK Bering Sea, Aleutian Islands Pacific cod longline | 45 | Northern fur seal, Eastern Pacific.<br>Spotted seal, AK.<br>Steller sea lion, Western U.S. |
| AK Bering Sea, Aleutian Islands sablefish longline | 22 | None documented. |
| AK Bering Sea, Aleutian Islands halibut longline | 127 | Northern fur seal, Eastern Pacific.<br>Sperm whale, North Pacific. |
| AK Gulf of Alaska halibut longline | 855 | Harbor seal, Cook Inlet.<br>Steller sea lion, Eastern U.S. |
| AK Gulf of Alaska Pacific cod longline | 92 | Steller sea lion, Western U.S. |
| AK octopus/squid longline | 3 | None documented. |
| AK state-managed waters longline/setline (including sablefish, rockfish, lingcod, and miscellaneous finfish). | 464 | None documented. |
| WA/OR/CA groundfish, bottomfish longline/set line | 367 | Bottlenose dolphin, CA/OR/WA offshore.<br>California sea lion, U.S.<br>Northern elephant seal, California breeding.<br>Sperm whale, CA/OR/WA.<br>Steller sea lion, Eastern U.S. |
| WA/OR Pacific halibut longline | 350 | None documented. |
| CA pelagic longline | 1 | None documented in the most recent 5 years of data. |
| HI kaka line | 15 | None documented. |
| HI vertical line | 3 | None documented. |
| *Trawl Fisheries:* | | |
| AK Bering Sea, Aleutian Islands Atka mackerel trawl | 13 | Bearded seal, AK.<br>Harbor seal, Aleutian Islands.<br>Steller sea lion, Western U.S. |
| AK Bering Sea, Aleutian Islands Pacific cod trawl | 72 | Bearded seal, AK.<br>Ribbon seal, AK.<br>Steller sea lion, Western U.S. |
| AK Gulf of Alaska flatfish trawl | 36 | Northern elephant seal, North Pacific.<br>Steller sea lion, Western U.S. |
| AK Gulf of Alaska Pacific cod trawl | 55 | Harbor seal, AK.<br>Steller sea lion, Western U.S. |
| AK Gulf of Alaska pollock trawl | 67 | Dall's porpoise, AK.<br>Fin whale, Northeast Pacific.<br>Northern elephant seal, North Pacific.<br>Steller sea lion, Western U.S. |
| AK Gulf of Alaska rockfish trawl | 43 | Steller sea lion, Western U.S. |
| AK Kodiak food/bait herring otter trawl | 4 | None documented. |
| AK shrimp otter trawl and beam trawl | 38 | None documented. |

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

| Fishery description | Estimated # of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| AK state-managed waters of Prince William Sound groundfish trawl. | 2 | None documented. |
| CA halibut bottom trawl | 47 | California sea lion, U.S.<br>Harbor porpoise, unknown.<br>Harbor seal, unknown.<br>Northern elephant seal, CA breeding.<br>Steller sea lion, unknown. |
| CA sea cucumber trawl | 16 | None documented. |
| WA/OR/CA shrimp trawl | 300 | California sea lion, U.S. |
| WA/OR/CA groundfish trawl | 160–180 | California sea lion, U.S.<br>Dall's porpoise, CA/OR/WA.<br>Harbor seal, OR/WA coast.<br>Northern elephant seal, CA breeding.<br>Northern fur seal, Eastern Pacific.<br>Northern right whale dolphin, CA/OR/WA.<br>Pacific white-sided dolphin, CA/OR/WA.<br>Steller sea lion, Eastern U.S. |
| *Pot, Ring Net, and Trap Fisheries:* | | |
| AK Bering Sea, Aleutian Islands sablefish pot | 6 | None documented. |
| AK Bering Sea, Aleutian Islands crab pot | 540 | Bowhead whale, Western Arctic.<br>Gray whale, Eastern North Pacific. |
| AK Gulf of Alaska crab pot | 271 | None documented. |
| AK Gulf of Alaska Pacific cod pot | 116 | Harbor seal, GOA. |
| AK Gulf of Alaska sablefish pot | 248 | None documented. |
| AK Southeast Alaska crab pot | 375 | Humpback whale, Central North Pacific (Southeast AK). |
| AK Southeast Alaska shrimp pot | 99 | Humpback whale, Central North Pacific (Southeast AK). |
| AK shrimp pot, except Southeast | 141 | None documented. |
| AK octopus/squid pot | 15 | None documented. |
| CA rock crab pot | 124 | Gray whale, Eastern North Pacific.<br>Harbor seal, CA. |
| WA/OR/CA hagfish pot | 54 | None documented. |
| WA/OR shrimp pot/trap | 254 | None documented. |
| WA Puget Sound Dungeness crab pot/trap | 249 | None documented. |
| HI crab trap | 5 | Humpback whale, Central North Pacific. |
| HI fish trap | 9 | None documented. |
| HI lobster trap | <3 | None documented in recent years. |
| HI shrimp trap | 10 | None documented. |
| HI crab net | 4 | None documented. |
| HI Kona crab loop net | 33 | None documented. |
| *Hook and Line, Handline, and Jig Fisheries:* | | |
| AK Bering Sea, Aleutian Islands groundfish jig | 2 | None documented. |
| AK Gulf of Alaska groundfish jig | 214 | Fin whale, Northeast Pacific. |
| AK halibut jig | 71 | None documented. |
| American Samoa bottomfish | fewer than 20 | None documented. |
| Commonwealth of the Northern Mariana Islands bottomfish. | 28 | None documented. |
| Guam bottomfish | >300 | None documented. |
| HI aku boat, pole, and line | <3 | None documented. |
| HI bottomfish handline | 578 | None documented in recent years. |
| HI inshore handline | 357 | None documented. |
| HI pelagic handline | 534 | None documented. |
| WA groundfish, bottomfish jig | 679 | None documented. |
| Western Pacific squid jig | 0 | None documented. |
| *Harpoon Fisheries:* | | |
| CA swordfish harpoon | 6 | None documented. |
| *Pound Net/Weir Fisheries:* | | |
| AK herring spawn on kelp pound net | 291 | None documented. |
| AK Southeast herring roe/food/bait pound net | 2 | None documented. |
| HI bullpen trap | 3 | None documented. |
| *Bait Pens:* | | |
| WA/OR/CA bait pens | 13 | California sea lion, U.S. |
| *Dredge Fissheries:* | | |
| AK scallop dredge | 108 (5 AK) | None documented. |
| *Dive, Hand/Mechanical Collection Fisheries:* | | |
| AK clam | 130 | None documented. |
| AK Dungeness crab | 2 | None documented. |
| AK herring spawn on kelp | 266 | None documented. |
| AK miscellaneous invertebrates handpick | 214 | None documented. |
| HI black coral diving | <3 | None documented. |
| HI fish pond | 5 | None documented. |

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

| Fishery description | Estimated # of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| HI handpick | 46 | None documented. |
| HI lobster diving | 19 | None documented. |
| HI spearfishing | 163 | None documented. |
| WA/CA kelp | 4 | None documented. |
| WA/OR bait shrimp, clam hand, dive, or mechanical collection. | 201 | None documented. |
| OR/CA sea urchin, sea cucumber hand, dive, or mechanical collection. | 10 | None documented. |
| *Commercial Passenger Fishing Vessel (Charter Boat) Fisheries:* | | |
| AK/WA/OR/CA commercial passenger fishing vessel | >7,000 (1,006 AK) | Humpback whale, Western North Pacific.<br>Killer whale, unknown.<br>Steller sea lion, Eastern U.S.<br>Steller sea lion, Western U.S. |
| *Live Finfish/Shellfish Fisheries:* | | |
| CA nearshore finfish live trap/hook-and-line | 93 | None documented. |
| HI aquarium collecting | 90 | None documented. |

List of Abbreviations and Symbols Used in Table 1: AI—Aleutian Islands; AK—Alaska; BS—Bering Sea; CA—California; ENP—Eastern North Pacific; GOA—Gulf of Alaska; HI—Hawaii; MHI—Main Hawaiian Islands; OR—Oregon; WA—Washington;

[1] Fishery classified based on mortalities and serious injuries of this stock, which are greater than or equal to 50 percent (Category I) or greater than 1 percent and less than 50 percent (Category II) of the stock's PBR.

[2] Fishery classified by analogy.

* Fishery has an associated high seas component listed in Table 3; and

^ The list of marine mammal species and/or stocks killed or injured in this fishery is identical to the list of species and/or stocks killed or injured in high seas component of the fishery, minus species and/or stocks that have geographic ranges exclusively on the high seas. The species and/or stocks are found, and the fishery remains the same, on both sides of the EEZ boundary. Therefore, the EEZ components of these fisheries pose the same risk to marine mammals as the components operating on the high seas.

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN

| Fishery description | Estimated number of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| **Category I** | | |
| *Gillnet Fisheries:* | | |
| Mid-Atlantic gillnet | 4,020 | Bottlenose dolphin, Northern Migratory coastal.<br>Bottlenose dolphin, Southern Migratory coastal.[1]<br>Bottlenose dolphin, Northern NC estuarine system.[1]<br>Bottlenose dolphin, Southern NC estuarine system.[1]<br>Bottlenose dolphin, WNA offshore.<br>Common dolphin, WNA.<br>Gray seal, WNA.<br>Harbor porpoise, GME/BF.<br>Harbor seal, WNA.<br>Hooded seal, WNA.<br>Humpback whale, Gulf of Maine.<br>Minke whale, Canadian east coast. |
| Northeast sink gillnet | 4,072 | Bottlenose dolphin, WNA offshore.<br>Common dolphin, WNA.<br>Fin whale, WNA.<br>Gray seal, WNA.[1]<br>Harbor porpoise, GME/BF.<br>Harbor seal, WNA.<br>Harp seal, WNA.<br>Humpback whale, Gulf of Maine.<br>Minke whale, Canadian east coast.<br>North Atlantic right whale, WNA.<br>Risso's dolphin, WNA.<br>White-sided dolphin, WNA. |
| *Trap/Pot Fisheries:* | | |
| Northeast/Mid-Atlantic American lobster trap/pot | 8,485 | Humpback whale, Gulf of Maine.<br>Minke whale, Canadian east coast.<br>North Atlantic right whale, WNA.[1] |
| *Longline Fisheries:* | | |
| Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline*. | 201 | Atlantic spotted dolphin, Northern GMX.<br>Bottlenose dolphin, Northern GMX oceanic.<br>Bottlenose dolphin, WNA offshore.<br>Common dolphin, WNA |

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

| Fishery description | Estimated number of vessels/ persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| | | Cuvier's beaked whale, WNA.<br>False killer whale, WNA<br>Harbor porpoise, GME, BF.<br>Kogia *spp.* (Pygmy or dwarf sperm whale), WNA.<br>Long-finned pilot whale, WNA.<br>Mesoplodon beaked whale, WNA.<br>Minke whale, Canadian East coast.<br>Pantropical spotted dolphin, Northern GMX.<br>Pygmy sperm whale, GMX.<br>Risso's dolphin, Northern GMX.<br>Risso's dolphin, WNA.<br>Rough-toothed dolphin, Northern GMX.<br>Short-finned pilot whale, Northern GMX.<br>Short-finned pilot whale, WNA.[1]<br>Sperm whale, Northern GMX. |
| **Category II** | | |
| *Gillnet Fisheries:* | | |
| Chesapeake Bay inshore gillnet [2] | 265 | Bottlenose dolphin, unknown (Northern migratory coastal or Southern migratory coastal). |
| Gulf of Mexico gillnet [2] | 248 | Bottlenose dolphin, Eastern GMX coastal.<br>Bottlenose dolphin, GMX bay, sound, and estuarine.<br>Bottlenose dolphin, Mobile Bay, Bonsecour Bay.<br>Bottlenose dolphin, Northern GMX coastal.<br>Bottlenose dolphin, Western GMX coastal. |
| NC inshore gillnet | 2,676 | Bottlenose dolphin, Northern NC estuarine system.[1]<br>Bottlenose dolphin, Southern NC estuarine system.[1] |
| Northeast anchored float gillnet [2] | 852 | Harbor seal, WNA.<br>Humpback whale, Gulf of Maine.<br>White-sided dolphin, WNA. |
| Northeast drift gillnet [2] | 1,036 | None documented. |
| Southeast Atlantic gillnet [2] | 273 | Bottlenose dolphin, Central FL coastal.<br>Bottlenose dolphin, Northern FL coastal.<br>Bottlenose dolphin, SC/GA coastal.<br>Bottlenose dolphin, Southern migratory coastal. |
| Southeastern U.S. Atlantic shark gillnet | 21 | Bottlenose dolphin, unknown (Central FL, Northern FL, SC/GA coastal, or Southern migratory coastal).<br>North Atlantic right whale, WNA. |
| *Trawl Fisheries:* | | |
| Mid-Atlantic mid-water trawl (including pair trawl) | 320 | Bottlenose dolphin, WNA offshore.<br>Harbor seal, WNA. |
| Mid-Atlantic bottom trawl | 633 | Bottlenose dolphin, WNA offshore.[1]<br>Common dolphin, WNA.[1]<br>Gray seal, WNA.[1]<br>Harbor seal, WNA.<br>Risso's dolphin, WNA.[1]<br>White-sided dolphin, WNA. |
| Northeast mid-water trawl (including pair trawl) | 542 | Common dolphin, WNA.<br>Gray seal, WNA.<br>Harbor seal, WNA.<br>Long-finned pilot whale, WNA.[1] |
| Northeast bottom trawl | 968 | Bottlenose dolphin, WNA offshore.[1]<br>Common dolphin, WNA.<br>Gray seal, WNA.[1]<br>Harbor porpoise, GME/BF.<br>Harbor seal, WNA.<br>Harp seal, WNA.<br>Long-finned pilot whale, WNA.[1]<br>Risso's dolphin, WNA.[1]<br>White-sided dolphin, WNA.[1] |
| Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl | 10,824 | Atlantic spotted dolphin, Northern Gulf of Mexico.<br>Bottlenose dolphin, Charleston estuarine system.<br>Bottlenose dolphin, Eastern GMX coastal.[1]<br>Bottlenose dolphin, GMX bay, sound, estuarine.[1]<br>Bottlenose dolphin, GMX continental shelf.<br>Bottlenose dolphin, Mississippi River Delta.<br>Bottlenose dolphin, Mobile Bay, Bonsecour Bay. |

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

| Fishery description | Estimated number of vessels/persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| | | Bottlenose dolphin, Northern GMX coastal.[1] |
| | | Bottlenose dolphin, SC/GA coastal.[1] |
| | | Bottlenose dolphin, Southern migratory coastal. |
| | | Bottlenose dolphin, Western GMX coastal.[1] |
| *Trap/Pot Fisheries:* | | |
| Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot[2]. | 1,101 | Bottlenose dolphin, Biscayne Bay estuarine. |
| | | Bottlenose dolphin, Central FL coastal. |
| | | Bottlenose dolphin, Eastern GMX coastal. |
| | | Bottlenose dolphin, FL Bay. |
| | | Bottlenose dolphin, GMX bay, sound, estuarine (FL west coast portion). |
| | | Bottlenose dolphin, Indian River Lagoon estuarine system. |
| | | Bottlenose dolphin, Jacksonville estuarine system. |
| | | Bottlenose dolphin, Northern GMX coastal. |
| | | Bottlenose dolphin, Sarasota Bay, Little Sarasota Bay. |
| Atlantic mixed species trap/pot[2] | 3,493 | Fin whale, WNA. |
| | | Humpback whale, Gulf of Maine. |
| Atlantic blue crab trap/pot | 6,679 | Bottlenose dolphin, Central FL coastal. |
| | | Bottlenose dolphin, Central GA estuarine system.[1] |
| | | Bottlenose dolphin, Charleston estuarine system.[1] |
| | | Bottlenose dolphin, Indian River Lagoon estuarine system. |
| | | Bottlenose dolphin, Jacksonville estuarine system. |
| | | Bottlenose dolphin, Northern FL coastal.[1] |
| | | Bottlenose dolphin, Northern GA/Southern SC estuarine system. |
| | | Bottlenose dolphin, Northern Migratory coastal. |
| | | Bottlenose dolphin, Northern NC estuarine system.[1] |
| | | Bottlenose dolphin, Northern SC estuarine system. |
| | | Bottlenose dolphin, SC/GA coastal. |
| | | Bottlenose dolphin, Southern GA estuarine system. |
| | | Bottlenose dolphin, Southern Migratory coastal.[1] |
| | | Bottlenose dolphin, Southern NC estuarine system. |
| | | West Indian manatee, FL. |
| *Purse Seine Fisheries:* | | |
| Gulf of Mexico menhaden purse seine | 40–42 | Bottlenose dolphin, GMX bay, sound, estuarine. |
| | | Bottlenose dolphin, Mississippi River Delta. |
| | | Bottlenose dolphin, Mississippi Sound, Lake Borgne, Bay Boudreau. |
| | | Bottlenose dolphin, Northern GMX coastal.[1] |
| | | Bottlenose dolphin, Western GMX coastal.[1] |
| Mid-Atlantic menhaden purse seine[2] | 17 | Bottlenose dolphin, Northern Migratory coastal. |
| | | Bottlenose dolphin, Southern Migratory coastal. |
| *Haul/Beach Seine Fisheries:* | | |
| Mid-Atlantic haul/beach seine | 359 | Bottlenose dolphin, Northern Migratory coastal.[1] |
| | | Bottlenose dolphin, Northern NC estuarine system.[1] |
| | | Bottlenose dolphin, Southern Migratory coastal.[1] |
| NC long haul seine | 22 | Bottlenose dolphin, Northern NC estuarine system.[1] |
| | | Bottlenose dolphin, Southern NC estuarine system. |
| *Stop Net Fisheries:* | | |
| NC roe mullet stop net | 1 | Bottlenose dolphin, Northern NC estuarine system. |
| | | Bottlenose dolphin, unknown (Southern migratory coastal or Southern NC estuarine system). |
| *Pound Net Fisheries:* | | |
| VA pound net | 20 | Bottlenose dolphin, Northern migratory coastal. |
| | | Bottlenose dolphin, Northern NC estuarine system. |
| | | Bottlenose dolphin, Southern Migratory coastal.[1] |
| **Category III** | | |
| *Gillnet Fisheries:* | | |
| Caribbean gillnet | 127 | None documented in the most recent 5 years of data. |
| DE River inshore gillnet | unknown | None documented in the most recent 5 years of data. |
| Long Island Sound inshore gillnet | unknown | None documented in the most recent 5 years of data. |
| RI, southern MA (to Monomoy Island), and NY Bight (Raritan and Lower NY Bays) inshore gillnet. | unknown | None documented in the most recent 5 years of data. |
| Southeast Atlantic inshore gillnet | unknown | Bottlenose dolphin, Northern SC estuarine system. |
| *Trawl Fisheries:* | | |
| Atlantic shellfish bottom trawl | >58 | None documented. |

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

| Fishery description | Estimated number of vessels/ persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| Gulf of Mexico butterfish trawl | 2 | Bottlenose dolphin, Northern GMX oceanic.<br>Bottlenose dolphin, Northern GMX continental shelf. |
| Gulf of Mexico mixed species trawl | 20 | None documented. |
| GA cannonball jellyfish trawl | 1 | Bottlenose dolphin, SC/GA coastal. |
| *Marine Aquaculture Fisheries:* | | |
| Finfish aquaculture | 48 | Harbor seal, WNA. |
| Shellfish aquaculture | unknown | None documented. |
| *Purse Seine Fisheries:* | | |
| Gulf of Maine Atlantic herring purse seine | >7 | Harbor seal, WNA. |
| Gulf of Maine menhaden purse seine | >2 | None documented. |
| FL West Coast sardine purse seine | 10 | Bottlenose dolphin, Eastern GMX coastal. |
| U.S. Atlantic tuna purse seine * | 5 | None documented in most recent 5 years of data. |
| *Longline/Hook and Line Fisheries:* | | |
| Northeast/Mid-Atlantic bottom longline/hook-and-line | >1,207 | None documented. |
| Gulf of Maine, U.S. Mid-Atlantic tuna, shark, swordfish hook-and-line/harpoon. | 2,846 | Humpback whale, Gulf of Maine. |
| Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean snapper-grouper and other reef fish bottom longline/ hook-and-line. | >5,000 | Bottlenose dolphin, GMX continental shelf. |
| Southeastern U.S. Atlantic, Gulf of Mexico shark bottom longline/hook-and-line. | 39 | Bottlenose dolphin, Eastern GMX coastal.<br>Bottlenose dolphin, Northern GMX continental shelf. |
| Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean pelagic hook-and-line/harpoon. | 680 | None documented. |
| U.S. Atlantic, Gulf of Mexico trotline | unknown | None documented. |
| *Trap/Pot Fisheries:* | | |
| Caribbean mixed species trap/pot | 154 | Bottlenose dolphin, Puerto Rico and United States Virgin Islands. |
| Caribbean spiny lobster trap/pot | 40 | None documented. |
| FL spiny lobster trap/pot | 1,268 | Bottlenose dolphin, Biscayne Bay estuarine. Bottlenose dolphin, Central FL coastal.<br>Bottlenose dolphin, Eastern GMX coastal.<br>Bottlenose dolphin, FL Bay estuarine.<br>Bottlenose dolphin, FL Keys. |
| Gulf of Mexico blue crab trap/pot | 4,113 | Bottlenose dolphin, Barataria Bay.<br>Bottlenose dolphin, Eastern GMX coastal.<br>Bottlenose dolphin, GMX bay, sound, estuarine.<br>Bottlenose dolphin, Mississippi Sound, Lake Borgne, Bay Boudreau.<br>Bottlenose dolphin, Mobile Bay, Bonsecour Bay.<br>Bottlenose dolphin, Northern GMX coastal.<br>Bottlenose dolphin, Western GMX coastal.<br>West Indian manatee, FL. |
| Gulf of Mexico mixed species trap/pot | unknown | None documented. |
| Southeastern U.S. Atlantic, Gulf of Mexico golden crab trap/pot. | 10 | None documented. |
| U.S. Mid-Atlantic eel trap/pot | unknown | None documented. |
| *Stop Seine/Weir/Pound Net/Floating Trap/Fyke Net Fisheries:* | | |
| Gulf of Maine herring and Atlantic mackerel stop seine/ weir. | >1 | Harbor porpoise, GME/BF.<br>Harbor seal, WNA.<br>Minke whale, Canadian east coast.<br>Atlantic white-sided dolphin, WNA. |
| U.S. Mid-Atlantic crab stop seine/weir | 2,600 | None documented. |
| U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the NC roe mullet stop net). | unknown | Bottlenose dolphin, Northern NC estuarine system. |
| RI floating trap | 9 | None documented. |
| Northeast and Mid-Atlantic fyke net | unknown | None documented. |
| *Dredge Fisheries:* | | |
| Gulf of Maine sea urchin dredge | unknown | None documented. |
| Gulf of Maine mussel dredge | unknown | None documented. |
| Gulf of Maine, U.S. Mid-Atlantic sea scallop dredge | >403 | None documented. |
| Mid-Atlantic blue crab dredge | unknown | None documented. |
| Mid-Atlantic soft-shell clam dredge | unknown | None documented. |
| Mid-Atlantic whelk dredge | unknown | None documented. |
| U.S. Mid-Atlantic/Gulf of Mexico oyster dredge | 7,000 | None documented. |
| New England and Mid-Atlantic offshore surf clam/quahog dredge. | unknown | None documented. |
| *Haul/Beach Seine Fisheries:* | | |

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

| Fishery description | Estimated number of vessels/ persons | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| Caribbean haul/beach seine | 38 | West Indian manatee, Puerto Rico. |
| Gulf of Mexico haul/beach seine | unknown | None documented. |
| Southeastern U.S. Atlantic haul/beach seine | 25 | None documented. |
| *Dive, Hand/Mechanical Collection Fisheries:* | | |
| Atlantic Ocean, Gulf of Mexico, Caribbean shellfish dive, hand/mechanical collection. | 20,000 | None documented. |
| Gulf of Maine urchin dive, hand/mechanical collection | unknown | None documented. |
| Gulf of Mexico, Southeast Atlantic, Mid-Atlantic, and Caribbean cast net. | unknown | None documented. |
| *Commercial Passenger Fishing Vessel (Charter Boat) Fisheries:* | | |
| Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel. | 4,000 | Bottlenose dolphin, Barataria Bay estuarine system.<br>Bottlenose dolphin, Biscayne Bay estuarine.<br>Bottlenose dolphin, Central FL coastal.<br>Bottlenose dolphin, Choctawhatchee Bay.<br>Bottlenose dolphin, Eastern GMX coastal.<br>Bottlenose dolphin, FL Bay.<br>Bottlenose dolphin, GMX bay, sound, estuarine.<br>Bottlenose dolphin, Indian River Lagoon estuarine system.<br>Bottlenose dolphin, Jacksonville estuarine system.<br>Bottlenose dolphin, Mississippi Sound, Lake Borgne, Bay Boudreau.<br>Bottlenose dolphin, Northern FL coastal.<br>Bottlenose dolphin, Northern GA/Southern SC estuarine.<br>Bottlenose dolphin, Northern GMX coastal.<br>Bottlenose dolphin, Northern migratory coastal.<br>Bottlenose dolphin, Northern NC estuarine.<br>Bottlenose dolphin, Southern migratory coastal.<br>Bottlenose dolphin, Southern NC estuarine system.<br>Bottlenose dolphin, SC/GA coastal.<br>Bottlenose dolphin, Western GMX coastal.<br>Short-finned pilot whale, WNA. |

List of Abbreviations and Symbols Used in Table 2:

DE—Delaware; FL—Florida; GA—Georgia; GME/BF—Gulf of Maine/Bay of Fundy; GMX—Gulf of Mexico; MA—Massachusetts; NC—North Carolina; NY—New York; RI—Rhode Island; SC—South Carolina; VA—Virginia; WNA—Western North Atlantic;

[1] Fishery classified based on mortalities and serious injuries of this stock, which are greater than or equal to 50 percent (Category I) or greater than 1 percent and less than 50 percent (Category II) of the stock's PBR;

[2] Fishery classified by analogy; and

* Fishery has an associated high seas component listed in Table 3.

TABLE 3—LIST OF FISHERIES—COMMERCIAL FISHERIES ON THE HIGH SEAS

| Fishery description | Number of HSFCA permits | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| **Category I** | | |
| *Longline Fisheries:* | | |
| Atlantic Highly Migratory Species * | 45 | Atlantic spotted dolphin, WNA.<br>Bottlenose dolphin, Northern GMX oceanic.<br>Bottlenose dolphin, WNA offshore.<br>Common dolphin, WNA.<br>Cuvier's beaked whale, WNA.<br>False killer whale, WNA.<br>Killer whale, GMX oceanic.<br>Kogia *spp.* whale (Pygmy or dwarf sperm whale), WNA.<br>Long-finned pilot whale, WNA.<br>Mesoplodon beaked whale, WNA.<br>Minke whale, Canadian East coast.<br>Pantropical spotted dolphin, WNA.<br>Risso's dolphin, GMX.<br>Risso's dolphin, WNA.<br>Short-finned pilot whale, WNA. |
| Western Pacific Pelagic (HI Deep-set component) * ^ | 143 | Bottlenose dolphin, HI Pelagic.<br>False killer whale, HI Pelagic.<br>Humpback whale, Central North Pacific.<br>Kogia *spp.* (Pygmy or dwarf sperm whale), HI. |

TABLE 3—LIST OF FISHERIES—COMMERCIAL FISHERIES ON THE HIGH SEAS—Continued

| Fishery description | Number of HSFCA permits | Marine mammal species and/or stocks incidentally killed or injured |
|---|---|---|
| | | Pygmy killer whale, HI.<br>Risso's dolphin, HI.<br>Short-finned pilot whale, HI.<br>Striped dolphin, HI. |
| **Category II** | | |
| *Drift Gillnet Fisheries:* | | |
| Pacific Highly Migratory Species*^ | 5 | Long-beaked common dolphin, CA.<br>Humpback whale, CA/OR/WA.<br>Northern right-whale dolphin, CA/OR/WA.<br>Pacific white-sided dolphin, CA/OR/WA.<br>Risso's dolphin, CA/OR/WA.<br>Short-beaked common dolphin, CA/OR/WA. |
| *Trawl Fisheries:* | | |
| Atlantic Highly Migratory Species ** | 1 | No information. |
| CCAMLR | 0 | Antarctic fur seal. |
| *Purse Seine Fisheries:* | | |
| South Pacific Tuna Fisheries | 26 | No information. |
| Western Pacific Pelagic | 1 | No information. |
| *Longline Fisheries:* | | |
| CCAMLR | 0 | None documented. |
| South Pacific Albacore Troll | 6 | No information. |
| South Pacific Tuna Fisheries ** | 3 | No information. |
| Western Pacific Pelagic (HI Shallow-set component) * ^ | 11 | Blainville's beaked whale, HI.<br>Bottlenose dolphin, HI Pelagic.<br>False killer whale, HI Pelagic.<br>Fin whale, HI.<br>Guadalupe fur seal.<br>Humpback whale, Central North Pacific.<br>Mesoplodon sp., unknown.<br>Northern elephant seal, CA breeding.<br>Risso's dolphin, HI.<br>Rough-toothed dolphin, HI.<br>Short-beaked common dolphin, CA/OR/WA.<br>Striped dolphin, HI. |
| *Handline/Pole and Line Fisheries:* | | |
| Atlantic Highly Migratory Species | 1 | No information. |
| Pacific Highly Migratory Species | 43 | No information. |
| South Pacific Albacore Troll | 10 | No information. |
| Western Pacific Pelagic | 5 | No information. |
| *Troll Fisheries:* | | |
| Atlantic Highly Migratory Species | 0 | No information. |
| South Pacific Albacore Troll | 18 | No information. |
| South Pacific Tuna Fisheries ** | 1 | No information. |
| Western Pacific Pelagic | 4 | No information. |
| **Category III** | | |
| *Longline Fisheries:* | | |
| Northwest Atlantic Bottom Longline | 2 | None documented. |
| Pacific Highly Migratory Species | 105 | None documented in the most recent 5 years of data. |
| *Purse Seine Fisheries:* | | |
| Pacific Highly Migratory Species * ^ | 5 | None documented. |
| *Trawl Fisheries:* | | |
| Northwest Atlantic | 4 | None documented. |
| *Troll Fisheries:* | | |
| Pacific Highly Migratory Species * | 111 | None documented. |

List of Terms, Abbreviations, and Symbols Used in Table 3:

CA—California; GMX—Gulf of Mexico; HI—Hawaii; OR—Oregon; WA—Washington; WNA—Western North Atlantic;

* Fishery is an extension/component of an existing fishery operating within U.S. waters listed in Table 1 or 2. The number of permits listed in Table 3 represents only the number of permits for the high seas component of the fishery;

** These gear types are not authorized under the Pacific HMS FMP (2004), the Atlantic HMS FMP (2006), or without a South Pacific Tuna Treaty license (in the case of the South Pacific Tuna fisheries). Because HSFCA permits are valid for 5 years, permits obtained in past years exist in the HSFCA permit database for gear types that are now unauthorized. Therefore, while HSFCA permits exist for these gear types, it does not represent effort. In order to land fish species, fishers must be using an authorized gear type. Once these permits for unauthorized gear types expire, the permit-holder will be required to obtain a permit for an authorized gear type; and

^ The list of marine mammal species and/or stocks killed or injured in this fishery is identical to the list of marine mammal species and/or stocks killed or injured in U.S. waters component of the fishery, minus species and/or stocks that have geographic ranges exclusively in coastal waters, because the marine mammal species and/or stocks are also found on the high seas and the fishery remains the same on both sides of the EEZ boundary. Therefore, the high seas components of these fisheries pose the same risk to marine mammals as the components of these fisheries operating in U.S. waters.

TABLE 4—FISHERIES AFFECTED BY TAKE REDUCTION TEAMS AND PLANS

| Take reduction plans | Affected fisheries |
| --- | --- |
| Atlantic Large Whale Take Reduction Plan (ALWTRP)—50 CFR 229.32. | *Category I*<br>Mid-Atlantic gillnet.<br>Northeast/Mid-Atlantic American lobster trap/pot.<br>Northeast sink gillnet.<br>*Category II*<br>Atlantic blue crab trap/pot.<br>Atlantic mixed species trap/pot.<br>Northeast anchored float gillnet.<br>Northeast drift gillnet.<br>Southeast Atlantic gillnet.<br>Southeastern U.S. Atlantic shark gillnet.*<br>Southeastern, U.S. Atlantic, Gulf of Mexico stone crab trap/pot.^ |
| Bottlenose Dolphin Take Reduction Plan (BDTRP)—50 CFR 229.35. | *Category I*<br>Mid-Atlantic gillnet.<br>*Category II*<br>Atlantic blue crab trap/pot.<br>Chesapeake Bay inshore gillnet fishery.<br>Mid-Atlantic haul/beach seine.<br>Mid-Atlantic menhaden purse seine.<br>NC inshore gillnet.<br>NC long haul seine.<br>NC roe mullet stop net.<br>Southeast Atlantic gillnet.<br>Southeastern U.S. Atlantic shark gillnet.<br>Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl.^<br>Southeastern, U.S. Atlantic, Gulf of Mexico stone crab trap/pot.^<br>VA pound net. |
| False Killer Whale Take Reduction Plan (FKWTRP)—50 CFR 229.37. | *Category I*<br>HI deep-set longline.<br>*Category II*<br>HI shallow-set longline. |
| Harbor Porpoise Take Reduction Plan (HPTRP)—50 CFR 229.33 (New England) and 229.34 (Mid-Atlantic). | *Category I*<br>Mid-Atlantic gillnet.<br>Northeast sink gillnet. |
| Pelagic Longline Take Reduction Plan (PLTRP)—50 CFR 229.36 | *Category I*<br>Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline. |
| Pacific Offshore Cetacean Take Reduction Plan (POCTRP)—50 CFR 229.31. | *Category II*<br>CA thresher shark/swordfish drift gillnet (≥14 in mesh). |
| Atlantic Trawl Gear Take Reduction Team (ATGTRT) ..................... | *Category II*<br>Mid-Atlantic bottom trawl.<br>Mid-Atlantic mid-water trawl (including pair trawl).<br>Northeast bottom trawl.<br>Northeast mid-water trawl (including pair trawl). |

List of Symbols Used in Table 4:
* Only applicable to the portion of the fishery operating in U.S. waters; and
^ Only applicable to the portion of the fishery operating in the Atlantic Ocean.

## Classification

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule would not have a significant economic impact on a substantial number of small entities. No comments were received on that certification, and no new information has been discovered to change that conclusion. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

This rule contains existing collection-of-information (COI) requirements subject to the Paperwork Reduction Act and would not impose additional or new COI requirements. The COI for the registration of individuals under the MMPA has been approved by the OMB under OMB Control Number 0648–0293 (0.15 hours per report for new registrants). The requirement for reporting marine mammal mortalities or injuries has been approved by OMB under OMB Control Number 0648–0292 (0.15 hours per report). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the COI. Send comments regarding these reporting burden estimates or any other aspect of the COI, including suggestions for reducing burden, to NMFS (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with a COI, subject to the requirements of the Paperwork Reduction Act, unless that COI displays a currently valid OMB control number.

This rule has been determined to be not significant for the purposes of Executive Orders 12866 and 13563.

This rule is not expected to be an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

In accordance with the Companion Manual for NOAA Administrative Order (NAO) 216–6A, NMFS determined that publishing this LOF qualifies to be categorically excluded from further NEPA review, consistent with categories of activities identified in Categorical Exclusion G7 (‘‘Preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis'') of the Companion Manual and we have not identified any extraordinary circumstances listed in Chapter 4 of the Companion Manual for NAO 216–6A that would preclude application of this categorical exclusion. If NMFS takes a management action, for example, through the development of a TRP, NMFS would first prepare an Environmental Impact Statement or Environmental Assessment, as required under NEPA, specific to that action.

This rule would not affect species listed as threatened or endangered under the ESA or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this rule will not affect the conclusions of those opinions. The classification of fisheries on the LOF is not considered to be a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, through the development of a TRP, NMFS would consult under ESA section 7 on that action.

This rule would have no adverse impacts on marine mammals and may have a positive impact on marine mammals by improving knowledge of marine mammals and the fisheries interacting with marine mammals through information collected from observer programs, stranding and sighting data, or take reduction teams.

This rule would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

## References


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National Marine Fisheries Service. 2016. Guidelines for Preparing Stock Assessment Reports Pursuant to the 1994 Amendments to the MMPA. 02–204–01. 25 p. (Available at: *https://www.fisheries.noaa.gov/webdam/download/64690366*)


**Authority:** MMPA, 16 U.S.C. 1361 *et seq.*

Dated: January 8, 2021.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2021–00570 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register

Vol. 86, No. 9

Thursday, January 14, 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.

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2020–0505; FRL–10017–22–OAR]**

**RIN 2060–AU66**

## National Emission Standards for Hazardous Air Pollutants: Carbon Black Production Residual Risk and Technology Review and Carbon Black Production Area Sources Technology Review

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.


**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is proposing amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Carbon Black Production major source category. The proposal addresses the results of the residual risk and technology review (RTR) for this source category as required under the Clean Air Act (CAA). The proposed amendments address hazardous air pollutant (HAP) emissions that occur after the main unit filter of a carbon black production unit, as well as emissions from boilers and process heaters. The proposed amendments also address the startup, shutdown, and malfunction (SSM) provisions of the existing standards, and would require electronic reporting of certain notifications, performance test results, and semiannual reports. Additionally, the proposal addresses the results of the technology review for the Carbon Black Production Area Source NESHAP.


**DATES:**

*Comments.* Comments must be received on or before March 1, 2021. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before February 16, 2021.

*Public hearing:* If anyone contacts us requesting a public hearing on or before January 19, 2021, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–HQ–OAR–2020–0505, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0505 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2020–0505.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2020–0505, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except federal holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact Mr. Korbin Smith Sector Policies and Programs Division (D243–04), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–2416; fax number: (919) 541–4991; and email address: *smith.korbin@epa.gov.* For specific information regarding the risk modeling methodology, contact Mr. James Hirtz, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *hirtz.james@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Participation in virtual public hearing.* Please note that the EPA is deviating from its typical approach for public hearings because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, the EPA cannot hold in-person public meetings at this time.

To request a virtual public hearing, contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* If requested, the virtual hearing will be held on January 29, 2021. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

Upon publication of this document in the **Federal Register**, the EPA will begin pre-registering speakers for the hearing, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen* or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* The last day to pre-register to speak at the hearing will be January 26, 2021. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to *smith.korbin@epa.gov.* The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by January 21, 2021. The EPA may not be able to arrange accommodations without advanced notice.

*Docket.* The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2020–0505. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) 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. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov.*

*Instructions.* Direct your comments to Docket ID No. EPA–HQ–OAR–2020–0505. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

*Submitting CBI.* Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0505. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

*Preamble acronyms and abbreviations.* We use multiple acronyms and terms in this preamble.

While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AEGL Acute exposure guideline level
AERMOD air dispersion model used by the HEM–3 model
ATSDR Agency for Toxic Substance and Disease Registry
CAA Clean Air Act
CalEPA California EPA
CBI Confidential Business Information
CCD combustion control device
CDC Centers for Disease Control and Prevention
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
EAV equivalent annual value
EPA Environmental Protection Agency
ERPG emergency response planning guideline
ERT Electronic Reporting Tool
GACT generally available control technology
HAP hazardous air pollutant(s)
HCl hydrochloric acid
HEM–3 Human Exposure Model, Version 1.5.5
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
ICBA International Carbon Black Association
ICR Information Collection Request
IRIS Integrated Risk Information System
km kilometer
MACT maximum achievable control technology
mg/m3 milligrams per cubic meter
MIR maximum individual risk
MUF main unit filter
NAAQS National Ambient Air Quality Standards
NAICS North American Industry Classification System
NATA National Air Toxics Assessment
NEI National Emissions Inventory
NESHAP national emission standards for hazardous air pollutants
NOAEL no observed adverse effect level
NOCS Notification of Compliance Status
NSR New Source Review
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PDF portable document format
POM polycyclic organic matter
ppm parts per million
PRA Paperwork Reduction Act
PV present value
RBLC Reasonably Available Control Technology, Best Available Control Technology, and Lowest Achievable Emission Rate Clearinghouse
REL reference exposure level
RfC reference concentration
RfD reference dose
RTR residual risk and technology review
SAB Science Advisory Board
SV screening value
SSM startup, shutdown, and malfunction
TOSHI target organ-specific hazard index
tpy tons per year
TRIM.FaTE Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure model
UF uncertainty factor
μg/m3 microgram per cubic meter
URE unit risk estimate
USGS U.S. Geological Survey

*Organization of this document.* The information in this preamble is organized as follows:

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## I. General Information

### *A. Does this action apply to me?*

The source categories that are the subject of this proposal are carbon black production major sources regulated under 40 CFR 63, subpart YY, and carbon black production area sources, regulated under 40 CFR 63 Subpart MMMMMM (6M). The North American Industry Classification System (NAICS) code for the carbon black production industry is 325182. This list of categories and NAICS codes is not intended to be exhaustive, but rather provides a guide for readers regarding the entities that this proposed action is likely to affect.

Federal, state, local, and tribal government entities would not be affected by this proposed action. The Carbon Black Production major source category was added to EPA's source category list June 4,1996 (61 FR 28197). As defined in the *National Emission Standards for Hazardous Air Pollutants; Revision of Initial List of Categories of Sources and Schedule for Standards Under Sections 112(c) and (e) of the Clean Air Act Amendments of 1990,* the Carbon Black Production major source categories are any facility engaged in the manufacture of carbon black using the channel, thermal, or furnace process. (61 FR 28197, June 4, 1996). The Carbon Black Production area source category was added to the EPA's source category list in 2002. (67 FR 70427, November 22, 2002).

### *B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same website. Information on the overall RTR program is available at *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.*

The proposed changes to the CFR that would be necessary to incorporate the changes proposed in this action are set out in an attachment to the memorandum titled *Proposed Regulation Edits for 40 CFR part 63, subpart YY,* available in the docket for this action (Docket ID No. EPA–HQ–OAR–2020–0505). The document includes the specific proposed amendatory language for revising the CFR and, for the convenience of interested parties, a redline version of the regulation. Following signature by the EPA Administrator, the EPA will also post a copy of this memorandum and the attachments to *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

## II. Background

### *A. What is the statutory authority for this action?*

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA establishes a two-stage regulatory process to develop standards for emissions of hazardous air pollutants (HAP) from stationary sources. Generally, the first stage involves establishing technology-based standards and the second stage involves evaluating those standards that are based on maximum achievable control technology (MACT) to determine whether additional standards are needed to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the ''residual risk review.'' In addition to the residual risk review, the CAA also requires the EPA to review standards set under CAA section 112 every 8 years and revise the standards as necessary taking into account any ''developments in practices, processes, or control technologies.'' This review is commonly referred to as the ''technology review.'' When the two reviews are combined into a single rulemaking, it is commonly referred to as the ''risk and technology review.'' The discussion that follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory requirements. A more comprehensive discussion appears in the document titled *CAA Section 112 Risk and Technology Reviews: Statutory Authority and Methodology,* in the docket for this rulemaking.

In the first stage of the CAA section 112 standard setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. ''Major sources'' are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources are ''area sources.'' For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) also establishes a minimum control level for MACT standards, known as the MACT ''floor.'' In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards in lieu of numerical emission standards. The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as beyond-the-floor standards. For area sources, CAA section 112(d)(5) gives the EPA discretion to set standards based on generally available control technologies or management practices (GACT standards) in lieu of MACT standards.

The second stage in standard-setting focuses on identifying and addressing any remaining (*i.e.,* ''residual'') risk pursuant to CAA section 112(f). For source categories subject to MACT standards, section 112(f)(2) of the CAA requires the EPA to determine whether promulgation of additional standards is needed to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. Section 112(d)(5) of the CAA provides that this residual risk review is not required for categories of area sources subject to GACT standards. Section 112(f)(2)(B) of the CAA further expressly preserves the EPA's use of the two-step approach for developing standards to address any residual risk and the Agency's interpretation of ''ample margin of safety'' developed in the National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the Residual Risk Report that the Agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) upheld the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Cir. 2008).

The approach incorporated into the CAA and used by the EPA to evaluate residual risk and to develop standards under CAA section 112(f)(2) is a two-step approach. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [1] of approximately 1 in 10 thousand.'' (54 FR 38045). If risks are unacceptable, the EPA must determine the emissions standards necessary to reduce risk to an acceptable level without considering costs. In the second step of the approach, the EPA considers whether the emissions standards provide an ample margin of safety to protect public health ''in consideration of all health information, including the number of persons at risk levels higher than approximately 1 in 1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety to protect public health or determine that the standards being reviewed provide an ample margin of safety without any revisions. After conducting the ample margin of safety analysis, we consider whether a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

CAA section 112(d)(6) separately requires the EPA to review standards promulgated under CAA section 112 and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no

[1] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk if an individual were exposed to the maximum level of a pollutant for a lifetime.

less often than every 8 years. In conducting this review, which we call the ''technology review,'' the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (D.C. Cir. 2013). The EPA may consider cost in deciding whether to revise the standards pursuant to CAA section 112(d)(6). The EPA is required to address regulatory gaps, such as missing standards for listed air toxics known to be emitted from the source category. *Louisiana Environmental Action Network (LEAN)* v. *EPA,* 955 F.3d 1088 (D.C. Cir. 2020).

*B. What is this source category and how does the current NESHAP regulate its HAP emissions?*

The NESHAP for the Carbon Black Production major source category was promulgated on July 12, 2002 (67 FR 46258), and codified at 40 CFR part 63, subpart YY. Additionally, the Carbon Black Production area source NESHAP was promulgated on July 16, 2007 (72 FR 38864), and codified at 40 CFR part 63, subpart MMMMMM. Subpart MMMMMM was subsequently amended by a direct final rule on March 26, 2008 (73 FR 15923). As promulgated, the Carbon Black Production major source and area source NESHAPs apply to affected sources of HAP at carbon black production facilities that are, respectively, major sources and area sources of HAP. The affected sources covered by subpart YY include each carbon black production process unit, along with associated process vents and equipment that are located at a major source, as defined in section 112(a) of the CAA.

Emissions limits in the 2002 major source NESHAP for the Carbon Black Production source category were set for process vents associated with the main unit filter (MUF). Process vents at the MUF that have a HAP concentration of the emission stream equal to or greater than 260 parts per million by volume (ppmv), must reduce emissions of HAP by the use of a flare meeting the requirements of 40 CFR part 63, subpart SS, or must reduce emissions of total HAP by 98 weight-percent or to a concentration of 20 ppmv, whichever is less stringent, by venting emissions through a closed vent system to any combination of control devices meeting the requirements of subpart SS of this part, as specified in 40 CFR 63.982(a)(2). 40 CFR 63.982(a)(2) specifies separate compliance depending on whether the closed vent system is routed to a flare, or a non-flare control device. These provisions include flare compliance assessments, and specific monitoring, recordkeeping, and reporting requirements. Emission limits for the Carbon Black Production area source category NESHAP reference the provisions of the major source standard.

*C. What data collection activities were conducted to support this action?*

For the residual risk assessment, the EPA utilized data from the 2016 National Emissions Inventory (NEI). The NEI is a database that contains information about sources that emit criteria air pollutants, their precursors, and HAP. The database includes estimates of annual air pollutant emissions from point, nonpoint, and mobile sources in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The EPA collects this information and releases an updated version of the NEI database every 3 years. The NEI contains data necessary for conducting the residual risk assessment, including annual HAP emissions estimates from individual emission points at facilities in the Carbon Black Production source category, and related emissions release parameters.

The 2016 NEI data for the Carbon Black Production source category was reviewed and updated as appropriate by the International Carbon Black Association (ICBA). Major source members of ICBA represent all major sources subject to this regulation. The information received included descriptions of HAP-emitting processes, information on the HAP-containing materials used, estimates of emissions, and descriptions of control technologies, if present.

The EPA used NEI emissions data and the review by ICBA as the primary technical basis for developing the model input files for the residual risk assessment for the Carbon Black Production source category. Additional information on the development of the modeling file for the Carbon Black Production source category can be found in the document, *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this rulemaking.

To support both the residual risk assessment and the technology review addressed in this action, the EPA visited two carbon black production facilities. During the visits, the EPA discussed process operations, compliance with the existing NESHAP, description of the emission points, process controls, unregulated emissions, and other aspects of facility operations. The EPA used the information provided by the facilities to understand the various operations, existing controls, and new developments in practices, processes, and control technologies for the source category. Additional information can be found in the site visit reports, the *Orion Borger Facility Site Visit Report* and the *Sid Richardson Addis Facility Site Visit Report,* which are available in the docket for this action.

*D. What other relevant background information and data are available?*

For the technology review, we reviewed the Reasonably Available Control Technology (RACT), Best Available Control Technology (BACT), and Lowest Achievable Emission Rate (LAER) Clearinghouse (RBLC). This is a database that contains case-specific information on air pollution control technologies that have been required to reduce the emissions of air pollutants from stationary sources. Under the EPA's New Source Review (NSR) program, if a facility is planning new construction or a modification that will increase the air emissions above certain defined thresholds, an NSR permit may be required. The RBLC promotes the sharing of information among permitting agencies and aids in case-by-case BACT and LAER determinations for NSR permits. We examined information contained in the RBLC to determine what technologies are currently used for this source category to reduce air emissions and did not identify any new technologies.

Additional information about these data collection activities for the technology review is contained in the technology review memorandum, *Technology Review for the Carbon Black Production Source Category,* which is available in the docket for this action.

## III. Analytical Procedures and Decision-Making

In this section, we describe the analyses performed to support the proposed decisions for the RTR and other issues addressed in this proposal.

*A. How do we consider risk in our decision-making?*

As discussed in section II.A of this preamble and in the Benzene NESHAP, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step approach to determine whether or not risks are acceptable and to determine if the standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and, thus, ''[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information.'' (54 FR 38046). Similarly, with regard to the ample margin of safety determination, ''the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.*

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. The EPA conducts a risk assessment that provides estimates of the MIR posed by emissions of HAP that are carcinogens from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects, and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects.[2] The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The scope of the EPA's risk analysis is consistent with the explanation in the EPA's response to comments on our policy under the Benzene NESHAP:

> The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing his expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in his judgment, believes are appropriate to determining what will ''protect the public health.''

(54 FR 38057). Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risk. The Benzene NESHAP explained that ''an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes an MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' *Id.* at 38045. In other words, risks that include an MIR above 100-in-1 million may be determined to be acceptable, and risks with an MIR below that level may be determined to be unacceptable, depending on all of the available health information. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify the HAP risk that may be associated with emissions from other facilities that do not include the source category under review, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in the category.

The EPA understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing noncancer risk, where pollutant-specific exposure health reference levels (*e.g.,* reference concentrations (RfCs)) are based on the assumption that thresholds exist for adverse health effects. For example, the EPA recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse noncancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in an increased risk of adverse noncancer health effects. In May 2010, the Science Advisory Board (SAB) advised the EPA ''that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.''[3]

In response to the SAB recommendations, the EPA incorporates cumulative risk analyses into its RTR risk assessments. The Agency: (1) Conducts facility-wide assessments, which include source category emission points, as well as other emission points within the facilities; (2) combines exposures from multiple sources in the same category that could affect the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzes the ingestion route of exposure. In addition, the RTR risk assessments consider aggregate cancer risk from all carcinogens and aggregated noncancer HQs for all noncarcinogens affecting the same target organ or target organ system.

Although we are interested in placing source category and facility-wide HAP risk in the context of total HAP risk from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Estimates of total HAP risk from emission sources other than those that we have studied in depth during this RTR review would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

### *B. How do we perform the technology review?*

Our technology review primarily focuses on the identification and

[2] The MIR is defined as the cancer risk associated with a lifetime of exposure at the highest concentration of HAP where people are likely to live. The HQ is the ratio of the potential HAP exposure concentration to the noncancer dose-response value; the HI is the sum of HQs for HAP that affect the same target organ or organ system.

[3] Recommendations of the SAB Risk and Technology Review Methods Panel are provided in their report, which is available at: *https://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. Where we identify such developments, we analyze their technical feasibility, estimated costs, energy implications, and non-air environmental impacts. We also consider the emission reductions associated with applying each development. This analysis informs our decision of whether it is ''necessary'' to revise the emissions standards. In addition, we consider the appropriateness of applying controls to new sources versus retrofitting existing sources. For this exercise, we consider any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards;
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original MACT standards) that could result in additional emissions reduction;
- Any work practice or operational procedure that was not identified or considered during development of the original MACT standards;
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original MACT standards; and
- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed the NESHAP, we review a variety of data sources in our investigation of potential practices, processes, or controls. We also review the NESHAP and the available data to determine if there are any unregulated emissions of HAP within the source category and evaluate this data for use in developing new emission standards. See sections II.C and II.D of this preamble for information on the specific data sources that were reviewed as part of the technology review.

### *C. How do we estimate post-MACT risk posed by the source category?*

In this section, we provide a complete description of the types of analyses that we generally perform during the risk assessment process. In some cases, we do not perform a specific analysis because it is not relevant. For example, in the absence of emissions of HAP known to be persistent and bioaccumulative in the environment (PB–HAP), we would not perform a multipathway exposure assessment. Where we do not perform an analysis, we state that we do not and provide the reason. While we present all of our risk assessment methods, we only present risk assessment results for the analyses actually conducted (see section IV.B of this preamble).

The EPA conducts a risk assessment that provides estimates of the MIR for cancer posed by the HAP emissions from each source in the source category, the HI for chronic exposures to HAP with the potential to cause noncancer health effects, and the HQ for acute exposures to HAP with the potential to cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The seven sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the 2020 Risk and Technology Review Proposed Rule.* The methods used to assess risk (as described in the seven primary steps below) are consistent with those described by the EPA in the document reviewed by a panel of the EPA's SAB in 2009;[4] and described in the SAB review report issued in 2010. They are also consistent with the key recommendations contained in that report.

#### 1. How did we estimate actual emissions and identify the emissions release characteristics?

The estimated actual emissions and the emission release characteristics for each facility in the source category were obtained from the 2016 NEI. In addition, the EPA provided draft actual emissions data and stack parameters to facilities for review and confirmation. In some cases, facilities were contacted to confirm emissions that appeared to be outliers, otherwise inconsistent with our understanding of the industry, or associated with high risk values in our initial risk screening analyses. Where appropriate, emission values and release characteristics were corrected, based on revised stack parameter information provided by the facilities. Additional information on the development of the modeling file for the source category, including the development of the actual emissions and emissions release characteristics, can be found in the Appendix 1 of the document, *Residual Risk Assessment for Carbon Black Production Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

#### 2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during a specified annual time period. These ''actual'' emission levels are often lower than the emission levels allowed under the requirements of the current MACT standards. The emissions allowed under the MACT standards are referred to as the ''MACT-allowable'' emissions. We discussed the consideration of both MACT-allowable and actual emissions in the final Coke Oven Batteries RTR (70 FR 19992, 19998 through 19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP RTR (71 FR 34421, 34428, June 14, 2006, and 71 FR 76603, 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risk at the MACT-allowable level is inherently reasonable since that risk reflects the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach. (54 FR 38044.)

In order to calculate allowable emissions, a detailed analysis of the source category was conducted to determine how each major source facility meets the emissions standards of the Carbon Black NESHAP. With respect to the various types of controls used within the source category, all facilities use a combination of combustion control devices (CCDs). Facilities that manufacture carbon black typically have several types of CCDs including but not limited to, flares, incinerators, boilers/process heaters, and dryers. CCDs can be used to control emissions for a single emissions source, or as is generally the case, to control emissions from multiple emission sources/emission source types.

[4] U.S. EPA. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* June 2009. EPA–452/R–09–006. *https://www3.epa.gov/airtoxics/rrisk/rtrpg.html.*

Historically, the majority of facilities in this source category utilize flares to control emissions. Emissions reductions for flares in this source category presume to control HAP at a level of 98 percent (*e.g.,* see as an example, Technical Supplement 4: Flares in ''2016 Emissions Inventory Guidelines,'' (TCEQ 2017)). Due to ongoing consent decrees, several facilities are transitioning from flares to incinerators to reduce criteria pollutants. Since the current emission limit allows the use of a flare, or to control emissions to 98 percent, and all facilities utilize a CCD meeting those requirements, it is appropriate to estimate actual emissions as equal to allowable emissions.

For equipment leaks, which are subject to work practice standards, there is no difference between actual and MACT-allowable emissions for facilities in the Carbon Black Production source category. This is because all facilities are using the same work practice standard, and when the work practice standard is correctly applied, the actual emissions that result are the same as allowable emissions. For additional information on the allowable calculations, see *Development of the RTR Proposal Risk Modeling Dataset for the Carbon Black Production Source Category,* available in the docket for this rulemaking.

3. How do we conduct dispersion modeling, determine inhalation exposures, and estimate individual and population inhalation risk?

Both long-term and short-term inhalation exposure concentrations and health risk from the source category addressed in this proposal were estimated using the Human Exposure Model (HEM–3).[5] The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources, and (3) estimating individual and population-level inhalation risk using the exposure estimates and quantitative dose-response information.

a. Dispersion Modeling

The air dispersion model AERMOD, used by the HEM–3 model, is one of the EPA's preferred models for assessing air pollutant concentrations from industrial facilities.[6] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2016) of hourly surface and upper air observations from 824 meteorological stations selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block[7] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant-specific dose-response values is used to estimate health risk. These are discussed below.

b. Risk From Chronic Exposure to HAP

In developing the risk assessment for chronic exposures, we use the estimated annual average ambient air concentrations of each HAP emitted by each source in the source category. The HAP air concentrations at each nearby census block centroid located within 50 km of the facility are a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

For each facility, we calculate the MIR as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, 52 weeks per year, 70 years) exposure to the maximum concentration at the centroid of each inhabited census block. We calculate individual cancer risk by multiplying the estimated lifetime exposure to the ambient concentration of each HAP (in micrograms per cubic meter (μg/m$^3$)) by its unit risk estimate (URE). The URE is an upper-bound estimate of an individual's incremental risk of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use UREs from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) UREs, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate. The pollutant-specific dose-response values used to estimate health risk are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

To estimate individual lifetime cancer risks associated with exposure to HAP emissions from each facility in the source category, we sum the risks for each of the carcinogenic HAP[8] emitted by the modeled facility. We estimate cancer risk at every census block within 50 km of every facility in the source category. The MIR is the highest individual lifetime cancer risk estimated for any of those census blocks. In addition to calculating the MIR, we estimate the distribution of individual cancer risks for the source category by summing the number of individuals within 50 km of the sources whose estimated risk falls within a specified risk range. We also estimate annual cancer incidence by multiplying the estimated lifetime cancer risk at each census block by the number of people residing in that block, summing results for all of the census blocks, and then dividing this result by a 70-year lifetime.

To assess the risk of noncancer health effects from chronic exposure to HAP, we calculate either an HQ or a target organ-specific hazard index (TOSHI). We calculate an HQ when a single noncancer HAP is emitted. Where more than one noncancer HAP is emitted, we sum the HQ for each of the HAP that affects a common target organ or target

[5] For more information about HEM–3, go to *https://www.epa.gov/fera/risk-assessment-and-modeling-human-exposure-model-hem.*

[6] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[7] A census block is the smallest geographic area for which census statistics are tabulated.

[8] The EPA classification system is, in general, an adaptation of the International Agency for Research on Cancer (IARC, 1982) approach for classifying the weight of evidence for human data and animal data. The EPA classification system for the characterization of the overall weight of evidence for carcinogenicity (animal, human, and other supportive data) includes: Group A—Carcinogenic to Humans; Group B—Probably Carcinogenic to Humans; Group C—Possibly Carcinogenic to Humans; Group D—Not Classifiable as to Human Carcinogenicity; and Group E—Evidence of Noncarcinogenicity for Humans. These classifications also coincide with the terms, ''carcinogenic to humans, probably carcinogenic to humans, and possibly carcinogenic to humans,'' respectively, which are the terms advocated in the EPA's *Guidelines for Carcinogenic Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986); *https://nepis.epa.gov/Exe/ZyPDF.cgi/30004TZX.PDF?/Dockey=/30004TZX.PDF.*

organ system to obtain a TOSHI. The HQ is the estimated exposure divided by the chronic noncancer dose-response value, which is a value selected from one of several sources. The preferred chronic noncancer dose-response value is the EPA RfC, defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime'' (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossaries/and/keyword/lists/search.do?/details=/&vocabName=/IRIS%20/Glossary*). In cases where an RfC from the EPA's IRIS is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic noncancer dose-response value can be a value from the following prioritized sources, which define their dose-response values similarly to the EPA: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*https://www.atsdr.cdc.gov/mrls/index.asp*); (2) the CalEPA Chronic Reference Exposure Level (REL) (*https://oehha.ca.gov/air/crnr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0*); or (3) as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA. The pollutant-specific dose-response values used to estimate health risks are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

c. Risk From Acute Exposure to HAP That May Cause Health Effects Other Than Cancer

For each HAP for which appropriate acute inhalation dose-response values are available, the EPA also assesses the potential health risks due to acute exposure. For these assessments, the EPA makes conservative assumptions about emission rates, meteorology, and exposure location. As part of our efforts to continually improve our methodologies to evaluate the risks that HAP emitted from categories of industrial sources pose to human health and the environment,[9] we revised our treatment of meteorological data to use reasonable worst-case air dispersion conditions in our acute risk screening assessments instead of worst-case air dispersion conditions. This revised treatment of meteorological data and the supporting rationale are described in more detail in *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the 2020 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* This revised approach has been used in this proposed rule and in all other RTR rulemakings proposed on or after June 3, 2019.

To assess the potential acute risk to the maximally exposed individual, we use the peak hourly emission rate for each emission point,[10] reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile), and the point of highest off-site exposure. Specifically, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions co-occur and that a person is present at the point of maximum exposure.

To characterize the potential health risks associated with estimated acute inhalation exposures to a HAP, we generally use multiple acute dose-response values, including acute RELs, acute exposure guideline levels (AEGLs), and emergency response planning guidelines (ERPG) for 1-hour exposure durations, if available, to calculate acute HQs. The acute HQ is calculated by dividing the estimated acute exposure concentration by the acute dose-response value. For each HAP for which acute dose-response values are available, the EPA calculates acute HQs.

An acute REL is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' [11] Acute RELs are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. They are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact. AEGLs represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours.[12] They are guideline levels for ''once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' *Id.* at 21. The AEGL–1 is specifically defined as ''the airborne concentration (expressed as ppm (parts per million) or $mg/m^3$ (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes that ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' *Id.* AEGL–2 are defined as ''the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.'' *Id.*

ERPGs are ''developed for emergency planning and are intended as health-based guideline concentrations for single exposures to chemicals.'' [13] *Id.* at 1. The ERPG–1 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined,

[9] See, *e.g.,* U.S. EPA. *Screening Methodologies to Support Risk and Technology Reviews (RTR): A Case Study Analysis* (Draft Report, May 2017. *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html*).

[10] In the absence of hourly emission data, we develop estimates of maximum hourly emission rates by multiplying the average actual annual emissions rates by a factor (either a category-specific factor or a default factor of 10) to account for variability. This is documented in *Residual Risk Assessment for Carbon Black Production Source Category in Support of the 2020 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* Both are available in the docket for this rulemaking.

[11] CalEPA issues acute RELs as part of its Air Toxics Hot Spots Program, and the 1-hour and 8-hour values are documented in *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* which is available at *https://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary.*

[12] National Academy of Sciences, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2. Available at *https://www.epa.gov/sites/production/files/2015-09/documents/sop_final_standing_operating_procedures_2001.pdf.* Note that the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances ended in October 2011, but the AEGL program continues to operate at the EPA and works with the National Academies to publish final AEGLs (*https://www.epa.gov/aegl*).

[13] *ERPGS Procedures and Responsibilities.* March 2014. American Industrial Hygiene Association.

objectionable odor.'' *Id.* at 2. Similarly, the ERPG–2 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.'' *Id.* at 1.

An acute REL for 1-hour exposure durations is typically lower than its corresponding AEGL–1 and ERPG–1. Even though their definitions are slightly different, AEGL–1s are often the same as the corresponding ERPG–1s, and AEGL–2s are often equal to ERPG–2s. The maximum HQs from our acute inhalation screening risk assessment typically result when we use the acute REL for a HAP. In cases where the maximum acute HQ exceeds 1, we also report the HQ based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1).

For this source category, carbon black is produced at a steady state, continuously. Due to the consistency of operation, we do not expect significant variability in emissions for this source category. To allow for small variations in production, we have assigned an hourly acute multiplication factor of two for all emission process groups. A further discussion of why this factor was chosen can be found in the memorandum, *Development of the RTR Proposal Risk Modeling Dataset for the Carbon Black Production Source Category,* available in the docket for this rulemaking.

In our acute inhalation screening risk assessment, acute impacts are deemed negligible for HAP for which acute HQs are less than or equal to 1, and no further analysis is performed for these HAP. In cases where an acute HQ from the screening step is greater than 1, we assess the site-specific data to ensure that the acute HQ is at an off-site location.

4. How do we conduct the multipathway exposure and risk screening assessment?

The EPA conducts a tiered screening assessment examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* ingestion). We first determine whether any sources in the source category emit any HAP known to be persistent and bioaccumulative in the environment, as identified in the EPA's Air Toxics Risk Assessment Library (see Volume 1, Appendix D, at *https://www.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library*).

For the Carbon Black Production source category, we identified PB–HAP emissions of arsenic, cadmium, lead, mercury, and polycyclic organic matter (POM) of which polycyclic aromatic hydrocarbons is a subset, so we proceeded to the next step of the evaluation. Except for lead, the human health risk screening assessment for PB–HAP consists of three progressive tiers. In a Tier 1 screening assessment, we determine whether the magnitude of the facility-specific emissions of PB–HAP warrants further evaluation to characterize human health risk through ingestion exposure. To facilitate this step, we evaluate emissions against previously developed screening threshold emission rates for several PB–HAP that are based on a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with screening threshold emission rates are arsenic compounds, cadmium compounds, chlorinated dibenzodioxins and furans, mercury compounds, and POM. Based on the EPA estimates of toxicity and bioaccumulation potential, these pollutants represent a conservative list for inclusion in multipathway risk assessments for RTR rules. (See Volume 1, Appendix D at *https://www.epa.gov/sites/production/files/2013-08/documents/volume_1_reflibrary.pdf.*) In this assessment, we compare the facility-specific emission rates of these PB–HAP to the screening threshold emission rates for each PB–HAP to assess the potential for significant human health risks via the ingestion pathway. We call this application of the TRIM.FaTE model the Tier 1 screening assessment. The ratio of a facility's actual emission rate to the Tier 1 screening threshold emission rate is a ''screening value (SV).''

We derive the Tier 1 screening threshold emission rates for these PB–HAP (other than lead compounds) to correspond to a maximum excess lifetime cancer risk of 1-in-1 million (*i.e.,* for arsenic compounds, polychlorinated dibenzodioxins and furans, and POM) or, for HAP that cause noncancer health effects (*i.e.,* cadmium compounds and mercury compounds), a maximum HQ of 1. If the emission rate of any one PB–HAP or combination of carcinogenic PB–HAP in the Tier 1 screening assessment exceeds the Tier 1 screening threshold emission rate for any facility (*i.e.,* the SV is greater than 1), we conduct a second screening assessment, which we call the Tier 2 screening assessment. The Tier 2 screening assessment separates the Tier 1 combined fisher and farmer exposure scenario into fisher, farmer, and gardener scenarios that retain upper-bound ingestion rates.

In the Tier 2 screening assessment, the location of each facility that exceeds a Tier 1 screening threshold emission rate is used to refine the assumptions associated with the Tier 1 fisher and farmer exposure scenarios at that facility. A key assumption in the Tier 1 screening assessment is that a lake and/or farm is located near the facility. As part of the Tier 2 screening assessment, we use a U.S. Geological Survey (USGS) database to identify actual waterbodies within 50 km of each facility and assume the fisher only consumes fish from lakes within that 50 km zone. We also examine the differences between local meteorology near the facility and the meteorology used in the Tier 1 screening assessment. We then adjust the previously-developed Tier 1 screening threshold emission rates for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenario change with the use of local meteorology and the USGS lakes database.

In the Tier 2 farmer scenario, we maintain an assumption that the farm is located within 0.5 km of the facility and that the farmer consumes meat, eggs, dairy, vegetables, and fruit produced near the facility. We may further refine the Tier 2 screening analysis by assessing a gardener scenario to characterize a range of exposures, with the gardener scenario being more plausible in RTR evaluations. Under the gardener scenario, we assume the gardener consumes home-produced eggs, vegetables, and fruit products at the same ingestion rate as the farmer. The Tier 2 screen continues to rely on the high-end food intake assumptions that were applied in Tier 1 for local fish (adult female angler at 99th percentile fish consumption [14]) and locally grown or raised foods (90th percentile consumption of locally grown or raised foods for the farmer and gardener scenarios [15]). If PB–HAP emission rates do not result in a Tier 2 SV greater than 1, we consider those PB–HAP emissions to pose risks below a level of concern. If the PB–HAP emission rates for a

[14] Burger, J. 2002. *Daily consumption of wild fish and game: Exposures of high end recreationists. International Journal of Environmental Health Research,* 12:343–354.

[15] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

facility exceed the Tier 2 screening threshold emission rates, we may conduct a Tier 3 screening assessment.

There are several analyses that can be included in a Tier 3 screening assessment, depending upon the extent of refinement warranted, including validating that the lakes are fishable, locating residential/garden locations for urban and/or rural settings, considering plume-rise to estimate emissions lost above the mixing layer, and considering hourly effects of meteorology and plume-rise on chemical fate and transport (a time-series analysis). If necessary, the EPA may further refine the screening assessment through a site-specific assessment.

In evaluating the potential multipathway risk from emissions of lead compounds, rather than developing a screening threshold emission rate, we compare maximum estimated chronic inhalation exposure concentrations to the level of the current National Ambient Air Quality Standard (NAAQS) for lead.[16] Values below the level of the primary (health-based) lead NAAQS are considered to have a low potential for multipathway risk.

For further information on the multipathway assessment approach, see the *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

5. How do we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect, Environmental HAP, and Ecological Benchmarks

The EPA conducts a screening assessment to examine the potential for an adverse environmental effect as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines ''adverse environmental effect'' as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.''

The EPA focuses on eight HAP, which are referred to as ''environmental HAP,'' in its screening assessment: Six PB–HAP and two acid gases. The PB–HAP included in the screening assessment are arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. The acid gases included in the screening assessment are hydrochloric acid (HCl) and hydrogen fluoride (HF).

HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment, and water. The acid gases, HCl and HF, are included due to their well-documented potential to cause direct damage to terrestrial plants. In the environmental risk screening assessment, we evaluate the following four exposure media: Terrestrial soils, surface water bodies (includes water-column and benthic sediments), fish consumed by wildlife, and air. Within these four exposure media, we evaluate nine ecological assessment endpoints, which are defined by the ecological entity and its attributes. For PB–HAP (other than lead), both community-level and population-level endpoints are included. For acid gases, the ecological assessment evaluated is terrestrial plant communities.

An ecological benchmark represents a concentration of HAP that has been linked to a particular environmental effect level. For each environmental HAP, we identified the available ecological benchmarks for each assessment endpoint. We identified, where possible, ecological benchmarks at the following effect levels: Probable effect levels, lowest-observed-adverse-effect level, and no-observed-adverse-effect level. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

For further information on how the environmental risk screening assessment was conducted, including a discussion of the risk metrics used, how the environmental HAP were identified, and how the ecological benchmarks were selected, see Appendix 9 of the *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

b. Environmental Risk Screening Methodology

For the environmental risk screening assessment, the EPA first determined whether any facilities in the Carbon Black Production source category emitted any of the environmental HAP. For the Carbon Black Production source category, we identified emissions of arsenic, cadmium, lead, mercury, POM and the two acid gasses, hydrochloric and hydrofluoric acid. Because one or more of the environmental HAP evaluated are emitted by at least one facility in the source category, we proceeded to the second step of the evaluation.

c. PB–HAP Methodology

The environmental screening assessment includes six PB–HAP, arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. With the exception of lead, the environmental risk screening assessment for PB–HAP consists of three tiers. The first tier of the environmental risk screening assessment uses the same health-protective conceptual model that is used for the Tier 1 human health screening assessment. TRIM.FaTE model simulations were used to back-calculate Tier 1 screening threshold emission rates. The screening threshold emission rates represent the emission rate in tons of pollutant per year that results in media concentrations at the facility that equal the relevant ecological benchmark. To assess emissions from each facility in the category, the reported emission rate for each PB–HAP was compared to the Tier 1 screening threshold emission rate for that PB–HAP for each assessment endpoint and effect level. If emissions from a facility do not exceed the Tier 1 screening threshold emission rate, the facility ''passes'' the screening assessment, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening threshold emission rate, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening assessment, the screening threshold emission rates are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screening assessment. For soils, we evaluate the average soil concentration for all soil parcels within a 7.5-km

[16] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—differs from the CAA section 112(f) standard (requiring, among other things, that the standard provide an ''ample margin of safety to protect public health''). However, the primary lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.,* the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since that primary lead NAAQS reflects an adequate margin of safety.

radius for each facility and PB–HAP. For the water, sediment, and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening threshold emission rate, the facility ''passes'' the screening assessment and typically is not evaluated further. If emissions from a facility exceed the Tier 2 screening threshold emission rate, we evaluate the facility further in Tier 3.

As in the multipathway human health risk assessment, in Tier 3 of the environmental screening assessment, we examine the suitability of the lakes around the facilities to support life and remove those that are not suitable (*e.g.,* lakes that have been filled in or are industrial ponds), adjust emissions for plume-rise, and conduct hour-by-hour time-series assessments. If these Tier 3 adjustments to the screening threshold emission rates still indicate the potential for an adverse environmental effect (*i.e.,* facility emission rate exceeds the screening threshold emission rate), we may elect to conduct a more refined assessment using more site-specific information. If, after additional refinement, the facility emission rate still exceeds the screening threshold emission rate, the facility may have the potential to cause an adverse environmental effect.

To evaluate the potential for an adverse environmental effect from lead, we compared the average modeled air concentrations (from HEM–3) of lead around each facility in the source category to the level of the secondary NAAQS for lead. The secondary lead NAAQS is a reasonable means of evaluating environmental risk because it is set to provide substantial protection against adverse welfare effects which can include ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

d. Acid Gas Environmental Risk Methodology

The environmental screening assessment for acid gases evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to HF and HCl. The environmental risk screening methodology for acid gases is a single-tier screening assessment that compares modeled ambient air concentrations (from AERMOD) to the ecological benchmarks for each acid gas. To identify a potential adverse environmental effect (as defined in section 112(a)(7) of the CAA) from emissions of HF and HCl, we evaluate the following metrics: The size of the modeled area around each facility that exceeds the ecological benchmark for each acid gas, in acres and square kilometers; the percentage of the modeled area around each facility that exceeds the ecological benchmark for each acid gas; and the area-weighted average SV around each facility (calculated by dividing the area-weighted average concentration over the 50-km modeling domain by the ecological benchmark for each acid gas). For further information on the environmental screening assessment approach, see Appendix 9 of the *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

6. How do we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category emission points of interest, but also emissions of HAP from all other emission sources at the facility for which we have data. For this source category, we conducted the facility-wide assessment using a dataset compiled from the 2016 NEI. The source category records of that NEI dataset were removed, evaluated, and updated as described in section II.C of this preamble: What data collection activities were conducted to support this action? Once a quality assured source category dataset was available, it was placed back with the remaining records from the NEI for that facility. The facility-wide file was then used to analyze risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of the facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

For this source category, we conducted the facility-wide assessment using a dataset that the EPA compiled from the 2016 NEI with updated emissions and release data provided by industry. We analyzed risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, we made a reasonable attempt to identify the source category risks, and these risks were compared to the facility-wide risks to determine the portion of facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

7. How do we consider uncertainties in risk assessment?

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. Also included are those uncertainties specific to our acute screening assessments, multipathway screening assessments, and our environmental risk screening assessments. A more thorough discussion of these uncertainties is included in the *Residual Risk Assessment for the Carbon Black*

*Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action. If a multipathway site-specific assessment was performed for this source category, a full discussion of the uncertainties associated with that assessment can be found in Appendix 11 of that document, *Site-Specific Human Health Multipathway Residual Risk Assessment Report.*

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates, and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor applied to the average annual hourly emission rates, which are intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.,* not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.,* not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.,* meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations. We also note that the selection of meteorology dataset location could have an impact on the risk estimates. As we continue to update and expand our library of meteorological station data used in our risk assessments, we expect to reduce this variability.

c. Uncertainties in Inhalation Exposure Assessment

Although every effort is made to identify all of the relevant facilities and emission points, as well as to develop accurate estimates of the annual emission rates for all relevant HAP, the uncertainties in our emission inventory likely dominate the uncertainties in the exposure assessment. Some uncertainties in our exposure assessment include human mobility, using the centroid of each census block, assuming lifetime exposure, and assuming only outdoor exposures. For most of these factors, there is neither an under nor overestimate when looking at the maximum individual risk or the incidence, but the shape of the distribution of risks may be affected. With respect to outdoor exposures, actual exposures may not be as high if people spend time indoors, especially for very reactive pollutants or larger particles. For all factors, we reduce uncertainty when possible. For example, with respect to census-block centroids, we analyze large blocks using aerial imagery and adjust locations of the block centroids to better represent the population in the blocks. We also add additional receptor locations where the population of a block is not well represented by a single location.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties are generally expressed quantitatively, and others are generally expressed in qualitative terms. We note, as a preface to this discussion, a point on dose-response uncertainty that is stated in the EPA's *2005 Guidelines for Carcinogen Risk Assessment;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (the EPA's *2005 Guidelines for Carcinogen Risk Assessment,* page 1 through 7). This is the approach followed here as summarized in the next paragraphs.

Cancer UREs used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk.[17] That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit). In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[18] Chronic noncancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. To derive dose-response values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach,[19] which considers uncertainty, variability, and gaps in the available data. The UFs are applied to derive dose-response values that are intended to protect against appreciable risk of deleterious effects.

Many of the UFs used to account for variability and uncertainty in the development of acute dose-response values are quite similar to those developed for chronic durations. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute dose-response value at another exposure duration (*e.g.,* 1 hour). Not all acute dose-response values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the dose-response value or values being exceeded. Where relevant to the estimated exposures, the lack of acute dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Uncertainty also exists in the selection of ecological benchmarks for the environmental risk screening assessment. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological

[17] IRIS glossary (*https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

[18] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[19] See *A Review of the Reference Dose and Reference Concentration Processes,* U.S. EPA, December 2002, and *Methods for Derivation of Inhalation Reference Concentrations and Application of Inhalation Dosimetry,* U.S. EPA, 1994.

assessment endpoint. We searched for benchmarks for three effect levels (*i.e.,* no-effects level, threshold-effect level, and probable effect level), but not all combinations of ecological assessment/environmental HAP had benchmarks for all three effect levels. Where multiple effect levels were available for a particular HAP and assessment endpoint, we used all of the available effect levels to help us determine whether risk exists and whether the risk could be considered significant and widespread.

For a group of compounds that are unspeciated (*e.g.,* glycol ethers), we conservatively use the most protective dose-response value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.,* ethylene glycol diethyl ether) that does not have a specified dose-response value, we also apply the most protective dose-response value from the other compounds in the group to estimate risk.

e. Uncertainties in Acute Inhalation Screening Assessments

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112 of the CAA. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and the presence of a person. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile) co-occur. We then include the additional assumption that a person is located at this point at the same time. Together, these assumptions represent a reasonable worst-case actual exposure scenario. In most cases, it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and reasonable worst-case air dispersion conditions occur simultaneously.

f. Uncertainties in the Multipathway and Environmental Risk Screening Assessments

For each source category, we generally rely on site-specific levels of PB–HAP or environmental HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary or whether it is necessary to perform an environmental screening assessment. This determination is based on the results of a three-tiered screening assessment that relies on the outputs from models—TRIM.FaTE and AERMOD—that estimate environmental pollutant concentrations and human exposures for five PB–HAP (dioxins, POM, mercury, cadmium, and arsenic) and two acid gases (HF and HCl). For lead, we use AERMOD to determine ambient air concentrations, which are then compared to the secondary NAAQS standard for lead. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[20]

Model uncertainty concerns whether the model adequately represents the actual processes (*e.g.,* movement and accumulation) that might occur in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screening assessments are appropriate and state-of-the-art for the multipathway and environmental screening risk assessments conducted in support of RTRs.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway and environmental screening assessments, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water, soil characteristics, and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures.

In Tier 2 of the multipathway and environmental screening assessments, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screening assessment. In Tier 3 of the screening assessments, we refine the model inputs again to account for hour-by-hour plume-rise and the height of the mixing layer. We can also use those hour-by-hour meteorological data in a TRIM.FaTE run using the screening configuration corresponding to the lake location. These refinements produce a more accurate estimate of chemical concentrations in the media of interest, thereby reducing the uncertainty with those estimates. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for all three tiers.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For all tiers of the multipathway and environmental screening assessments, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do not exceed screening threshold emission rates (*i.e.,* screen out), we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do exceed screening threshold emission rates, it does not mean that impacts are significant, only that we cannot rule out that possibility and that a refined assessment for the site might be necessary to obtain a more accurate risk characterization for the source category.

The EPA evaluates the following HAP in the multipathway and/or environmental risk screening assessments, where applicable: Arsenic, cadmium, dioxins/furans, lead, mercury (both inorganic and methyl mercury), POM, HCl, and HF. These HAP represent pollutants that can cause adverse impacts either through direct

[20] In the context of this discussion, the term ''uncertainty'' as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

exposure to HAP in the air or through exposure to HAP that are deposited from the air onto soils and surface waters and then through the environment into the food web. These HAP represent those HAP for which we can conduct a meaningful multipathway or environmental screening risk assessment. For other HAP not included in our screening assessments, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond these that we are evaluating may have the potential to cause adverse effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

## IV. Analytical Results and Proposed Decisions

### *A. What actions are we taking pursuant to CAA sections 112(d)(2) and 112(d)(3)?*

In this proposal, pursuant to CAA section 112(d)(2) and (3), the EPA is proposing to broaden the scope of the existing standard, which applies to process vents associated with the MUF, to include all process vents associated with the carbon black production unit. This would require all process vents, including those located after the MUF, to control to 98 percent where the HAP concentration of the emission stream is equal to or greater than 260 ppmv. Additionally, it would require facilities to conduct performance testing on the additional process vents located after the MUF.

### *B. What are the results of the risk assessment and analyses?*

As described above, for the Carbon Black Production major source category, we conducted an inhalation risk assessment for all HAP emitted, a multipathway screening assessment for the PB–HAP emitted, and an environmental risk screening assessment for the PB–HAP and acid gasses emitted from the source category. We present results of the risk assessment briefly below and in more detail in the *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

#### 1. Chronic Inhalation Risk Assessment Results

The EPA estimated the inhalation risk for the Carbon Black Production major source category based on actual and allowable emissions. The estimated baseline maximum individual lifetime cancer risk (MIR) from inhalation posed by the source category is less than 1-in-1 million based on actual emissions and MACT-allowable emissions. The total estimated cancer incidence based on actual or allowable emission levels is 0.00004 excess cancer cases per year, or one case every 25,000 years. No one is exposed to cancer risk greater than or equal to 1-in-1 million based upon actual and allowable emissions (see Table 1 of this preamble).

The maximum chronic noncancer TOSHI value for the source category was estimated to be less than 1 (0.06) based on actual and allowable emissions. For both actual and allowable emissions, neurological risks were driven by hydrogen cyanide emissions from process filters and fugitive emissions.

TABLE 1—INHALATION RISK ASSESSMENT SUMMARY FOR CARBON BLACK PRODUCTION [1] SOURCE CATEGORY

[40 CFR part 63, subpart YY]

| Risk assessment | Number of facilities [2] | Maximum individual cancer risk (1-in-1 million) [3] | Estimated population at increased risk of cancer ≥1-in-1 million | Estimated annual cancer incidence (cases per yr) | Maximum chronic noncancer TOSHI [4] | Maximum screening acute noncancer HQ [5] |
|---|---|---|---|---|---|---|
| **Baseline Actual Emissions** | | | | | | |
| Source Category | 15 | 0.06 | 0 | 0.00004 | <1 (neurological) | 0.09 (REL). |
| Facility-Wide | 15 | 0.06 | 0 | 0.00004 | <1 (neurological). | |
| **Baseline Allowable Emissions** | | | | | | |
| Source Category | 15 | 0.06 | 0 | 0.00004 | <1 (neurological). | |

[1] Based on actual and allowable emissions.
[2] Number of facilities evaluated in the risk assessment. Includes 15 operating facilities subject to 40 CFR part 63, subpart YY.
[3] Maximum individual excess lifetime cancer risk due to HAP emissions from the source category.
[4] Maximum TOSHI. The target organ with the highest TOSHI for the Carbon Black Production source category is the neurological system.
[5] The maximum estimated acute exposure concentration was divided by available short-term threshold values to develop an array of HQ values. The acute HQ shown was based upon the lowest acute 1-hour dose-response value, the REL for hydrogen cyanide. When an HQ exceeds 1, we also show the HQ using the next lowest available acute dose-response value.

#### 2. Screening Level Acute Inhalation Risk Assessment Results

Based on our screening analysis of reasonable worst-case acute exposure to actual emissions from the source category, no HAP exposures result in an acute noncancer HQ greater than 0.09 based upon the 1-hour REL. As discussed in section III.C.3.c of this preamble, we used an acute hourly multiplier of 2 for all emission processes.

#### 3. Multipathway Risk Screening Results

PB–HAP emissions were reported from 14 of the 15 facilities in the source category with seven facilities exceeding the Tier 1 screening threshold emission rates for the carcinogenic PB–HAP, arsenic and POM. Emissions from two facilities exceeded the Tier 1 screening threshold emission rates for mercury and cadmium, which are PB–HAP with noncancer health effects. For the PB–HAP and facilities with Tier 1 SVs greater than 1, we conducted a Tier 2 screening analysis.

Two facilities exceeded the arsenic and POM Tier 2 cancer SV with a maximum value of 9 for the farmer scenario. One facility exceeded the cadmium Tier 2 noncancer SV with a maximum value of 2. Two facilities exceeded the mercury Tier 2 noncancer SV under the fisher scenario, with a maximum value of 4. When we evaluated the effect multiple facilities within the source category could have on common lake(s) in the modeling domain, mercury and cadmium emissions exceeded the noncancer SVs with a maximum value of 4 and 2, respectively.

For cadmium and mercury, we continued the fisher scenario screening analysis with a Tier 3 multipathway screen which comprises three individual stages. These stages included lake, plume rise, and time-series assessments. A Tier 3 lake assessment was conducted for the two facilities with Tier 2 noncancer SVs greater than 1. After conducting the lake analysis screen, only one facility was above a noncancer SV of 1, with a Tier 3 noncancer SV of 2 for mercury, including consideration of cumulative lake impacts from facilities within the source category.

Further details on the Tier 3 screening analysis can be found in Appendix 11 of *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule.*''

An SV in any of the tiers is not an estimate of the cancer risk or a noncancer HQ (or HI). Rather, an SV represents a high-end estimate of what the risk or HQ may be. For example, facility emissions resulting in an SV of 2 for a non-carcinogen can be interpreted to mean that we are confident that the HQ would be lower than 2. Similarly, facility emissions resulting in a cancer SV of 20 for a carcinogen means that we are confident that the cancer risk is lower than 20-in-1 million. Our confidence comes from the health-protective assumptions that are incorporated into the screens: We choose inputs from the upper end of the range of possible values for the influential parameters used in the screens and we assume food consumption behaviors that would lead to high total exposure. This risk assessment estimates the maximum hazard for mercury and cadmium through fish consumption based on upper bound screens and the maximum excess cancer risks from POM and arsenic through ingestion of fish and farm produce.

When we progress from the model designs of the Tier 1, 2, and 3 screens to a site-specific assessment, we refine the risk assessment through incorporation of additional site-specific data and enhanced model designs. Site-specific refinements include the following: (1) Improved spatial locations identifying the boundaries of the watershed and lakes within the watershed as it relates to surrounding facilities within the source category; (2) calculating actual soil/water run-off amounts to target lakes based upon actual soil type(s) and elevation changes associated with the affected watershed versus assuming a worst-case assumption of 100-percent run-off to target lakes; and (3) incorporating AERMOD deposition of pollutants into TRIM.FaTE to accurately account for site-specific release parameters such as stack heights and exit gas temperatures, versus using TRIM.FaTE's simple dispersion algorithms that assume the pollutant is uniformly distributed within the airshed. These refinements have the net effect of improved modeling of the mass of HAP entering a lake by more accurately defining the watershed/lake boundaries as well as the dispersion of HAP into the atmosphere to better reflect deposition contours across all target watersheds and lakes in our 50-km model domain.

As discussed above, the maximum mercury Tier 3 noncancer SV based upon the lake analysis resulted in a maximum value of 2. The EPA determined that it is not necessary to go beyond the Tier 3 lake analysis or conduct a site-specific assessment. As explained above, the SV of 2 is a high-end estimate of what the risk or hazard may be and can be interpreted to mean that we are confident that the HQ would be lower than 2. Further, risk results from five site-specific mercury assessments the EPA has conducted for five RTR source categories resulted in noncancer HQs that range from 50 times to 800 times lower than the respective Tier 2 SV for these facilities (refer to EPA Docket ID No. EPA–HQ–OAR–2017–0015 for a copy of these reports).[21] Based on our review of these analyses, we would expect at least a one order of magnitude decrease in all Tier 2 noncancer SVs for mercury for the Carbon Black Production source category, if we were to perform a site-specific assessment. In addition, based upon the conservative nature of the screens and the level of additional refinements that would go into a site-specific multipathway assessment, were one to be conducted, we are confident that the HI for ingestion exposure, specifically mercury through fish ingestion, is less than 1. Further details on the Tier 3 screening assessment can be found in Appendix 11 of *Residual Risk Assessment for the Carbon Black Production Source Category in Support of the Risk and Technology Review 2020 Proposed Rule.*

In evaluating the potential for adverse health effects from emissions of lead, the EPA compared modeled annual lead concentrations around each facility to the secondary NAAQS level for lead (0.15 µg/m$^3$, arithmetic mean concentration over a 3-month period. The highest annual average lead concentration, of 0.000099 µg/m$^3$, is below the NAAQS level for lead, indicating a low potential for multipathway impacts.

4. Environmental Risk Screening Results

As described in section III.A of this preamble, we conducted an environmental risk screening assessment for the Carbon Black Production source category for the following pollutants: arsenic, cadmium, HCL, hydrofluoric acid, lead, mercury (methyl mercury and mercuric chloride), and POMs.

In the Tier 1 screening analysis for PB–HAP (other than lead, which was evaluated differently), cadmium, methyl mercury, and divalent mercury resulted in exceedances of ecological benchmarks for two facilities. Cadmium emissions had Tier 1 exceedances for the following benchmarks: surface soil no observed adverse effect levels (NOAELs) for mammalian insectivores and avian ground insectivores, and fish (avian piscivores) NOAEL, geometric-maximum-allowable-toxicant-level, and lowest observed adverse effect level benchmarks with a maximum SV of 6. Divalent mercury emissions had Tier 1 exceedances for the following benchmarks: surface soil threshold level—plant communities, surface soil threshold level—invertebrate communities with a maximum SV of 10. Methyl mercury emissions had Tier 1 exceedances for the following benchmarks: NOAEL—mammalian insectivores and surface soil NOAEL for avian ground insectivores with a maximum SV of 10.

[21] EPA Docket records (EPA–HQ–OAR–2017–0015): Appendix 11 of the *Residual Risk Assessment for the Taconite Manufacturing Source Category in Support of the Risk and Technology Review 2019 Proposed Rule;* Appendix 11 of the *Residual Risk Assessment for the Integrated Iron and Steel Source Category in Support of the Risk and Technology Review 2019 Proposed Rule;* Appendix 11 of the *Residual Risk Assessment for the Portland Cement Manufacturing Source Category in Support of the 2018 Risk and Technology Review Final Rule;* and Appendix 11 of the *Residual Risk Assessment for the Coal and Oil-Fired EGU Source Category in Support of the 2018 Risk and Technology Review Proposed Rule and EPA Docket (EPA–HQ–2019–0373):* Appendix 11 of the *Residual Risk Assessment for the Iron and Steel Foundries Source Category in Support of the Risk and Technology Review 2019 Proposed Rule.*

A Tier 2 screening analysis was performed for cadmium, divalent mercury, and methyl mercury emissions. In the Tier 2 screening analysis, there were no exceedances of any of the ecological benchmarks evaluated for cadmium, divalent mercury, and methyl mercury.

For lead, we did not estimate any exceedances of the secondary lead NAAQS. For HCl and HF, the average modeled concentration around each facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, each individual modeled concentration of HCl and HF (*i.e.,* each off-site data point in the modeling domain) was below the ecological benchmarks for all facilities.

Based on the results of the environmental risk screening analysis, we do not expect an adverse environmental effect as a result of HAP emissions from this source category.

5. Facility-Wide Risk Results

As shown in Table 1, the facility-wide risks are the same as the risks for actual emissions and allowable emissions from units subject to the NESHAP for the Carbon Black Production major source category, with no change in incidence or risk drivers.

6. What demographic groups might benefit from this regulation?

To examine the potential for any environmental justice issues that might be associated with the source category, we performed a demographic analysis, which is an assessment of risks to individual demographic groups of the populations living within 5 km and within 50 km of the facilities. In the analysis, we evaluated the distribution of HAP-related cancer and noncancer risks from the Carbon Black Production source category across different demographic groups within the populations living near facilities.[22]

Results of the demographic analysis indicate that, for four of the 11 demographic groups, African American, age greater than or equal to 65, age greater than or equal to 25 years of age without a high school diploma, and people below the poverty level reside within 5 km of facilities in the source category at a percentage greater than the corresponding national percentage for the same demographic groups. When examining the risk levels of those exposed to emissions from carbon black production facilities, we find that no one is exposed to a cancer risk at or above 1-in-1 million or to a chronic noncancer TOSHI greater than 1.

The methodology and the results of the demographic analysis are presented in a technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Carbon Black Production Source Category Operations,* available in the docket for this action.

*C. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effect?*

1. Risk Acceptability

As explained in section II.A of this preamble, the EPA sets standards under CAA section 112(f)(2) using ''a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on MIR of approximately 1-in-10 thousand'' (54 FR 38045, September 14, 1989). The EPA weighed all health risk measures and information, including risk estimation uncertainties, in determining whether risk posed by HAP emissions from the source category is acceptable.

The maximum individual lifetime cancer risk (MIR) for inhalation exposure to actual and allowable emissions from the Carbon Black Production source category (< 1-in-1 million) is two orders of magnitude below 100-in-1 million, which is the presumptive upper limit of acceptable risk. The EPA estimates emissions from the category would result in a cancer incidence of 0.00004 excess cancer cases per year, or one case every 25,000 years. Inhalation exposures to HAP associated with chronic noncancer health effects result in a TOSHI of 0.06 based on actual emissions, 25 times below an exposure that the EPA has determined is without appreciable risk of adverse health effects. An exposure analysis of HAP with acute noncancer health effects demonstrated that the risks are below a level of concern with a max HQ equal to 0.09 based upon the 1-hour REL.

Maximum cancer risk due to ingestion exposures estimated using health-protective risk screening assumptions are below 10-in-1 million for the Tier 2 farmer exposure scenario. Tier 3 screening analyses of mercury exposure due to fish ingestion determined that the maximum HQ for mercury would be less than 2 as explained in section III.C.4 of this preamble. The EPA is confident that this hazard estimate would be reduced to a HQ less than 1, if further refined to incorporate enhanced site-specific analyses such as improved model boundary identification with improved soil/water run-off calculations and AERMOD deposition outputs used in the TRIM.FaTE model. Considering all of the health risk information and factors discussed above, as well as the uncertainties discussed in section III of this preamble, we propose that the risks posed by HAP emissions from the Black Carbon Production source category are acceptable.

2. Ample Margin of Safety Analysis

As directed by CAA section 112(f)(2), we conducted an analysis to determine whether the current emissions standards provide an ample margin of safety to protect public health. In light of the cancer risk being below 1-in-1 million and the noncancer chronic and acute risks being below established levels of concern as well as the low potential for multipathway risks, we propose to conclude that the existing standards provide an ample margin of safety to protect public health.

3. Adverse Environmental Effect

The emissions data for the Carbon Black Production source category indicate that the following environmental HAP are emitted by this category: Arsenic, cadmium, HCl, hydrofluoric acid, lead, mercury (methyl mercury and mercuric chloride), and POMs. The screening-level evaluation of the potential for adverse environmental effects associated with emissions of these environmental HAP from the Carbon Black Production source category indicated that there are no exceedances of Tier 2 screening values for PB–HAP, no exceedances of the average modeled concentration around each facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) for acid gases, and, for lead, we did not estimate any exceedances of the secondary lead NAAQS. In addition, we are unaware of any adverse environmental effects caused by HAP emitted by this source category. Therefore, we do not expect there to be an adverse environmental effect as a result of HAP emissions from this source category and we are proposing that it is not necessary to set a more stringent standard to prevent, taking into consideration costs, energy, safety,

[22] Demographic groups included in the analysis are: White, African American, Native American, other races and multiracial, Hispanic or Latino, children 17 years of age and under, adults 18 to 64 years of age, adults 65 years of age and over, adults without a high school diploma, people living below the poverty level, people living two times the poverty level, and linguistically isolated people.

and other relevant factors, an adverse environmental effect.

*D. What are the results and proposed decisions based on our technology review?*

1. Major Source Technology Review

As described in section III.B of this preamble, the technology review focused on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. In conducting the technology review, we reviewed various informational sources regarding the emissions from the Carbon Black Production major source category. The review included a search of the RBLC database, reviews of air permits for carbon black production facilities, and meetings with industry and the trade association (summarized in the docket for this action). We reviewed these data sources for information on practices, processes, and control technologies that were not considered during the development of the Carbon Black Production NESHAP. We also looked for information on improvements in practices, processes, and control technologies that have occurred since the development of the Carbon Black Production NESHAP for major sources.

After reviewing information from the aforementioned sources, we did not identify any developments in practices, processes, or control technologies used at carbon black production facilities since promulgation of the MACT standard.

Based on the technology review, we are proposing that it is not necessary to revise the existing standards because we did not identify developments in practices, processes, or control technologies. Additional information on our technology review can be found in the memorandum, *Technology Review for Carbon Black Production Source Category,* which is available in the docket for this action.

2. Area Source Technology Review

We performed a technology review of the Carbon Black Production area source NESHAP. As part of that review, we determined that there are no area sources in this source category currently in operation. Given this and the overlap in the requirements for major and area sources, we are concluding that it is not necessary to make changes to the existing area source standards as a result of this review. For more information on the determination that there are no sources subject to the area source standard see the memorandum, *Identification of Area Sources for the Carbon Black Production NESHAP,* available in the docket for this action.

*E. What other actions are we proposing?*

In addition to the proposed actions described above, we are proposing four other revisions to the NESHAP. We are proposing revisions to the SSM-related provisions of the MACT rule in order to ensure that they are consistent with the decision in *Sierra Club* v. *EPA,* 551 F. 3d 1019 (DC Cir. 2008), in which the court vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We are also proposing to require electronic reporting and annual tune-up requirements for applicable process heaters/boilers. Lastly, we are proposing that owners and operators of carbon black production process vents subject to the rule conduct performance tests every 5 years to demonstrate continued compliance with the NESHAP. A discussion of these proposed changes follows.

1. SSM

a. Proposed Elimination of the SSM Exemption

In its 2008 decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), the D.C. Circuit Court vacated portions of two regulatory provisions governing the emissions of HAP during periods of SSM, which were promulgated pursuant to CAA section 112. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some CAA section 112 standards apply continuously. Consistent with the court's decision in *Sierra Club* v. *EPA,* we are proposing standards in this rule that apply at all times. We are also proposing several revisions to cross-references of SSM exemptions in 40 CFR part 63, subpart SS. We also are proposing to eliminate and revise certain recordkeeping and reporting requirements related to the SSM exemption as further described below.

The EPA has attempted to ensure that the provisions we are proposing to eliminate are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether we have successfully done so.

We are proposing the elimination of the SSM exemption, which currently appears at 40 CFR 63.1108, and any reference to SSM requirements in 40 CFR part 63, subpart YY that apply to carbon black production affected sources. For example, we are proposing to eliminate the incorporation of the requirement that the source develop an SSM plan. Additionally, we are proposing to eliminate and revise certain recordkeeping and reporting requirements related to the SSM exemption. The EPA is also proposing several similar SSM-related revisions to 40 CFR part 63, subpart YY to remove SSM-related referenced provisions of 40 CFR part 63, subpart SS (National Emission Standards for Closed Vent Systems, Control Devices, Recovery Devices and Routing to a Fuel Gas System or a Process). These revisions are discussed in greater detail below (see sections IV.E.1.b through j of this preamble).

In proposing the standards in this rule, the EPA has taken into consideration the impacts of the SSM exemption as it relates to startup and shutdown periods and is proposing a 13-minute startup work practice standard. This added provision is required for safety purposes in the absence of the SSM exemption and is discussed further below (see section IV.E.1.i of this preamble).

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead, they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process or monitoring equipment. (40 CFR 63.2) (containing regulatory definition of ''malfunction''). The EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards. The EPA's interpretation has been upheld as reasonable. See *United States Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–10 (D.C. Cir. 2016). Under CAA section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category. There is nothing in CAA section 112 that directs the Agency to consider malfunctions in determining the level ''achieved'' by the best performing sources when setting emission standards. See, *e.g., National*

*Ass'n of Clean Water Agencies* v. *EPA*, 734 F.3d 1115, 1141 (D.C. Cir. 2013) (noting that ''average emissions limitation achieved by the best performing 12 percent of'' sources ''says nothing about how the performance of the best units is to be calculated''). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 112 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to treat a malfunction in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a ''normal or usual manner'' and no statutory language compels the EPA to consider such events in setting CAA section 112 standards.

As the D.C. Circuit Court recognized in *United States Sugar Corp* v. *EPA,* accounting for malfunctions in setting standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree, and duration of various malfunctions that might occur. See *United States Sugar Corp.,* 830 F.3d at 608 (discussing work practice standards and explaining that ''the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor mechanical defects. Any possible standard is likely to be hopelessly generic to govern such a wide array of circumstances.''). As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g., Sierra Club* v. *EPA,* 167 F.3d 658, 662 (D.C. Cir. 1999) (''The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' ''). See also *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.''). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99-percent pollutant removal goes off-line as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99-percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of, and significantly less stringent than, levels that are achieved by a well-performing non-malfunctioning source. It is reasonable to interpret CAA section 112 in a way as to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

Although no statutory language compels the EPA to set standards for malfunctions, the EPA has the discretion to do so where feasible. For example, in the Petroleum Refinery Sector RTR, the EPA established a work practice standard for unique types of malfunction that result in releases from pressure relief devices or emergency flaring events because the EPA had information to determine that such work practices reflected the level of control that applies to the best performers. 80 FR 75178, 75211 through 14 (December 1, 2015). The EPA will consider whether circumstances warrant setting standards for a particular type of malfunction and, if so, whether the EPA has sufficient information to identify the relevant best performing sources and establish a standard for such malfunctions. We also encourage commenters to provide any such information.

In the unlikely event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, sudden, infrequent, not reasonably preventable, and was not instead caused, in part, by poor maintenance or careless operation. 40 CFR 63.2 (definition of malfunction).

If the EPA determines in a particular case that an enforcement action against a source for violation of an emission standard is warranted, the source can raise any and all defenses in that enforcement action and the federal district court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions. Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

In summary, the EPA interpretation of the CAA and, in particular, CAA section 112, is reasonable and encourages practices that will avoid malfunctions. Administrative and judicial procedures for addressing exceedances of the standards fully recognize that violations may occur despite good faith efforts to comply and can accommodate those situations. *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

b. Proposed Revisions to 40 CFR Part 63, Subpart YY (and Referenced 40 CFR Part 63, Subpart SS)

The EPA assessed existing applicable provisions that apply to carbon black production affected sources under 40 CFR part 63, subpart YY (including references to 40 CFR part 63, subpart SS), and we are proposing to eliminate the applicability of provisions that are no longer appropriate, unnecessary, or redundant in the absence of the SSM exemption. The revisions to 40 CFR part 63, subpart YY are discussed in sections IV.E.1.c through i of this section. The revisions to 40 CFR part 63, subpart YY related specifically to references to 40 CFR part 63, subpart SS are discussed in section IV.E.1.j of this preamble.

c. General Duty

Section 63.1108(a)(5) states that the emission standards of 40 CFR part 63, subpart YY (including the Carbon Black MACT standards) do not apply during periods of SSM. However, the paragraph maintains that owners and operators still have a general duty to implement measures to prevent or minimize excess emissions and that the measures to be taken to minimize excess emissions during these times shall be identified in the SSM plan (if applicable).

Similarly, 40 CFR 63.1111(a)(2) states that, during ''periods of startup, shutdown, and malfunction, the owner or operator of an affected source subject to this subpart YY shall operate and maintain such affected source (including associated air pollution control equipment and [continuous parament monitoring systems] (CPMS)) in a manner consistent with safety and good air pollution control practices for minimizing emissions to the extent practical. The general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times if this is not consistent with safety and good air pollution control practices, nor does it require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved.''

The current language in 40 CFR 63.1108(a)(5) and 40 CFR 63.1111(a)(2) characterizes the general duty to minimize emissions during periods of SSM. With the elimination of the SSM exemption, there is no longer a need to maintain the general duty language of 40 CFR 63.1108(a)(5) and 63.1111(a)(2) as owners and operators would be required to comply with the Carbon Black emission standards at all times (including during periods of SSM). Therefore, the EPA is proposing to remove the applicability of requirements at 40 CFR 63.1108(a)(5) (as specified in the proposed 40 CFR 63.1108(a) introductory text revisions) and 40 CFR 63.1111(a)(2) (as specified in the proposed 40 CFR 63.1111(a) introductory text revisions).

d. SSM Plan

We are proposing to remove the applicability of requirements at 40 CFR 63.1111(a) (as specified in the proposed 40 CFR 63.1111(a) introductory text revisions) requiring owners and operators to develop an SSM plan and specify SSM recordkeeping and reporting requirements related to the SSM plan. As noted, the EPA is proposing to remove the applicability of the SSM exemptions. Therefore, affected units will be subject to emission standards during such events. The applicability of a standard during such events will ensure that sources have ample incentive to plan for and achieve compliance and, thus, the SSM plan requirements are no longer necessary.

e. Compliance With Standards

We are proposing to remove the applicability of the provisions of 40 CFR 63.1108(a)(1) and (2) (as specified in the proposed 40 CFR 63.1108(a) introductory text revisions) which exempts sources from standards during periods of SSM. As discussed above, the D.C. Circuit Court in *Sierra Club* vacated the exemptions contained in this provision and held that the CAA requires that some CAA section 112 standards apply continuously. Consistent with *Sierra Club,* the EPA is proposing to revise standards in this rule to apply at all times.

f. Performance Testing

The proposal does not include the language that precludes startup and shutdown periods from being considered ''representative'' for purposes of performance testing, and instead allows performance testing during periods of startup or shutdown if specified by the Administrator. As in 40 CFR 63.997(e)(1), performance tests conducted under this subpart should not be conducted during malfunctions because conditions during malfunctions are often not representative of normal operating conditions. The EPA is also proposing to add the applicability of the requirements at 40 CFR 63.1108(b)(4)(ii)(B) (as specified in the proposed 40 CFR 63.1108(b)(4)(ii)(B) revisions) that require the owner and operator maintain records of process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Finally, the EPA is proposing to add the applicability of language clarifying that the owner and operator make such records available to the Administrator upon request (as specified in the proposed 40 CFR 63.1108(b)(4)(ii)(B) revisions).

g. Recordkeeping

We are not proposing to change the language at 40 CFR 63.1109(a) requiring owners and operators of each affected source to keep copies of reports. However, we are proposing to completely remove the applicability of the requirements at 40 CFR 63.1111(b) (as specified in the proposed 40 CFR 63.1111(b) introductory text revisions), which eliminates periodic SSM reports, consequently eliminating the requirement to keep a copy of this report. These requirements are no longer appropriate for startup and shutdown because SSM plans will no longer be required and the EPA is proposing that recordkeeping and reporting applicable to normal operations will apply to startup and shutdown. In the absence of special provisions applicable to startup and shutdown, such as a startup and shutdown plan, there is no reason to retain additional recordkeeping for startup and shutdown periods.

Furthermore, in lieu of the requirements applicable to malfunctions in 40 CFR 63.1111(b), we are proposing the applicability of the recordkeeping requirements at 40 CFR 63.1111(c)(1). The regulatory text we are proposing to apply at 40 CFR 63.1111(c)(1)(i) differs from 40 CFR 63.1111(b) in that 40 CFR 63.1111(b) requires the creation and retention of a record for each malfunction during which excess emissions occurred, including total duration of all malfunctions for a reporting period. The EPA is proposing that this requirement apply to any failure to meet an applicable standard and is requiring that the source record the date, time, and duration of the failure rather than the total duration of all malfunctions with which excess emissions occurred. For each failure to meet an applicable standard, the EPA is also proposing to revise the rule to include the applicability of the requirements at 40 CFR 63.1111(c)(1)(ii) (as specified in the proposed 40 CFR 63.1111(c) introductory text revisions). This provision requires that sources keep records that include a list of the affected source or equipment, an estimate of the quantity of each regulated pollutant emitted over the standard for which the source failed to meet the standard, and a description of the method used to estimate the emissions. Examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. Furthermore, the EPA is proposing to add the applicability of the requirements at 40 CFR 63.1111(c)(1)(iii) (as specified in the proposed 40 CFR 63.1111(c) introductory text revisions) requiring sources keep records of any corrective actions taken to return the affected unit to its normal or usual manner of operations, and actions taken to minimize emissions in accordance with the general duty regulatory text at 40 CFR 63.1108(a)(4)(ii). The EPA is proposing to require that sources keep records of this information to ensure that there is adequate information to allow the EPA to determine the severity of any failure to meet a standard, and to provide data that may document how the source met the general duty to minimize emissions when the source has failed to meet an applicable standard.

h. Reporting

We are proposing to remove the applicability of the requirements at 40 CFR 63.1111(b) (as specified in the proposed 40 CFR 63.1111(b) introductory text revisions) which describes the reporting requirements for SSM. When applicable, 40 CFR 63.1111(b)(1) requires sources to report actions taken during SSM events to show that actions taken were consistent with their SSM plan. When applicable, 40 CFR 63.1111(b)(2) requires sources to report actions taken during SSM events when actions were inconsistent with their SSM plan. The proposed amendments, therefore, eliminate the applicability of the requirements at 40 CFR 63.1111(b)(2) that require reporting of whether the source deviated from its SSM plan, including required actions to communicate with the Administrator, and the cross-reference to 40 CFR 63.1111(b)(1) that contains the description of the previously required SSM report format and submittal schedule from this section. These specifications are no longer necessary because the events will be reported in otherwise required reports with similar format and submittal requirements. We are proposing to remove the applicability of the requirements at 40 CFR 63.1111(b)(2) for reasons discussed above and because 40 CFR 63.1111(b)(2) describes an immediate report for startups, shutdown, and malfunctions when a source failed to meet an applicable standard but did not follow the SSM plan. We will no longer require owners and operators to report when actions taken during SSM were not consistent with an SSM plan, because plans would no longer be required.

i. Proposed 13-Minute Startup Control Device Bypass Provision

In order to address safety concerns related to the elimination of applicability of the SSM-related provisions when demonstrating compliance with standards under the Carbon Black Production NESHAP, we are proposing that the provisions specified in 40 CFR 63.983(a)(1) of subpart SS, that each closed vent system shall be designed and operated to collect the regulated material vapors from the emission point shall apply at all times, unless complying with the 13-minute startup control device bypass provision. In accordance with the requirements of CAA section 112(h), we are proposing a work practice standard to apply as follows: During periods of startup, when the percent excess oxygen of the collected vapor is greater than or equal to 3 percent, the closed vent system to the control device may be bypassed for the period when the excess oxygen concentration is greater than or equal to 3 percent or for 13 minutes, whichever time is shorter. At all other times, the use of a bypass line on a closed vent system to divert emissions subject to the requirements in Table 8 to 40 CFR 63.1103(f) to the atmosphere or to a control device not meeting the requirements specified in Table 8 of this subpart is an emissions standards violation.

We are proposing this work practice standard because it is not feasible to enforce or prescribe an emission standard during startup. Due to the combustible nature of the tail gas contained in the ductwork and primary bag filter at carbon black facilities, a CCD cannot be safely operated until the contents of the ductwork and primary bag filter are below 3-percent excess oxygen. If a CCD is used while the excess oxygen content is 3 percent or above, this could lead to an explosion at the facility.

After further discussions with the ICBA, we determined that the 13-minute allotment to bypass the CCD, corresponds with the minimum time necessary to completely purge the ductwork and primary bag filter of the facility representing the lowest production rate. A lower production rate results in a lower flow rate through the ductwork, leading to a longer period of time to completely purge the ductwork and primary bag filter. Some facilities that operate using a higher production rate, will be able to purge the line in less than the 13-minute allotment. To address this variability, we are proposing to require that once facilities are under 3-percent excess oxygen content, they must start controlling emissions to meet the applicable emission limit. This requirement minimizes emissions from higher production rate facilities, that can properly purge the ductwork and primary bag filter in less than the 13-minute period.

In order to further reduce emissions during the 13-minute startup work practice period, we are proposing to require that facilities operate using the minimum load for standard starting operating procedures. This requirement will reduce the amount of new HAP being generated during the 13-minute startup period, by limiting the quantity of tail gas being produced, thus, reducing the amount of HAP being released.

All facilities in this source category bypass the combustion control device until the excess oxygen concentration drops below 3-percent and use the minimum load for standard starting operating procedures during startup, therefore, this practice represents the best performers and represents the MACT floor. We did not identify additional measures to reduce emissions during this period, and, therefore, are proposing a standard based on the MACT floor. Based on conversations with industry, there are no other provisions that would need to be proposed as a result of the elimination of the SSM-related provisions being proposed with this action. For additional information on the proposed work practice requirement during periods of startup, see the file, *SSM Email correspondence with ICBA,* available in the docket for this action.

j. 40 CFR Part 63, Subpart SS Revisions

In keeping with the elimination of the SSM exemption, we are also proposing in the Carbon Black Production MACT standards at 40 CFR 63.1103(f)(4) to remove the applicability of SSM-related exemption provisions from 40 CFR part 63, subpart SS referenced by the Carbon Black Production MACT standards under 40 CFR part 63, subpart YY, similar to the revisions to 40 CFR part 63, subpart YY discussed under sections IV.1.E.c through h of this preamble. SSM-exemption related language being proposed for removal includes specific compliance SSM-related provisions/ language such as ''except during periods of start-up, shutdown and malfunction specified in a referencing subpart''; ''other than periods of startups, shutdowns, and malfunctions''; language requiring that an SSM plan be prepared and followed; language referencing operations during periods of SSM not constituting representative conditions for the purpose of a performance test; language allowing the exclusion of SSM data when determining compliance with a standard; excursion language related to SSM periods; and SSM-related record requirements.

2. Electronic Reporting

The EPA is proposing that owners and operators of carbon black production facilities submit electronic copies of required performance test reports, Notification of Compliance Status (NOCS), and periodic reports through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* available in the docket for this action.

The proposed rule requires that performance test results collected using test methods that are supported by the

EPA's Electronic Reporting Tool (ERT) as listed on the ERT website [23] at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance test results be submitted in portable document format (PDF) using the attachment module of the ERT. The proposed rule requires that NOCS reports be submitted as a PDF upload in CEDRI.

For periodic reports, the proposed rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. A draft version of the proposed template for these reports is included in the docket for this action.[24] The EPA specifically requests comment on the content, layout, and overall design of the template.

Additionally, the EPA has identified two broad circumstances in which electronic reporting extensions may be provided. These circumstances are (1) outages of the EPA's CDX or CEDRI which preclude an owner and operator from accessing the system and submitting required reports and (2) *force majeure* events, which are defined as events that will be or have been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevent an owner and operator from complying with the requirement to submit a report electronically. Examples of *force majeure* events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible.

The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements, and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [25] to implement Executive Order 13563 and is in keeping with the EPA's Agency-wide policy [26] developed in response to the White House's Digital Government Strategy.[27] For more information on the benefits of electronic reporting, see the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* referenced earlier in this section.

3. Boiler and Process Heater Provisions

As a result of the EPA's assessment of the MACT standards that currently apply to the Carbon Black Production source category under 40 CFR part 63, subpart YY, the EPA was made aware that there may be instances where carbon black production process vents at affected sources, route emissions to a boiler/process heater for use as fuel gas may not be subject to any requirements. Under the existing standards, although emission streams may be subject to the Carbon Black Production MACT, these streams are exempt from any requirements under the rule when emissions are routed to a boiler/process heater for use as fuel gas. The EPA assumed that these boilers/process heaters would be subject to the 40 CFR part 63, subpart DDDDD, Industrial, Commercial, and Institutional Boilers and Process Heaters NESHAP (Boiler MACT). However, under the Boiler MACT, process heaters/boilers covered under another standard (as with the Carbon Black Production MACT) would not be subject to the Boiler MACT. Specifically, boilers that are used as control devices for other NESHAP standards, where at least 50 percent of the heat input to the boiler is provided by the NESHAP-regulated gas stream would not be subject to the Boiler MACT. This was an unintended consequence of the Carbon Black Production MACT rule. We are, therefore, proposing that applicable boilers/process heaters that receive tail gas for use as fuel gas must comply with annual tune up requirements specified in 40 CFR 63.1103(f)(3)(iii). The proposed annual boiler/process heater tune-up requirements are similar to what is included for gas 1 units under the Boiler MACT.

4. Performance Test Frequency

The EPA is proposing to revise the MACT standard compliance provisions for the Carbon Black Production source category to require owners and operators of carbon black production affected source process vents subject to the rule conduct performance tests every 5 years. The EPA has determined that an initial performance test is insufficient to demonstrate continued compliance over time. Thus, this proposed revision is necessary to ensure continued compliance with standards.

*F. What compliance dates are we proposing?*

Amendments to the Carbon Black Production standards proposed in this rulemaking for adoption under CAA section 112(d)(2) and (3) and CAA section 112(d)(6) are subject to the compliance deadlines outlined in the CAA under CAA section 112(i). New sources, (*i.e.,* sources that commence construction or reconstruction after proposal of the standard) must comply with the standard immediately upon start-up. Existing sources, as described in CAA section 112(i) provides that the compliance date shall provide for compliance as expeditiously as practicable, but no later than 3 years after the effective date of the standard. (''Section 112(i)(3)'s three-year maximum compliance period applies generally to any emission standard . . . *Association of Battery Recyclers* v. *EPA,* 716 F.3d 667, 672 (D.C. Cir. 2013).) In determining what compliance period is as expeditious as practicable, we consider the amount of time needed to plan and construct projects and change operating procedures by affected sources. The final action is not expected to be a ''major rule'' as defined by 5 U.S.C. 804(2), so the effective date of the

[23] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[24] See *Proposal Form 5900–484 Carbon Black Periodic Report,* available at Docket ID No. EPA–HQ–OAR–2020–0505.

[25] The EPA's *Final Plan for Periodic Retrospective Reviews,* August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[26] *E-Reporting Policy Statement for EPA Regulations,* September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[27] *Digital Government: Building a 21st Century Platform to Better Serve the American People,* May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

final rule will be the promulgation date as specified in CAA section 112(d)(10).

The EPA is proposing several changes that would impact new and ongoing compliance requirements for carbon black production affected sources under 40 CFR part 63, subpart YY. These changes include: (1) Process vent emission standards being expanded to cover all applicable (based on an applicability threshold) carbon black production process vents; (2) the requirement to conduct performance tests every 5 years when demonstrating compliance with process vent emission control requirements; (3) boiler and process heater tune up requirements; (4) several SSM-related changes (changes proposed as a result of removing the applicability of the SSM exemption from the requirements); (5) the alternative work practice standard specified in 40 CFR 63.1103(f)(5) related to the requirement that a closed vent system route the collected vapors to a control device when demonstrating compliance, and (6) the addition of requirements to submit reports electronically. The compliance applicability dates vary for listed items one through three, and four and five.

The EPA is proposing that, if applicable, all carbon black production affected sources that commenced construction or reconstruction on or before January 14, 2021, must be in compliance with the: (1) Process vent emission standards being expanded to cover all applicable (based on an applicability threshold) carbon black production process vents; (2) the requirement to conduct performance tests every 5 years when demonstrating compliance with process vent emission control requirements; and (3) boiler and process heater tune up requirements by 1 year after the date the final rule is published in the **Federal Register**. The 1-year allowance for existing sources to comply with the rule is based on the EPA's assessment that owners and operators will need time to plan, determine applicability of process vent requirements, and implement performance testing and control requirements (which could include equipment/retrofit investments to comply with new requirements). The EPA is also proposing that, if applicable, all carbon black production affected sources that commenced construction or reconstruction after January 14, 2021, must be in compliance with the: (1) Process vent emission standards being expanded to cover all applicable (based on an applicability threshold) carbon black production process vents; (2) the requirement to conduct performance tests every 5 years when demonstrating compliance with process vent emission control requirements; and (3) boiler and process heater tune up requirements upon initial startup, or the date of publication of the final rule in the **Federal Register**, whichever is later.

For other proposed requirements related to SSM-related changes and electronic reporting, the EPA is proposing that all carbon black production affected sources that commenced construction or reconstruction on or before January 14, 2021, must be in compliance with the: (1) SSM-related changes (changes proposed as a result of removing the SSM exemption from the requirements); (2) the alternative work practice standard specified in 40 CFR 63.1103(f)(5) related to the requirement that a closed vent system route the collected vapors to a control device when demonstrating compliance; and (3) the addition of requirements to submit reports electronically 180 days after publication of the final rule in the **Federal Register**. All carbon black production affected sources that commenced construction or reconstruction after January 14, 2021, must be in compliance with the: (1) SSM-related changes; (2) the alternative work practice standard specified in 40 CFR 63.1103(f)(5) related to the requirement that a closed vent system route the collected vapors to a control device when demonstrating compliance; and (3) the addition of requirements to submit reports electronically upon initial startup, or the date of publication of the final rule in the **Federal Register**, whichever is later. Based on our assessment, for existing sources, the EPA considers a period of 180 days to be the most expeditious compliance period practicable for complying with SSM-related and electronic reporting requirement change planning and implementation.

For SSM-related requirement changes, we believe 180 days is sufficient for owners and operators of affected sources to familiarize themselves with the operational, monitoring, reporting, and recordkeeping changes associated with the SSM-related requirement changes. Additionally, 180 days is sufficient for owners and operators of affected sources to comply with the alternative work practice standard that addresses safety concerns as a result of removing the applicability of SSM-related provisions when demonstrating compliance with standards under the Carbon Black Production NESHAP.[28]

We are also proposing to change the applicability of requirements for SSM by removing the applicability of the exemption from the requirements to meet the standard during SSM periods and by removing the requirement to develop and implement an SSM plan. Our experience with similar industries that are required to convert reporting mechanisms to install necessary hardware and software, become familiar with the process of submitting performance test results electronically through the EPA's CEDRI, test these new electronic submission capabilities, and reliably employ electronic reporting shows that a time period of a minimum of 90 days, and, more typically, 180 days is generally necessary to successfully accomplish these revisions. Our experience with similar industries further shows that owners and operators generally require a time period of 180 days to read and understand the amended rule requirements; to evaluate their operations to ensure that they can meet the standards during periods of startup and shutdown as defined in the rule and make any necessary adjustments; and to update their operation, maintenance, and monitoring plan to reflect the revised requirements.

For electronic reporting changes, the EPA's experience with similar industries that are required to convert reporting mechanisms, to install necessary hardware and software, become familiar with the process of submitting performance test results electronically through the EPA's CEDRI, test these new electronic submission capabilities, and reliably employ electronic reporting shows that a time period of a minimum of 90 days, and, more typically, 180 days, is generally necessary to successfully accomplish these revisions. Our experience with similar industries further shows that this sort of regulated facility generally requires a time period of 180 days to read and understand the amended rule requirements; to evaluate their operations to ensure that they can meet the standards during periods of startup and shutdown as defined in the rule and make any necessary adjustments; and to update their operation, maintenance, and monitoring plan to reflect the revised requirements.

We solicit comment on the proposed compliance periods. Specifically, we request that comments in support of, and in opposition to, the proposed compliance periods for the differing requirements provide supporting

[28] Section 63.983(a)(1) of 40 CFR part 63, subpart SS requires that each closed vent system be designed and operated to collect the regulated material vapors from the emission point, and to route the collected vapors to a control device, apply at all times.

information as to why or why not the compliance periods proposed are sufficient/insufficient.

## V. Summary of Cost, Environmental, and Economic Impacts

### A. What are the affected sources?

The EPA estimates that there are 15 production facilities in the Carbon Black Production major source category that will be subject to the Carbon Black Production NESHAP affected by the proposed amendments to 40 CFR part 63, subpart YY. The basis of our estimates of affected facilities is provided in the memorandum, *Identification of Major Sources for the Carbon Black Production NESHAP,* which is available in the docket for this action. We are not currently aware of any planned or potential new or reconstructed carbon black production facilities in the source category.

### B. What are the air quality impacts?

While we are broadening the scope of the current standard, setting annual tune up requirements for process heaters/boilers, removing the SSM exemption, and establishing a work practice standard for periods of startup, we do not have data to determine quantitatively the reduction in HAP emissions resulting from this action. Nevertheless, we do not anticipate that this action will result in significant HAP emission reductions.

### C. What are the cost impacts?

Costs were developed on a per facility basis, and all facilities were determined to have similar costs. Costs were valued in 2019 dollars. Costs were broken into three separate categories based on proposed requirements: Initial Applicability Test, Performance Test, and Boiler/Process Heater Maintenance Costs.

Initial applicability testing costs include costs associated with the proposed requirement that process vents located after the MUF meet the standard, which will require facilities to determine whether emissions control is needed for process vents after the MUF process vent. We estimate this to be a one-time cost of $21, 350 per facility, due to the assumption that the majority of HAP is removed and controlled at the MUF, which results in the vent stream concentration located after the MUF to fall below the HAP applicability concentration threshold (260 ppmv).

Performance test costs include costs associated with the proposed requirement to conduct emissions tests at the subject process vents every 5 years starting in the first year of the proposed requirement. We estimate that 20 percent of subject facilities will conduct a performance test each year resulting in an annual cost of $15,241 per facility.

Boiler/process heater maintenance costs include costs associated with the proposed requirement to ensure that boilers and process heaters are operating at peak efficiency and not creating excess emissions through inefficient operation. Initial tune-up costs are assumed to be higher to get the units back to peak efficiency. We assume that following year costs would be lower because less maintenance would be needed. As such, we estimate the initial tune-up cost to be $6,750 per facility and subsequent annual tune-ups to cost $1,350 per facility.

Costs were based primarily on labor, equipment, and travel costs. Labor costs are based on Bureau of Labor Statistics data for relevant employees necessary to perform the tests and maintenance. A detailed cost analysis can be found in the memorandum, *Carbon Black Cost Memorandum,* available in the docket for this action.

### D. What are the economic impacts?

Economic impact analyses focus on changes in market prices and output levels. If changes in market prices and output levels in the primary markets are significant enough, impacts on other markets may also be examined. Both the magnitude of costs associated with the proposed requirements and the distribution of these costs among affected facilities can have a role in determining how the market will change in response to a proposed rule.

Economic costs to carbon black producers were measured in Present Value (PV) total costs and Equivalent Annual Value (EAV) costs. All producer facilities were estimated to have similar costs. All costs are presented in 2019 dollars. Refer to the memorandum, *Carbon Black Economic Impact Analysis,* in the docket for this rulemaking for more information. PV total costs and EAV costs were measured at the 3-percent and 7-percent discount rate. The duration of analysis was 10 years which represented two full cycles of cost analysis for the proposed requirements. Per facility PV total costs were estimated to be $70,000 and $63,000 at the 3-percent and 7-percent discount rates, respectively. EAV costs per facility were estimated to be $8,000 and $9,000 at the 3-percent and 7-percent discount rates, respectively. The combined PV total cost of the proposed requirements for all facilities was estimated to be $1,005,000 and $945,000 at the 3-percent and 7-percent discount rates, respectively. The combined EAV cost of the proposed requirements for all facilities was estimated to be $118,000 and $135,000 at the 3-percent and 7-percent discount rates, respectively.

All carbon black producers subject to this rule were determined to be large entities based on Small Business Administration standards. Because the PV and EAV costs associated with the proposed revisions are minimal, no significant economic impacts from the proposed amendments are anticipated. Refer to the *Carbon Black Economic Impact Memorandum,* available in the docket, for more information.

### E. What are the benefits?

Although the EPA does not anticipate any significant reductions in HAP emissions as a result of the proposed amendments, we believe that the action, if finalized as proposed, would result in improvements to the rule, by broadening the current emission limit, requiring an annual tune-up for boilers/process heaters, and revising the SSM standards such that a standard applies at all times, including periods covered by the proposed work practice standard. Additionally, the proposed amendments requiring electronic submittal of NOCS reports, performance test results, and periodic reports will increase the usefulness of the data, are in keeping with current trends of data availability, will further assist in the protection of public health and the environment, and will ultimately result in reduced reporting burden on the regulated community. See section IV.D.3 of this preamble for more information.

## VI. Request for Comments

We solicit comments on this proposed action. In addition to general comments on this proposed action, we are also interested in additional data that may improve the risk assessments and other analyses. We are specifically interested in receiving any improvements to the data used in the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

## VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the RTR website at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-*

*black-hydrogen.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR website, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.

2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2020–0505 (through the method described in the **ADDRESSES** section of this preamble).

5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility (or facilities). We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the project website at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

## VIII. Statutory and Executive Order 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 not a significant regulatory action and was, therefore, not submitted to OMB for review.

### *B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

### *C. Paperwork Reduction Act (PRA)*

The information collection activities in this proposed rule have been submitted for approval to the OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2677.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

We are proposing changes to the recordkeeping and reporting requirements associated with 40 CFR part 63, subpart YY, in the form of eliminating the SSM plan and reporting requirements; broadening the initial emission limit to include process vents located after the MUF; and including the requirement for electronic submittal of reports. In addition, the number of facilities subject to the standards changed. The number of respondents was reduced from 18 to 15 based on consultation with industry representatives and state/local agencies.

*Respondents/affected entities:* The respondents to the recordkeeping and reporting requirements are owners and operators of carbon black production facilities subject to 40 CFR part 63, subpart YY.

*Respondent's obligation to respond:* Mandatory (40 CFR part 63, subpart YY).

*Estimated number of respondents:* 15 facilities.

*Frequency of response:* The frequency of responses varies depending on the burden item. Responses include one-time review of rule amendments, reports of periodic performance tests, and semiannual compliance reports.

*Total estimated burden:* The annual recordkeeping and reporting burden for responding facilities to comply with all of the requirements in the NESHAP, averaged over the 3 years of this ICR, is estimated to be 289 hours (per year). The average annual burden to the Agency over the 3 years after the amendments are final is estimated to be 213 hours (per year) for the Agency. Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* The annual recordkeeping and reporting cost for responding facilities to comply with all of the requirements in the NESHAP, averaged over the 3 years of this ICR, is estimated to be $180,928 (rounded, per year). There are no estimated capital and operation and maintenance costs. The total average annual Agency cost over the first 3 years after the amendments are final is estimated to be $10,247.

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 the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the dockets identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than February 16, 2021. The EPA will respond to any ICR-related comments in the 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. This action will not impose any requirements on small entities, since there are no small entities in the source category.

### *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 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. No tribal facilities are known to be engaged in the Carbon

Black Production source category and would not be affected by this action. Thus, Executive Order 13175 does not apply to this action.

*H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in sections III.A and IV.A and B of this preamble.

*I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

*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 does not have disproportionately high and adverse human 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 sections IV.A, IV.B, IV.F, and IV.G of this preamble. As discussed in sections IV.A, IV.B, IV.F, and IV.G of this preamble, we performed a demographic analysis for each source category, which is an assessment of risks to individual demographic groups, of the population close to the facilities (within 50 km and within 5 km). In our analysis, we evaluated the distribution of HAP-related cancer risks and noncancer hazards from the Carbon Black Production source category across different social, demographic, and economic groups within the populations living near operations identified as having the highest risks.

Results of the demographic analysis performed for the Carbon Black Production source category indicate that, for four of the 11 demographic groups, African American, people age 65 and up, people living below the poverty level, and adults over 25 without a high school diploma that reside within 5 km of facilities in the source category is greater than the corresponding national percentage for the same demographic groups. When examining the risk levels of those exposed to emissions from carbon black production facilities, we find nobody is exposed to a cancer risk at or above 1-in-1 million and nobody is exposed to a chronic noncancer TOSHI greater than 1. For additional information see the memorandum, *Risk and Technology Review—Analysis of Demographic Factors For Populations Living Near Carbon Black Production Source Category Operations,* available in the docket for this action.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

**Andrew Wheeler,**

*Administrator.*

[FR Doc. 2021–00233 Filed 1–13–21; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2020–0148; FRL–10018–66–OAR]**

**RIN 2060–AU67**

## National Emission Standards for Hazardous Air Pollutants: Refractory Products Manufacturing Residual Risk and Technology Review

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is proposing amendments to address the results of the residual risk and technology review (RTR) that the EPA is required to conduct in accordance with the Clean Air Act (CAA) with regard to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for Refractory Products Manufacturing. The EPA is proposing to find the risks due to emissions of air toxics from this source category under the current standards to be acceptable and that the standards provide an ample margin of safety to protect public health. We are proposing no revisions to the existing numerical emission limits based on these analyses; however, we are proposing new provisions for certain hazardous air pollutants (HAP). The EPA is also proposing to amend provisions addressing emissions during periods of startup, shutdown, and malfunction (SSM) and provisions addressing emissions during periods of scheduled maintenance; to amend provisions regarding electronic reporting of performance test results; and to make miscellaneous clarifying and technical corrections.

**DATES:** *Comments.*

Comments must be received on or before March 1, 2021. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before February 16, 2021.

*Public hearing.* If anyone contacts us requesting a public hearing on or before January 19, 2021, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–HQ–OAR–2020–0148, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0148 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2020–0148.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2020–0148, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except federal holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact Ms. Paula Hirtz, Minerals and Manufacturing Group, Sector Policies and Programs Division (D243–04), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–2618; fax number: (919) 541–4991; and email address: *hirtz.paula@epa.gov.* For specific information regarding the risk modeling methodology, contact Mr. Chris Sarsony, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–4843; fax number: (919) 541–0840; and email address: *sarsony.chris@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Participation in virtual public hearing.* Please note that the EPA is deviating from its typical approach for public hearings because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, the EPA cannot hold in-person public meetings at this time.

To request a virtual public hearing, contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* If requested, the virtual hearing will be held on January 29, 2021. The hearing will convene at 9:00 a.m. Eastern Time and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards.*

Upon publication of this document in the **Federal Register**, the EPA will begin pre-registering speakers for the hearing, if a public hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards* or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* The last day to pre-register to speak at the hearing will be January 26, 2021. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to *hirtz.paula@epa.gov.* The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by January 21, 2021. The EPA may not be able to arrange accommodations without advanced notice.

*Docket.* The EPA has established a docket for this rulemaking. Docket ID No. EPA–HQ–OAR–2020–0148 has been established for 40 CFR part 63, subpart SSSSS, Refractory Products Manufacturing. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) 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. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov*.

*Instructions.* Direct your comments to Docket ID No. EPA–HQ–OAR–2020–0148. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statue. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

*Submitting CBI.* Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0148. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

*Preamble acronyms and abbreviations.* We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AEGL acute exposure guideline level
AERMOD air dispersion model used by the HEM–3 model
ASTM American Society for Testing and Materials
CAA Clean Air Act
CalEPA California EPA
CBI Confidential Business Information
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
ECHO Enforcement and Compliance History Online
EPA Environmental Protection Agency
ERPG emergency response planning guideline
ERT Electronic Reporting Tool
HAP hazardous air pollutant(s)
HCl hydrochloric acid
HEM–3 Human Exposure Model, Version 1.1.0
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
HQREL hazard quotient recommended exposure limit
IBR incorporation by reference
IRIS Integrated Risk Information System
kg kilogram
km kilometer
MACT maximum achievable control technology
mg/m3 milligrams per cubic meter
MIR maximum individual risk
NAAQS National Ambient Air Quality Standards
NEI National Emission Inventory
NESHAP national emission standards for hazardous air pollutants
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PDF portable document format
POM polycyclic organic matter
PRA Paperwork Reduction Act
RBLC Reasonably Available Control Technology/Best Available Control Technology/Lowest Achievable Emission Rate Clearinghouse
REL reference exposure level
RfC reference concentration
RTO regenerative thermal oxidizer
RTR residual risk and technology review
SAB Science Advisory Board
SSM startup, shutdown, and malfunction
TOSHI target organ-specific hazard index
tpy tons per year
TRIM.FaTE Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure model
UF uncertainty factor
µg/m3 micrograms per cubic meter
URE unit risk estimate
VCS voluntary consensus standards

*Organization of this document.* The information in this preamble is organized as follows:

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K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

## I. General Information

### *A. Does this action apply to me?*

Refractory Products Manufacturing, the source category that is the subject of this proposal, is regulated under 40 CFR part 63, subpart SSSSS. The North American Industry Classification System (NAICS) codes for the refractory products industry are 327124 (clay) and 327125 (nonclay). We estimate that three major source facilities engaged in refractory products manufacturing would be affected by this proposal. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local, and tribal government entities would not be affected by this proposed action. The Refractory Products Manufacturing source category was revised since 1992 when it originally appeared in the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576, July 16, 1992) and *Documentation for Developing the Initial Source Category List, Final Report* (see EPA–450/3–91–030, July 1992). At that time the source category was listed as Chromium Refractories Production and it was defined to include any facility engaged in producing chromium-containing refractories. Refractories were defined as heat-resistant materials used to build or line high-temperature industrial furnaces, and chromium-containing refractories were defined as refractories produced from chrome ore or chromic oxide along with other raw materials such as alumina, zirconia, silica, and magnesia. The category included, but was not limited to, facilities that manufacture magnesia-chrome, chrome-magnesite, chrome alumina, and chromic oxide refractories. Also included were facilities that manufactured either formed (bricks) or unformed (mortar, castables) chromium-containing refractories.

The source category was renamed in 1999 to Refractories Manufacturing in the National Emission Standards for Hazardous Air Pollutants (NESHAP): Revision of Source Category List and Schedule for Standards Under Section 112 of the Clean Air Act (see 64 FR 3025, November 18, 1999). By that time the EPA had obtained information from nonchromium refractory manufacturing plants that confirmed they were major sources of HAP emissions. Because the production of nonchromium refractories at those facilities would not be covered by other source categories on the source category list, the EPA decided to expand the scope of the source category to include the nonchromium refractory manufacturing sources.

The source category was subsequently renamed in 2002 to Refractory Products Manufacturing in the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Refractory Products Manufacturing, proposed rule preamble (67 FR 42108, June 20, 2002). In this proposed action, the EPA revised and further clarified the source category as provided by section 112(c) of the CAA. The source category is defined to include, but is not limited to, any facility that manufactures refractory bricks and shapes that are produced using an organic HAP compound, pitch-impregnated refractory products, chromium refractory products, and fired clay refractory products.

### *B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at these same websites. Information on the overall RTR program is available at *https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous.*

The proposed changes to the CFR that would be necessary to incorporate the changes proposed in this action are set out in an attachment to the memorandum titled *Proposed Regulation Edits for 40 CFR part 63, subpart SSSSS,* available in the docket for this action (Docket ID No. EPA–HQ–OAR–2020–0148). The document includes the specific proposed amendatory language for revising the CFR and, for the convenience of interested parties, a redline version of the regulation. Following signature by the EPA Administrator, the EPA will also post a copy of this memorandum and the attachments to *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards.*

## II. Background

### *A. What is the statutory authority for this action?*

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*).[1] Section 112 of the CAA establishes a two-stage regulatory process to develop standards for emissions of HAP from stationary sources. Generally, the first stage involves establishing technology-based standards and the second stage involves evaluating those standards that are based on maximum achievable control technology (MACT) to determine whether additional standards are needed to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the ''residual risk review.'' In addition to the residual risk review, the CAA also requires the EPA to review standards set under CAA section 112 every 8 years and revise the standards as necessary taking into account any ''developments in practices, processes, or control technologies.'' This review is commonly referred to as the ''technology review.'' When the two reviews are combined into a single rulemaking, it is commonly referred to as the ''risk and technology review.'' The discussion that follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory requirements. A more comprehensive discussion appears in the document titled *CAA Section 112 Risk and Technology Reviews: Statutory Authority and Methodology,* in the docket for this rulemaking (Docket ID No. EPA–HQ–OAR–2020–0148).

In the first stage of the CAA section 112 standard setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are

[1] In addition, section 301 of the CAA provides general authority for the Administrator to ''prescribe such regulations as are necessary to carry out his functions'' under the CAA.

either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. ''Major sources'' are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources are ''area sources.'' For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) also establishes a minimum control level for MACT standards, known as the MACT ''floor.'' In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards in lieu of numerical emission standards. The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as beyond-the-floor standards. For area sources, CAA section 112(d)(5) gives the EPA discretion to set standards based on generally available control technologies or management practices (GACT standards) in lieu of MACT standards.

The second stage in standard-setting focuses on identifying and addressing any remaining (*i.e.,* ''residual'') risk pursuant to CAA section 112(f). For source categories subject to MACT standards, section 112(f)(2) of the CAA requires the EPA to determine whether promulgation of additional standards is needed to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. Section 112(d)(5) of the CAA provides that this residual risk review is not required for categories of area sources subject to GACT standards. Section 112(f)(2)(B) of the CAA further expressly preserves the EPA's use of the two-step approach for developing standards to address any residual risk and the Agency's interpretation of ''ample margin of safety'' developed in the National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the Residual Risk Report that the Agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and the United States Court of Appeals for the District of Columbia Circuit (the court) upheld the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (DC Cir. 2008).

The approach incorporated into the CAA and used by the EPA to evaluate residual risk and to develop standards under CAA section 112(f)(2) is a two-step approach. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [2] of approximately 1-in-10 thousand.'' (54 FR at 38045). If risks are unacceptable, the EPA must determine the emissions standards necessary to reduce risk to an acceptable level without considering costs. In the second step of the approach, the EPA considers whether the emissions standards provide an ample margin of safety to protect public health ''in consideration of all health information, including the number of persons at risk levels higher than approximately 1-in-1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety to protect public health or determine that the standards being reviewed provide an ample margin of safety without any revisions. After conducting the ample margin of safety analysis, we consider whether a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

The CAA section 112(d)(6) separately requires the EPA to review standards promulgated under CAA section 112 and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less often than every 8 years. In conducting this review, which we call the ''technology review,'' the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (DC Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (DC Cir. 2013). The EPA may consider cost in deciding whether to revise the standards pursuant to CAA section 112(d)(6). The EPA is required to address regulatory gaps, such as missing standards for listed air toxics known to be emitted from the source category. *Louisiana Environmental Action Network (LEAN)* v. *EPA,* 955 F.3d 1088 (DC Cir. 2020).

[2] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk if an individual were exposed to the maximum level of a pollutant for a lifetime.

*B. What is the source category and how does the current NESHAP regulate its HAP emissions?*

1. Source Category Description

The NESHAP for the Refractory Products Manufacturing source category was promulgated on April 16, 2003 (68 FR 18730), and is codified at 40 CFR part 63, subpart SSSSS. Minor amendments were made to the NESHAP related to the SSM provisions on April 20, 2006 (71 FR 20471). The Refractory Products Manufacturing NESHAP applies to each new, reconstructed, and existing affected source located at a refractory products manufacturing facility that is a major source of HAP emissions, is located at a major source of HAP emissions, or is part of a major source of HAP emissions. The affected sources include the following: shape dryers, curing ovens, and kilns that are used to manufacture refractory products that use organic HAP; shape preheaters, pitch working tanks, defumers, and coking ovens that are used to produce pitch-impregnated refractory products; kilns that are used to manufacture chromium refractory products; and kilns that are used to manufacture clay refractory products. A refractory products manufacturing facility is a plant site that manufactures refractory products, such as refractory bricks, refractory shapes, monolithics, kiln furniture, crucibles, and other materials used for lining furnaces and other high temperature process units. Refractory products manufacturing facilities typically process raw material by crushing, grinding, and screening; mixing the processed raw materials with binders and other additives; forming the refractory mix into shapes; and drying and firing the shapes.

Based on our search of the 2017 National Emission Inventory (NEI) (*www.epa.gov/air-emissions-inventories/national-emissions-inventory-nei*) and the EPA's Enforcement and Compliance History Online (ECHO) database (*echo.epa.gov)* and a review of active air emissions permits, we estimate that three major source facilities are subject to the Refractory Products Manufacturing

NESHAP. The three facilities that are subject to the Refractory Products Manufacturing NESHAP are listed in Appendix 1 to the memorandum titled *Technology Review for the Refractory Products Manufacturing Source Category,* in the Refractory Products Manufacturing Docket (Docket ID No. EPA–HQ–OAR–2020–0148).

2. HAP Emission Sources

The EPA estimated that a total of 167 refractory products manufacturing plants were operating in the U.S. in 2002. As a result of a comprehensive information collection request (ICR) that was sent out to the refractory products manufacturing industry at that time, the EPA found only eight of the 167 plants to be major sources of HAP and subject to the Refractory Products Manufacturing NESHAP (67 FR 42130, June 20, 2002). At that time, the EPA identified the primary sources of HAP emissions at most refractory products manufacturing plants to be the thermal process units used to manufacture the refractory products (67 FR 42130, June 20, 2002). These included the following:

- Shape dryers, curing ovens, and kilns used to produce clay and nonclay (organic resin-bonded) refractory products; and
- shape preheaters, pitch working tanks, defumers, and coking ovens used to produce pitch-bonded and pitch-impregnated refractory products.

In addition to these types of thermal process units at major sources, we identified other types of thermal process units at area source refractory products manufacturing plants not subject to the NESHAP. These area sources included those plants that manufactured refractory products from refractory ceramic fiber using a melting furnace and plants that manufactured refractory products with a fused-cast process using an electric arc furnace. (67 FR 42112, June 20, 2002)

Both HAP and criteria pollutants were identified as emissions from the thermal process units. The primary HAP emitted from refractory products manufacturing operations were identified as polycylic organic matter (POM), phenol, hydrochloric acid (HCl), hydrofluoric acid (HF), and ethylene glycol. POM emissions accounted for about 60 percent of the total annual HAP emissions, phenol accounted for 13 percent, HF for 10 percent, HCl for 7 percent and ethylene glycol for 7 percent. (68 FR 18744, April 16, 2003). The HAP emissions vary and depend on the raw materials used, the type of resin or additives used, and the type of thermal process unit used. The criteria pollutants emitted from refractory products manufacturing facilities include particulate matter (PM), sulfur dioxide ($SO_2$), carbon monoxide (CO), nitrogen oxides and volatile organic compounds.

The NESHAP groups refractory product manufacturing processes into four subcategories: Clay refractories, nonclay refractories, chromium refractories (nonclay), and pitch-impregnated refractories (nonclay).

A clay refractory product is defined as a refractory product that contains at least 10 percent uncalcined clay by weight prior to firing in a kiln. In this definition, the term ''clay'' means any of the following six classifications of clay defined by the U.S. Geological Survey (USGS): Ball clay, bentonite, common clay and shale, fire clay, fuller's earth, and kaolin. When clay is used as a raw material, HF and HCl emissions are emitted from kilns during firing due to the presence of chlorides and fluorides in the clay.

Nonclay refractories use raw materials such as alumina, magnesium oxide, and silicon carbide and typically require phenolic resins and other additives to hold the raw materials together. The phenolic resins and additives are needed to bind the raw materials and can result in organic HAP emissions from the curing ovens and kilns.

Kilns that are used to fire chromium refractory products can emit particulate chromium and other HAP metals. A chromium refractory product is a refractory product that contains at least 1 percent chromium by weight. The 2002 proposal (67 FR 42122) also identified inorganic HAP emissions from chromium refractory products kilns, which included hexavalent chromium, other chromium compounds, and other nonvolatile HAP metals.

Pitch-bonded and pitch-impregnated processes employ the use of coal tar and petroleum pitch, resulting in the emissions of POM from the curing and coking ovens, kilns, defumers, pitch working tanks, and shape preheaters.

In this action, the EPA estimates that a total of approximately 120 refractory products manufacturing plants are currently operating in the U.S. and three are major sources subject to the Refractory Products Manufacturing NESHAP. The three major sources manufacture clay and nonclay refractory products and can be grouped into the clay and nonclay subcategories. We also identified the same primary sources of HAP emissions at these refractory products manufacturing plants as the thermal process units used to manufacture the refractory products, including the shape dryers, curing ovens, and kilns used to produce clay and nonclay (organic resin-bonded) refractory products. The three major sources currently operating in the U.S. do not produce chromium, pitch-bonded, or pitch-impregnated products. Consequently, the thermal process units associated with these types of refractories (*i.e.,* shape preheaters, pitch working tanks, defumers, and coking ovens used to produce pitch-bonded and pitch-impregnated refractory products) are not used in the production of refractory products by the three major source facilities, and the HAP associated with these thermal process units are not emitted by the three major source facilities, except for trace amounts of POM. The primary HAP identified for the three major source facilities in this action are HCl and HF. Trace amounts of benzene, bis(2-ethylhexyl) phthalate, POM, and phenol are also reported to be emitted by these facilities from the phenolic resins and additives.

3. NESHAP Requirements for Control of HAP

The EPA estimated that the Refractory Products Manufacturing NESHAP requirements would reduce the emissions of HAP from the source category by 137 tpy (68 FR 18730, April 16, 2003). The Refractory Products Manufacturing NESHAP specifies emission limits, operating limits, and work practice standards for existing affected thermal process sources and for new and reconstructed affected thermal process sources that emit organic HAP according to refractory product type.

Existing and new nonclay refractories thermal process sources have two options for meeting a total hydrocarbon (THC) limit, to either (1) meet a THC concentration limit of 20 parts per million by volume, dry basis (ppmvd), corrected to 18 percent oxygen, or (2) reduce the THC mass emissions by at least 95 percent. Compliance with the THC emission limit is calculated differently for continuous and batch thermal process sources. For continuous process sources of organic HAP, compliance is based on meeting the THC emission limit as a 3-hour block average, and for batch process sources, compliance is based on meeting the THC emission limit as the average of 3-hour peak THC emission periods over two test runs.

Existing clay refractories and existing and new chromium refractory products kilns are required to use natural gas or equivalent fuel to limit metal HAP. Existing clay refractory product kilns must use natural gas to limit HF and HCl emissions. Natural gas or equivalent fuel must be used as the kiln fuel at all times except during periods of natural gas curtailment or other times when natural gas is not available.

New clay refractory product kilns are required to meet numeric limits for HF and HCl. For new continuous clay refractory product kilns, the HF limit is 0.038 pounds per ton (lb/ton) of uncalcined clay processed or a reduction in HF mass emissions by at least 90 percent and an HCl limit of 0.18 lb/ton of product or a reduction of uncontrolled HCl emissions by at least 30 percent. For new batch clay refractory product kilns, the NESHAP requires a reduction in HF emissions by at least 90 percent and a reduction in HCl emissions by at least 30 percent.

The NESHAP also establishes operating limits for thermal process sources and control devices, which are based on operating parameters established during performance testing. For thermal process sources emitting organic HAP, the NESHAP requires operating limits on the organic HAP processing rate and the operating temperature of the control devices (thermal and catalytic oxidizers). For new clay refractory products kilns, operating limits are specified for control devices, such as dry limestone absorber, dry lime injection fabric filters, dry lime scrubber/fabric filters, and wet scrubbers. The NESHAP also requires an operation, maintenance and monitoring (OM&M) plan for each continuous parameter monitoring system (CPMS).

The NESHAP also establishes work practice standards for thermal process sources associated with pitch-bonded and pitch-impregnated refractory product operations. As stated above, these refractory products are not manufactured by the three major sources currently operating in the U.S.

*C. What data collection activities were conducted to support this action?*

For the risk modeling portion of this RTR, the EPA used industry-supplied data and data from the 2017 NEI. The NEI is a database that contains information about sources that emit criteria air pollutants, their precursors, and HAP. The database includes estimates of annual air pollutant emissions from point, nonpoint, and mobile sources in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The EPA collects this information and releases an updated version of the NEI database every 3 years. The NEI includes the data necessary for conducting risk modeling, including annual HAP emissions estimates from individual emission points at facilities and the associated emission release parameters. We used NEI emissions and data supplied by the three major source facilities as the primary data to develop the model input files for the risk assessment for this source category. Detailed information on the development of the modeling file for the Refractory Products Manufacturing source category can be found in the memorandum titled *Emissions Data Used to Develop the Refractory Products Manufacturing Risk and Technology Review (RTR) Risk Modeling Input Files,* in Appendix 1 to the *Residual Risk Assessment for the Refractory Products Manufacturing Source Category in Support of the 2020 Risk and Technology Review Proposed Rule* (hereafter referred to as the *Refractory Products Risk Assessment Report*), in the Refractory Products Manufacturing Docket (Docket ID No. EPA–HQ–OAR–2020–0148).

For both the risk modeling and technology review portions of this RTR, we gathered additional data from the facilities, including stack test reports and operating permits regarding emission points, air pollution control devices, and process operations. We collected permits and supporting documentation directly from state permitting authorities or through state-maintained online databases. We contacted facility representatives directly to confirm and clarify the sources of emissions that were reported in the NEI. No formal ICR was conducted for this action.

The EPA's ECHO database was used to identify facilities that were potentially subject to the NESHAP. The ECHO database provides integrated compliance and enforcement information for approximately 800,000 regulated facilities nationwide. Using the search feature in ECHO, the EPA identified facilities that could potentially be subject to the NESHAP. We then reviewed operating permits for these facilities to confirm that they were major sources of HAP with emission sources subject to the NESHAP that is the subject of this action.

For the technology review, we reviewed various information sources regarding emission sources that are currently regulated by the Refractory Products Manufacturing NESHAP to support the technology review. The information sources included the Reasonably Available Control Technology/Best Available Control Technology/Lowest Achievable Emission Rate Clearinghouse (RBLC); state regulations; facility operating permits; regulatory actions, including technology reviews promulgated for other similar NESHAP subsequent to the Surface Coating of Metal Cans NESHAP; and discussions with individual refractory product manufacturing facilities. As a result of the technology review, we are proposing additional control measures based on the best practices of one facility in the source category. Additional information about the data collection activities for the technology review and the technology review results are discussed in section IV.D of this preamble and in the technology review memorandum titled *Technology Review for the Refractory Products Manufacturing Source Category,* July 2020 (hereafter referred to as the *Refractory Products Technology Review Memo*), available in Docket ID No. EPA–HQ–OAR–2020–0148.

*D. What other relevant background information and data are available?*

We also reviewed the NESHAP for other similar source categories that were promulgated after the Refractory Products Manufacturing NESHAP as part of the technology review for this source category. We reviewed the regulatory requirements and/or technical analyses associated with these later regulatory actions to identify any practices, processes, and control technologies considered in those rulemakings that could be applied to emission sources in the Refractory Products Manufacturing source category, as well as the costs, non-air impacts, and energy implications associated with the use of those technologies. We also reviewed information available in industry trade publications such as the *Refractories World Forum.* These publications provided information on trends in refractory technologies that can affect emissions from the Refractory Products Manufacturing source category. This literature review did not identify industry trends that would affect emissions from the sources subject to this NESHAP. Additional details regarding our review of these information sources are contained in the memorandum, *Technology Review for Refractory Products Manufacturing NESHAP,* available in Docket ID No. EPA–HQ–OAR–2020–0148.

## III. Analytical Procedures and Decision-Making

In this section, we describe the analyses performed to support the proposed decisions for the RTRs and other issues addressed in this proposal.

*A. How do we consider risk in our decision-making?*

As discussed in section II.A of this preamble and in the Benzene NESHAP, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step approach to determine whether or not risks are acceptable and to determine if the standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and, thus, ''[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information.'' (54 FR 38046). Similarly, with regard to the ample margin of safety determination, ''the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.*

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. The EPA conducts a risk assessment that provides estimates of the MIR posed by emissions of HAP that are carcinogens from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects, and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects.[3] The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The scope of the EPA's risk analysis is consistent with the explanation in EPA's response to comments on our policy under the Benzene NESHAP:

> The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of noncancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the Vinyl Chloride mandate that the Administrator ascertain an acceptable level of risk to the public by employing his expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in his judgment, believes are appropriate to determining what will ''protect the public health.''

(54 FR at 38057). Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risk. The Benzene NESHAP explained that ''an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes an MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' *Id.* at 38045. In other words, risks that include an MIR above 100-in-1 million may be determined to be acceptable, and risks with an MIR below that level may be determined to be unacceptable, depending on all of the available health information. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that the: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify the HAP risk that may be associated with emissions from other facilities that do not include the source category under review, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in the category.

The EPA understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing noncancer risk, where pollutant-specific exposure health reference levels (*e.g.,* reference concentrations (RfCs)) are based on the assumption that thresholds exist for adverse health effects. For example, the EPA recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse noncancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in an increased risk of adverse noncancer health effects. In May 2010, the Science Advisory Board (SAB) advised the EPA ''that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.''[4]

In response to the SAB recommendations, the EPA incorporates cumulative risk analyses into its RTR risk assessments. The Agency (1) Conducts facility-wide assessments, which include source category emission points, as well as other emission points within the facilities; (2) combines exposures from multiple sources in the same category that could affect the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzes the ingestion route of exposure. In addition, the RTR risk assessments consider aggregate cancer risk from all carcinogens and aggregated noncancer HQs for all noncarcinogens affecting the same target organ or target organ system.

Although we are interested in placing source category and facility-wide HAP risk in the context of total HAP risk from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Estimates of total HAP risk from emission sources other than those that we have studied in depth during this RTR review would have significantly greater associated uncertainties than the source category or

[3] The MIR is defined as the cancer risk associated with a lifetime of exposure at the highest concentration of HAP where people are likely to live. The HQ is the ratio of the potential HAP exposure concentration to the noncancer dose-response value; the HI is the sum of HQs for HAP that affect the same target organ or organ system.

[4] Recommendations of the SAB Risk and Technology Review Methods Panel are provided in their report, which is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

*B. How do we perform the technology review?*

Our technology review primarily focuses on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. Where we identify such developments, we analyze their technical feasibility, estimated costs, energy implications, and non-air environmental impacts. We also consider the emission reductions associated with applying each development. This analysis informs our decision of whether it is ''necessary'' to revise the emissions standards. In addition, we consider the appropriateness of applying controls to new sources versus retrofitting existing sources. For this exercise, we consider any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards;
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original MACT standards) that could result in additional emissions reduction;
- Any work practice or operational procedure that was not identified or considered during development of the original MACT standards;
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original MACT standards; and
- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed the NESHAP (*i.e.,* the 2003 Refractory Products Manufacturing NESHAP), we review a variety of data sources in our investigation of potential practices, processes, or controls. We also review the NESHAP and the available data to determine if there are any unregulated emissions of HAP within the source category and evaluate this data for use in developing new emission standards. See sections II.C and II.D of this preamble for information on the specific data sources that were reviewed as part of the technology review.

*C. How do we estimate post-MACT risk posed by the source category?*

In this section, we provide a complete description of the types of analyses that we generally perform during the risk assessment process. In some cases, we do not perform a specific analysis because it is not relevant. For example, in the absence of emissions of HAP known to be persistent and bioaccumulative in the environment (PB–HAP), we would not perform a multipathway exposure assessment. Where we do not perform an analysis, we state that we do not and provide the reason. While we present all of our risk assessment methods, we only present risk assessment results for the analyses actually conducted (see section IV.B of this preamble).

The EPA conducts a risk assessment that provides estimates of the MIR for cancer posed by the HAP emissions from each source in the source category, the HI for chronic exposures to HAP with the potential to cause noncancer health effects, and the HQ for acute exposures to HAP with the potential to cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The seven sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for the Refractory Products Manufacturing Source Category in Support of the 2020 Risk and Technology Review Proposed Rule.* The methods used to assess risk (as described in the seven primary steps below) are consistent with those described by the EPA in the document reviewed by a panel of the EPA's SAB in 2009;[5] and described in the SAB review report issued in 2010. They are also consistent with the key recommendations contained in that report.

[5] U.S. EPA. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* June 2009. EPA–452/R–09–006. *https://www3.epa.gov/airtoxics/rrisk/rtrpg.html.*

1. How did we estimate actual emissions and identify the emissions release characteristics?

The actual emissions and the emission release characteristics for one of the three major source facilities were obtained primarily from the 2017 NEI. The actual emissions and the emission release characteristics for the other two facilities were developed by the EPA based on data provided by the facilities and refractory emission factors. Additional information on the development of the modeling file for each facility, including the development of the actual emissions estimates and emissions release characteristics, can be found in the memorandum titled *Emissions Data Used to Develop the Refractory Products Manufacturing Risk and Technology Review (RTR) Risk Modeling Input Files,* found in Appendix 1 to the *Refractory Products Risk Assessment Report,* available in Docket ID No. EPA–HQ–OAR–2020–0148.

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during a specified annual time period. These ''actual'' emission levels are often lower than the emission levels allowed under the requirements of the current MACT standards. The emissions allowed under the MACT standards are referred to as the ''MACT-allowable'' emissions. We discussed the consideration of both MACT-allowable and actual emissions in the final Coke Oven Batteries RTR (70 FR 1992, 1998 through 1999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP RTR (71 FR 34421, 34428, June 14, 2006, and 71 FR 76603, 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risk at the MACT-allowable level is inherently reasonable since that risk reflects the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach. (54 FR 38044.)

For Refractory Products Manufacturing sources with compliance test data, we determined allowable emissions by calculating a multiplier for each emission source. Based on the data in compliance test reports, we calculated the multipliers by comparing actual emissions and control efficiencies to the applicable Refractory Products

Manufacturing NESHAP emission limit. For some sources compliance was determined by comparing the concentration of THCs to the emission limit of 20 ppmvd, corrected to 18 percent oxygen, and the emissions were measured at the outlet of the control device. For other sources, compliance was determined by comparing the THC control efficiency to the THC control efficiency requirement of 95 percent, and the emissions were measured at the inlet and outlet of the control device accordingly. For sources without compliance test data, we assumed the actual and the allowable emissions were equal. Additional information on the development of the allowable emissions can be found in the memorandum titled *Emissions Data Used to Develop the Refractory Products Manufacturing Risk and Technology Review (RTR) Risk Modeling Input Files,* found in Appendix 1 to the *Refractory Products Risk Assessment Report,* available in Docket ID No. EPA–HQ–OAR–2020–0148.

3. How do we conduct dispersion modeling, determine inhalation exposures, and estimate individual and population inhalation risk?

Both long-term and short-term inhalation exposure concentrations and health risk from the source category addressed in this proposal were estimated using the Human Exposure Model (HEM–3).[6] The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources, and (3) estimating individual and population-level inhalation risk using the exposure estimates and quantitative dose-response information.

a. Dispersion Modeling

The air dispersion model AERMOD, used by the HEM–3 model, is one of the EPA's preferred models for assessing air pollutant concentrations from industrial facilities.[7] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2016) of hourly surface and upper air observations from 824 meteorological stations selected to provide coverage of the U.S. and Puerto Rico. A second library of U.S. Census Bureau census block [8] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant-specific dose-response values is used to estimate health risk. These are discussed below.

b. Risk From Chronic Exposure to HAP

In developing the risk assessment for chronic exposures, we use the estimated annual average ambient air concentrations of each HAP emitted by each source in the source category. The HAP air concentrations at each nearby census block centroid located within 50 km of the facility are a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044, September 14, 1989) and the limitations of Gaussian dispersion models, including AERMOD.

For each facility, we calculate the MIR as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, 52 weeks per year, 70 years) exposure to the maximum concentration at the centroid of each inhabited census block. We calculate individual cancer risk by multiplying the estimated lifetime exposure to the ambient concentration of each HAP (in micrograms per cubic meter ($\mu g/m^3$)) by its unit risk estimate (URE). The URE is an upper-bound estimate of an individual's incremental risk of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use UREs from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) UREs, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with the EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate. The pollutant-specific dose-response values used to estimate health risk are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

To estimate individual lifetime cancer risks associated with exposure to HAP emissions from each facility in the source category, we sum the risks for each of the carcinogenic HAP [9] emitted by the modeled facility. We estimate cancer risk at every census block within 50 km of every facility in the source category. The MIR is the highest individual lifetime cancer risk estimated for any of those census blocks. In addition to calculating the MIR, we estimate the distribution of individual cancer risks for the source category by summing the number of individuals within 50 km of the sources whose estimated risk falls within a specified risk range. We also estimate annual cancer incidence by multiplying the estimated lifetime cancer risk at each census block by the number of people residing in that block, summing results for all of the census blocks, and then dividing this result by a 70-year lifetime.

To assess the risk of noncancer health effects from chronic exposure to HAP, we calculate either an HQ or a target organ-specific hazard index (TOSHI). We calculate an HQ when a single noncancer HAP is emitted. Where more than one noncancer HAP is emitted, we sum the HQ for each of the HAP that affects a common target organ or target organ system to obtain a TOSHI. The HQ is the estimated exposure divided by the chronic noncancer dose-response

[6] For more information about HEM–3, go to *https://www.epa.gov/fera/risk-assessment-and-modeling-human-exposure-model-hem.*

[7] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[8] A census block is the smallest geographic area for which census statistics are tabulated.

[9] The EPA's 2005 *Guidelines for Carcinogen Risk Assessment* classifies carcinogens as: ''Carcinogenic to humans,'' ''likely to be carcinogenic to humans,'' and ''suggestive evidence of carcinogenic potential.'' These classifications also coincide with the terms ''known carcinogen, probable carcinogen, and possible carcinogen,'' respectively, which are the terms advocated in the EPA's *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). In August 2000, the document, *Supplemental Guidance for Conducting Health Risk Assessment of Chemical Mixtures* (EPA/630/R–00/002), was published as a supplement to the 1986 document. Copies of both documents can be obtained from *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=20533&CFID=70315376&CFTOKEN=71597944.* Summing the risk of these individual compounds to obtain the cumulative cancer risk is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at *https://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

value, which is a value selected from one of several sources. The preferred chronic noncancer dose-response value is the EPA RfC, defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime'' (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=IRIS%20Glossary*). In cases where an RfC from the EPA's IRIS is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic noncancer dose-response value can be a value from the following prioritized sources, which define their dose-response values similarly to the EPA: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*https://www.atsdr.cdc.gov/mrls/index.asp*); (2) the CalEPA Chronic Reference Exposure Level (REL) (*https://oehha.ca.gov/air/crnr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0*); or (3) as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA. The pollutant-specific dose-response values used to estimate health risks are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

c. Risk From Acute Exposure to HAP That May Cause Health Effects Other Than Cancer

For each HAP for which appropriate acute inhalation dose-response values are available, the EPA also assesses the potential health risks due to acute exposure. For these assessments, the EPA makes conservative assumptions about emission rates, meteorology, and exposure location. As part of our efforts to continually improve our methodologies to evaluate the risks that HAP emitted from categories of industrial sources pose to human health and the environment,[10] we revised our treatment of meteorological data to use reasonable worst-case air dispersion conditions in our acute risk screening assessments instead of worst-case air dispersion conditions. This revised treatment of meteorological data and the supporting rationale are described in more detail in *Residual Risk Assessment for Refractory Products Manufacturing Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* This revised approach has been used in this proposal and in all other RTR rulemakings proposed on or after June 3, 2019.

To assess the potential acute risk to the maximally exposed individual, we use the peak hourly emission rate for each emission point,[11] reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile), and the point of highest off-site exposure. Specifically, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions co-occur and that a person is present at the point of maximum exposure.

To characterize the potential health risks associated with estimated acute inhalation exposures to a HAP, we generally use multiple acute dose-response values, including acute RELs, acute exposure guideline levels (AEGLs), and emergency response planning guidelines (ERPG) for 1-hour exposure durations, if available, to calculate acute HQs. The acute HQ is calculated by dividing the estimated acute exposure concentration by the acute dose-response value. For each HAP for which acute dose-response values are available, the EPA calculates acute HQs.

An acute REL is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' [12] Acute RELs are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. They are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact. AEGLs represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours.[13] They are guideline levels for ''once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' *Id.* at 21. The AEGL–1 is specifically defined as ''the airborne concentration (expressed as ppm (parts per million) or $mg/m^3$ (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes that ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' *Id.* AEGL–2 are defined as ''the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.'' *Id.*

ERPGs are ''developed for emergency planning and are intended as health-based guideline concentrations for single exposures to chemicals.'' [14] *Id.* at 1. The ERPG–1 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to

[10] See, *e.g.,* U.S. EPA. *Screening Methodologies to Support Risk and Technology Reviews (RTR): A Case Study Analysis* (Draft Report, May 2017. *https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous*).

[11] In the absence of hourly emission data, we develop estimates of maximum hourly emission rates by multiplying the average actual annual emissions rates by a factor (either a category-specific factor or a default factor of 10) to account for variability. This is documented in *Residual Risk Assessment for Refractory Products Manufacturing Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* Both are available in the docket for this rulemaking.

[12] CalEPA issues acute RELs as part of its Air Toxics Hot Spots Program, and the 1-hour and 8-hour values are documented in *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* which is available at *https://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary.*

[13] National Academy of Sciences, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2. Available at *https://www.epa.gov/sites/production/files/2015-09/documents/sop_final_standing_operating_procedures_2001.pdf.* Note that the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances ended in October 2011, but the AEGL program continues to operate at the EPA and works with the National Academies to publish final AEGLs (*https://www.epa.gov/aegl*).

[14] *ERPGS Procedures and Responsibilities.* March 2014. American Industrial Hygiene Association. Available at: *https://www.aiha.org/get-involved/AIHAGuidelineFoundation/EmergencyResponsePlanningGuidelines/Documents/ERPG%20Committee%20Standard%20Operating%20Procedures%20%20-%20March%202014%20Revision%20%28Updated%2010-2-2014%29.pdf.*

1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.'' *Id.* at 2. Similarly, the ERPG–2 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.'' *Id.* at 1.

An acute REL for 1-hour exposure durations is typically lower than its corresponding AEGL–1 and ERPG–1. Even though their definitions are slightly different, AEGL–1s are often the same as the corresponding ERPG–1s, and AEGL–2s are often equal to ERPG–2s. The maximum HQs from our acute inhalation screening risk assessment typically result when we use the acute REL for a HAP. In cases where the maximum acute HQ exceeds 1, we also report the HQ based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1).

For this source category, we estimated acute emissions by determining acute multipliers, which we then multiplied by the actual emissions. The acute multipliers for all sources were based on data from compliance tests for the specific sources, when available. For the batch processes, which were tested for 8 to 18 hours, we determined the acute multiplier by calculating mass emissions for each hour of the test and then taking the ratio of the maximum hourly emission rate to the average hourly emission rate. For sources that were tested for three 1-hour test runs, we determined the acute multiplier as the ratio of the mass emissions for the highest test run to the three-run average. The acute emissions were converted from ton per hour to ton per year for the risk modeling input file using 8,760 hours per year. If compliance test results were not available, we applied source specific acute multipliers developed for other similar sources to estimate the acute emissions. Additional information on the development of the acute emissions can be found in the memorandum titled *Emissions Data Used to Develop the Refractory Products Manufacturing Risk and Technology Review (RTR) Risk Modeling Input Files,* found in Appendix 1 to the *Refractory Products Risk Assessment Report,* available in Docket ID No. EPA–HQ–OAR–2020–0148.

In our acute inhalation screening risk assessment, acute impacts are deemed negligible for HAP for which acute HQs are less than or equal to 1, and no further analysis is performed for these HAP. In cases where an acute HQ from the screening step is greater than 1, we assess the site-specific data to ensure that the acute HQ is at an off-site location.

4. How do we conduct the multipathway exposure and risk screening assessment?

The EPA conducts a tiered screening assessment examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* ingestion). We first determine whether any sources in the source category emit any HAP known to be persistent and bioaccumulative in the environment, as identified in the EPA's Air Toxics Risk Assessment Library (see Volume 1, Appendix D, at *https://www.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library*).

For the Refractory Products Manufacturing source category, we identified PB–HAP emissions of arsenic, cadmium, POM, mercury (divalent mercury and methyl mercury) and lead, so we proceeded to the next step of the evaluation. Except for lead, the human health risk screening assessment for PB–HAP consists of three progressive tiers. In a Tier 1 screening assessment, we determine whether the magnitude of the facility-specific emissions of PB–HAP warrants further evaluation to characterize human health risk through ingestion exposure. To facilitate this step, we evaluate emissions against previously developed screening threshold emission rates for several PB–HAP that are based on a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with screening threshold emission rates are arsenic compounds, cadmium compounds, chlorinated dibenzodioxins and furans, mercury compounds, and POM. Based on the EPA estimates of toxicity and bioaccumulation potential, these pollutants represent a conservative list for inclusion in multipathway risk assessments for RTR rules. (See Volume 1, Appendix D at *https://www.epa.gov/sites/production/files/2013-08/documents/volume_1_reflibrary.pdf.*) In this assessment, we compare the facility-specific emission rates of these PB–HAP to the screening threshold emission rates for each PB–HAP to assess the potential for significant human health risks via the ingestion pathway. We call this application of the TRIM.FaTE model the Tier 1 screening assessment. The ratio of a facility's actual emission rate to the Tier 1 screening threshold emission rate is a ''screening value (SV).''

We derive the Tier 1 screening threshold emission rates for these PB–HAP (other than lead compounds) to correspond to a maximum excess lifetime cancer risk of 1-in-1 million (*i.e.,* for arsenic compounds, polychlorinated dibenzodioxins and furans, and POM) or, for HAP that cause noncancer health effects (*i.e.,* cadmium compounds and mercury compounds), a maximum HQ of 1. If the emission rate of any one PB–HAP or combination of carcinogenic PB–HAP in the Tier 1 screening assessment exceeds the Tier 1 screening threshold emission rate for any facility (*i.e.,* the SV is greater than 1), we conduct a second screening assessment, which we call the Tier 2 screening assessment. The Tier 2 screening assessment separates the Tier 1 combined fisher and farmer exposure scenario into fisher, farmer, and gardener scenarios that retain upper-bound ingestion rates.

In the Tier 2 screening assessment, the location of each facility that exceeds a Tier 1 screening threshold emission rate is used to refine the assumptions associated with the Tier 1 fisher and farmer exposure scenarios at that facility. A key assumption in the Tier 1 screening assessment is that a lake and/or farm is located near the facility. As part of the Tier 2 screening assessment, we use a USGS database to identify actual waterbodies within 50 km of each facility and assume the fisher only consumes fish from lakes within that 50 km zone. We also examine the differences between local meteorology near the facility and the meteorology used in the Tier 1 screening assessment. We then adjust the previously-developed Tier 1 screening threshold emission rates for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenario change with the use of local meteorology and USGS lakes database.

In the Tier 2 farmer scenario, we maintain an assumption that the farm is located within 0.5 km of the facility and that the farmer consumes meat, eggs, dairy, vegetables, and fruit produced near the facility. We may further refine the Tier 2 screening analysis by assessing a gardener scenario to characterize a range of exposures, with the gardener scenario being more plausible in RTR evaluations. Under the gardener scenario, we assume the gardener consumes home-produced eggs, vegetables, and fruit products at the same ingestion rate as the farmer. The Tier 2 screen continues to rely on the high-end food intake assumptions that were applied in Tier 1 for local fish (adult female angler at 99th percentile fish consumption [15]) and locally grown or raised foods (90th percentile consumption of locally grown or raised foods for the farmer and gardener scenarios [16]). If PB–HAP emission rates do not result in a Tier 2 SV greater than 1, we consider those PB–HAP emissions to pose risks below a level of concern. If the PB–HAP emission rates for a facility exceed the Tier 2 screening threshold emission rates, we may conduct a Tier 3 screening assessment.

There are several analyses that can be included in a Tier 3 screening assessment, depending upon the extent of refinement warranted, including validating that the lakes are fishable, locating residential/garden locations for urban and/or rural settings, considering plume-rise to estimate emissions lost above the mixing layer, and considering hourly effects of meteorology and plume-rise on chemical fate and transport (a time-series analysis). If necessary, the EPA may further refine the screening assessment through a site-specific assessment.

In evaluating the potential multipathway risk from emissions of lead compounds, rather than developing a screening threshold emission rate, we compare maximum estimated chronic inhalation exposure concentrations to the level of the current National Ambient Air Quality Standard (NAAQS) for lead.[17] Values below the level of the primary (health-based) lead NAAQS are considered to have a low potential for multipathway risk.

For further information on the multipathway assessment approach, see the *Refractory Products Risk Assessment Report,* which is available in the docket for this action.

[15] Burger, J. 2002. *Daily consumption of wild fish and game: Exposures of high end recreationists. International Journal of Environmental Health Research,* 12:343–354.

[16] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

[17] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—differs from the CAA section 112(f) standard (requiring, among other things, that the standard provide an ''ample margin of safety to protect public health''). However, the primary lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.,* the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since that primary lead NAAQS reflects an adequate margin of safety.

5. How do we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect, Environmental HAP, and Ecological Benchmarks

The EPA conducts a screening assessment to examine the potential for an adverse environmental effect as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines ''adverse environmental effect'' as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.''

The EPA focuses on eight HAP, which are referred to as ''environmental HAP,'' in its screening assessment: Six PB–HAP and two acid gases. The PB–HAP included in the screening assessment are arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. The acid gases included in the screening assessment are HCl and HF.

HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment, and water. The acid gases, HCl and HF, are included due to their well-documented potential to cause direct damage to terrestrial plants. In the environmental risk screening assessment, we evaluate the following four exposure media: Terrestrial soils, surface water bodies (includes water-column and benthic sediments), fish consumed by wildlife, and air. Within these four exposure media, we evaluate nine ecological assessment endpoints, which are defined by the ecological entity and its attributes. For PB–HAP (other than lead), both community-level and population-level endpoints are included. For acid gases, the ecological assessment evaluated is terrestrial plant communities.

An ecological benchmark represents a concentration of HAP that has been linked to a particular environmental effect level. For each environmental HAP, we identified the available ecological benchmarks for each assessment endpoint. We identified, where possible, ecological benchmarks at the following effect levels: Probable effect levels, lowest-observed-adverse-effect level, and no-observed-adverse-effect level (NOAEL). In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

For further information on how the environmental risk screening assessment was conducted, including a discussion of the risk metrics used, how the environmental HAP were identified, and how the ecological benchmarks were selected, see Appendix 9 of the *Refractory Products Risk Assessment Report,* which is available in the docket for this action.

b. Environmental Risk Screening Methodology

For the environmental risk screening assessment, the EPA first determined whether any facilities in the Refractory Products Manufacturing source category emitted any of the environmental HAP. For the Refractory Products Manufacturing source category, we identified emissions of arsenic, cadmium, HCl, HF, lead, mercury (divalent mercury and methyl mercury), and POM. Because one or more of the environmental HAP evaluated are emitted by at least one facility in the source category, we proceeded to the second step of the evaluation.

c. PB–HAP Methodology

The environmental screening assessment includes six PB–HAP, arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. With the exception of lead, the environmental risk screening assessment for PB–HAP consists of three tiers. The first tier of the environmental risk screening assessment uses the same health-protective conceptual model that is used for the Tier 1 human health screening assessment. TRIM.FaTE model simulations were used to back-calculate Tier 1 screening threshold emission rates. The screening threshold emission rates represent the emission rate in tons of pollutant per year that results in media concentrations at the facility that equal the relevant ecological benchmark. To assess emissions from each facility in the category, the reported emission rate for each PB–HAP was compared to the Tier 1 screening threshold emission rate for that PB–HAP for each assessment endpoint and effect level. If emissions from a facility do not exceed the Tier 1 screening threshold emission rate, the facility ''passes'' the screening assessment, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening threshold emission rate, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening assessment, the screening threshold emission rates are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screening assessment. For soils, we evaluate the average soil concentration for all soil parcels within a 7.5-km radius for each facility and PB–HAP. For the water, sediment, and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening threshold emission rate, the facility ''passes'' the screening assessment and typically is not evaluated further. If emissions from a facility exceed the Tier 2 screening threshold emission rate, we evaluate the facility further in Tier 3.

As in the multipathway human health risk assessment, in Tier 3 of the environmental screening assessment, we examine the suitability of the lakes around the facilities to support life and remove those that are not suitable (*e.g.,* lakes that have been filled in or are industrial ponds), adjust emissions for plume-rise, and conduct hour-by-hour time-series assessments. If these Tier 3 adjustments to the screening threshold emission rates still indicate the potential for an adverse environmental effect (*i.e.,* facility emission rate exceeds the screening threshold emission rate), we may elect to conduct a more refined assessment using more site-specific information. If, after additional refinement, the facility emission rate still exceeds the screening threshold emission rate, the facility may have the potential to cause an adverse environmental effect.

To evaluate the potential for an adverse environmental effect from lead, we compared the average modeled air concentrations (from HEM–3) of lead around each facility in the source category to the level of the secondary NAAQS for lead. The secondary lead NAAQS is a reasonable means of evaluating environmental risk because it is set to provide substantial protection against adverse welfare effects which can include ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

d. Acid Gas Environmental Risk Methodology

The environmental screening assessment for acid gases evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to HF and HCl. The environmental risk screening methodology for acid gases is a single-tier screening assessment that compares modeled ambient air concentrations (from AERMOD) to the ecological benchmarks for each acid gas. To identify a potential adverse environmental effect (as defined in section 112(a)(7) of the CAA) from emissions of HF and HCl, we evaluate the following metrics: The size of the modeled area around each facility that exceeds the ecological benchmark for each acid gas, in acres and square kilometers; the percentage of the modeled area around each facility that exceeds the ecological benchmark for each acid gas; and the area-weighted average SV around each facility (calculated by dividing the area-weighted average concentration over the 50-km modeling domain by the ecological benchmark for each acid gas). For further information on the environmental screening assessment approach, see Appendix 9 of the *Refractory Products Risk Assessment Report,* which is available in the docket for this action.

6. How do we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category emission points of interest, but also emissions of HAP from all other emission sources at the facility for which we have data. For this source category, we conducted the facility-wide assessment using a dataset compiled from the 2017 NEI. The source category records of that NEI dataset were removed, evaluated, and updated as described in section II.C of this preamble: What data collection activities were conducted to support this action? Once a quality assured source category dataset was available, it was placed back with the remaining records from the NEI for that facility. The facility-wide file was then used to analyze risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of the facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Refractory Products Risk Assessment Report,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

7. How do we consider uncertainties in risk assessment?

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. Also included are those uncertainties specific to our acute screening assessments, multipathway screening assessments, and our environmental risk screening assessments. A more thorough discussion of these uncertainties is included in the *Refractory Products Risk Assessment Report,* which is available in the docket for this action. If a multipathway site-specific assessment was performed for this source category, a full discussion of the uncertainties associated with that assessment can be found in Appendix 11 of that document, *Site-Specific Human Health Multipathway Residual Risk Assessment Report.*

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates, and other factors. The emission estimates considered in this analysis reflect short-term fluctuations based on actual emissions testing data. The estimates of peak hourly emission rates for the acute effects screening assessment were also based on actual emissions testing data.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.,* not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.,* not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.,* meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations. We also note that the selection of meteorology dataset location could have an impact on the risk estimates. As we continue to update and expand our library of meteorological station data used in our risk assessments, we expect to reduce this variability.

c. Uncertainties in Inhalation Exposure Assessment

Although every effort is made to identify all of the relevant facilities and emission points, as well as to develop accurate estimates of the annual emission rates for all relevant HAP, the uncertainties in our emission inventory likely dominate the uncertainties in the exposure assessment. Some uncertainties in our exposure assessment include human mobility, using the centroid of each census block, assuming lifetime exposure, and assuming only outdoor exposures. For most of these factors, there is neither an under nor overestimate when looking at the maximum individual risk or the incidence, but the shape of the distribution of risks may be affected. With respect to outdoor exposures, actual exposures may not be as high if people spend time indoors, especially for very reactive pollutants or larger particles. For all factors, we reduce uncertainty when possible. For example, with respect to census-block centroids, we analyze large blocks using aerial imagery and adjust locations of the block centroids to better represent the population in the blocks. We also add additional receptor locations where the population of a block is not well represented by a single location.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties are generally expressed quantitatively, and others are generally expressed in qualitative terms. We note, as a preface to this discussion, a point on dose-response uncertainty that is stated in the EPA's *2005 Guidelines for Carcinogen Risk Assessment;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (the EPA's *2005 Guidelines for Carcinogen Risk Assessment,* pages 1 through 7). This is the approach followed here as summarized in the next paragraphs.

Cancer UREs used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk.[18] That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit). In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[19] Chronic noncancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. To derive dose-response values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach,[20] which considers uncertainty, variability, and gaps in the available data. The UFs are applied to derive dose-response values that are intended to protect against appreciable risk of deleterious effects.

Many of the UFs used to account for variability and uncertainty in the development of acute dose-response values are quite similar to those developed for chronic durations. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute dose-response value at another exposure duration (*e.g.,* 1 hour). Not all acute dose-response values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the dose-response value or values being exceeded. Where relevant to the estimated exposures, the lack of acute dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Uncertainty also exists in the selection of ecological benchmarks for the environmental risk screening assessment. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. We searched for benchmarks for three effect levels (*i.e.,* no-effects level, threshold-effect level, and probable effect level), but not all combinations of ecological assessment/environmental HAP had benchmarks for all three effect levels. Where multiple effect levels were available for a particular HAP and assessment endpoint, we used all of the available effect levels to help us determine whether risk exists and whether the risk could be considered significant and widespread.

Although we make every effort to identify appropriate human health effect dose-response values for all pollutants emitted by the sources in this risk assessment, some HAP emitted by this source category are lacking dose-response assessments. Accordingly, these pollutants cannot be included in the quantitative risk assessment, which could result in quantitative estimates understating HAP risk. To help to alleviate this potential underestimate, where we conclude similarity with a HAP for which a dose-response value is available, we use that value as a surrogate for the assessment of the HAP for which no value is available. To the extent use of surrogates indicates appreciable risk, we may identify a need to increase priority for an IRIS assessment for that substance. We additionally note that, generally

[18] IRIS glossary (*https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

[19] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[20] See *A Review of the Reference Dose and Reference Concentration Processes,* U.S. EPA, *December 2002, and Methods for Derivation of Inhalation Reference Concentrations and Application of Inhalation Dosimetry,* U.S. EPA, 1994.

speaking, HAP of greatest concern due to environmental exposures and hazard are those for which dose-response assessments have been performed, reducing the likelihood of understating risk. Further, HAP not included in the quantitative assessment are assessed qualitatively and considered in the risk characterization that informs the risk management decisions, including consideration of HAP reductions achieved by various control options.

For a group of compounds that are unspeciated (*e.g.,* glycol ethers), we conservatively use the most protective dose-response value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.,* ethylene glycol diethyl ether) that does not have a specified dose-response value, we also apply the most protective dose-response value from the other compounds in the group to estimate risk.

e. Uncertainties in Acute Inhalation Screening Assessments

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112 of the CAA. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and the presence of a person. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile) co-occur. We then include the additional assumption that a person is located at this point at the same time. Together, these assumptions represent a reasonable worst-case actual exposure scenario. In most cases, it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and reasonable worst-case air dispersion conditions occur simultaneously.

f. Uncertainties in the Multipathway and Environmental Risk Screening Assessments

For each source category, we generally rely on site-specific levels of PB–HAP or environmental HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary or whether it is necessary to perform an environmental screening assessment. This determination is based on the results of a three-tiered screening assessment that relies on the outputs from models—TRIM.FaTE and AERMOD—that estimate environmental pollutant concentrations and human exposures for five PB–HAP (dioxins, POM, mercury, cadmium, and arsenic) and two acid gases (HF and HCl). For lead, we use AERMOD to determine ambient air concentrations, which are then compared to the secondary NAAQS standard for lead. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[21]

Model uncertainty concerns whether the model adequately represents the actual processes (*e.g.,* movement and accumulation) that might occur in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screening assessments are appropriate and state-of-the-art for the multipathway and environmental screening risk assessments conducted in support of RTRs.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway and environmental screening assessments, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water, soil characteristics, and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures.

In Tier 2 of the multipathway and environmental screening assessments, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screening assessment. In Tier 3 of the screening assessments, we refine the model inputs again to account for hour-by-hour plume-rise and the height of the mixing layer. We can also use those hour-by-hour meteorological data in a TRIM.FaTE run using the screening configuration corresponding to the lake location. These refinements produce a more accurate estimate of chemical concentrations in the media of interest, thereby reducing the uncertainty with those estimates. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for all three tiers.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For all tiers of the multipathway and environmental screening assessments, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do not exceed screening threshold emission rates (*i.e.,* screen out), we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do exceed screening threshold emission rates, it does not mean that impacts are significant, only that we cannot rule out that possibility and that a refined assessment for the site might be necessary to obtain a more accurate risk characterization for the source category.

The EPA evaluates the following HAP in the multipathway and/or environmental risk screening assessments, where applicable: Arsenic, cadmium, dioxins/furans, lead, mercury (both inorganic and methyl mercury), POM, HCl, and HF. These HAP represent pollutants that can cause adverse impacts either through direct exposure to HAP in the air or through exposure to HAP that are deposited

[21] In the context of this discussion, the term ''uncertainty'' as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

from the air onto soils and surface waters and then through the environment into the food web. These HAP represent those HAP for which we can conduct a meaningful multipathway or environmental screening risk assessment. For other HAP not included in our screening assessments, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond these that we are evaluating may have the potential to cause adverse effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

## IV. Analytical Results and Proposed Decisions

### *A. What actions are we taking pursuant to CAA sections 112(d)(2) and (d)(3)?*

In this action, we are proposing standards for previously unregulated HAP for existing sources in the clay and nonclay refractory subcategories pursuant to CAA sections 112(d)(2) and (3).[22] For existing clay refractory sources, we are proposing a MACT floor limit for (non-mercury) metal HAP and a MACT floor limit for mercury (in addition to the existing NESHAP work practice standard to use natural gas as fuel for existing clay refractory sources). For existing nonclay refractory sources, we are proposing a work practice standard to use natural gas as fuel to limit metal HAP emissions as provided in CAA section 112(h) in lieu of a numerical emissions standard (in addition to the existing NESHAP THC limit for existing nonclay refractory sources).

The results and proposed decisions based on the analyses performed pursuant to CAA sections 112(d)(2) and (3) are presented below.

#### 1. Clay Refractory Products

#### a. Background

For existing clay refractory sources, the 2002 Refractory Products Manufacturing NESHAP proposal preamble identifies the primary HAP emissions as HF and HCl from the manufacture of clay products. The NESHAP requires control of HF/HCl with a work practice to use natural gas as a clean fuel replacement for coal, fuel oil, and waste-derived fuels that were used in kilns and ovens at that time. More recent available data in emission test reports for these sources reviewed for this action confirm trace (but measurable) amounts of (non-mercury) metal HAP and mercury emissions. Based on this data, we are proposing MACT floor limits for these HAP for new and existing clay refractory sources. We propose to set a limit for mercury and a limit for PM as a surrogate for (non-mercury) metal HAP. We are setting a limit for PM as a surrogate for (non-mercury) metal HAP because the metal HAP are contained in the PM and the control techniques that would be used to control PM will equally control (non-mercury) metal HAP. We have used PM as a surrogate for (non-mercury) metal HAP for other rules with similar processes (*e.g.,* Portland Cement Manufacturing, Lime Manufacturing, Clay Ceramics Manufacturing).

#### b. Proposed MACT Standards

Pursuant to CAA section 112(d)(3), we are proposing MACT floor limits of 9.5 pounds per hour for PM and 18 micrograms per dry standard cubic meter (µg/dscm), corrected to 18 percent oxygen, for mercury from each existing kiln that is used to produce clay refractory products. Because there are fewer than 30 kilns used to produce clay refractory products in the source category, CAA section 112(d)(3)(B) directs the EPA to base the MACT floor on the best performing five sources for which the EPA has data. For the clay refractory kiln subcategory, we had data for only two clay refractory kilns, so we considered all sources for which we had data as the best performing sources in the subcategory. To calculate the limits, we used the test data from the two clay refractory kilns to calculate the average emissions for each kiln. We then determined upper prediction limits (UPLs) that incorporate the potential variability in future measurements to develop the PM and mercury standards.

Pursuant to CAA section 112(d)(3) requirements for new sources, the standard for new sources shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source. We are proposing MACT floor limits of 3.1 pounds per hour for PM and 6.1 µg/dscm, corrected to 18 percent oxygen, for mercury from each new kiln that is used to produce clay refractory products. These limits were derived using the same test data as the existing source limits but are based on the UPL determinations for the best-performing kiln rather than both existing kilns for which we have data.

The EPA's MACT analyses use the UPL approach to identify the average emission limitation achieved by the best performing sources. The EPA uses this approach because it incorporates the average performance of the best performing sources as well as the variability of the performance during testing conditions. The UPL represents the value which one can expect the mean of a specified number of future observations (*e.g.,* 3-run average) to fall below for the specified level of confidence (99 percent), based upon the results from the same population. In other words, the UPL estimates what the upper bound of future values will be based upon present or past background data. The UPL approach encompasses all the data point-to-data point variability in the collected data, as derived from the dataset to which it is applied. For more details regarding how these limits were derived, see the technical memorandum titled *Development of Proposed Standards and Impacts for the Refractory Products Manufacturing NESHAP,* located in the docket for this rule.

To demonstrate compliance with the emission limits, the EPA is proposing initial and repeat 5-year performance testing for the regulated pollutants, continuous parameter monitoring, and daily visible emissions (VE) checks. Owners and operators whose clay refractory products kilns are equipped with a fabric filter to reduce PM (as a surrogate for metal HAP) have the option of demonstrating compliance using a bag leak detection system instead of daily VE checks.

#### c. Consideration of Beyond-the-Floor Options

The EPA also evaluated the beyond-the-floor option of requiring all existing sources to meet the proposed new source MACT standards for mercury and PM (as a surrogate for total (non-mercury) metal HAP). We assume an uncontrolled kiln would need a fabric filter for control of PM and an activated carbon injection and fabric filter system for control of mercury to meet the new source standards. For the total (non-mercury) metal HAP beyond-the-floor option, we estimate the total capital cost would be $1.74 million, the annual cost would be $649,000, and the control would achieve (non-mercury) metal HAP reductions of 0.015 tpy, for a cost effectiveness of $42.7 million per ton of (non-mercury) metal HAP removed. For the mercury beyond-the-floor option, we estimate the total capital cost would be $1.84 million, the annual cost would be

[22] The EPA not only has authority under CAA sections 112(d)(2) and (3) to set MACT standards for previously unregulated HAP emissions at any time, but is required to address any previously unregulated HAP emissions as part of its periodic review of MACT standards under CAA section 112(d)(6). *LEAN* v. *EPA,* 955 F3d at 1091–1099.

$740,000, and the control would achieve mercury reductions of 0.0023 tpy, for a cost effectiveness of $321 million per ton of mercury removed.

We conclude that the costs of the controls are not reasonable relative to the level of emission reduction achieved for either the mercury or total (non-mercury) metal HAP beyond-the-floor options. In addition, these controls would create additional solid waste, as there would be a need to dispose of the collected metal-contaminated dust. Therefore, we are not proposing beyond-the-floor limits for mercury or total non-mercury metal HAP and are proposing standards based on the MACT floor. See the technical memorandum titled *Development of Proposed Standards and Impacts for the Refractory Products Manufacturing NESHAP,* located in the docket for this rule, for details regarding the derivation of the cost and emission estimates for the beyond-the-floor option.

2. Nonclay Refractory Products That Use Organic HAP

For existing nonclay refractory sources, the 2002 Refractory Products Manufacturing NESHAP proposal preamble identifies organic HAP as the primary emissions from the manufacture of nonclay products that include organic resin binders. The NESHAP requires control of organic HAP with a THC limit for these sources. Sources currently employ the use of thermal oxidizers, regenerative thermal oxidizers, and catalytic oxidizers to meet the THC limit. However, the NESHAP does not require sources to use natural gas as fuel for sources in this subcategory because metal HAP emissions were determined to be below measurable quantities due to the use of purified nonclay raw materials. Available HAP data for these sources in the 2017 NEI were found to be outdated and not reflective of current operating conditions. The 2017 NEI included measurable PM emissions for these existing nonclay refractory sources, and the PM would be expected to have trace amounts of metal HAP; however, we have no emission stack test data to indicate measurable emissions of metal HAP for these existing nonclay refractory sources.[23] Therefore, we are proposing a work practice standard to use natural gas as fuel for existing nonclay refractory sources to limit metal HAP emissions in lieu of a numerical emissions standard as the MACT floor level of control in accordance with CAA section 112(h). Because we expect HAP metals to be emitted in unmeasurable quantities based on the purified raw materials used and we have no emission stack test data to indicate measurable emissions of metal HAP for these existing nonclay refractory sources, we could not identify a beyond the floor measure that would obtain further emission reductions.

*B. What are the results of the risk assessment and analyses?*

As described in section III of this preamble, for the Refractory Products Manufacturing source category, we conducted a risk assessment for all HAP emitted. We present results of the risk assessment briefly below and in more detail in the *Refractory Products Risk Assessment Report,* in the Docket for this action (Docket ID No. EPA–HQ–OAR–2020–0148).

1. Chronic Inhalation Risk Assessment Results

Table 1 below provides a summary of the results of the inhalation risk assessment for the source category. For more detail about the MACT-allowable emission levels, see Appendix 1 to the *Refractory Products Risk Assessment Report,* in the Docket for this action.

TABLE 1—REFRACTORY PRODUCTS MANUFACTURING SOURCE CATEGORY INHALATION RISK ASSESSMENT RESULTS

| Risk assessment | Maximum individual cancer risk (in 1 million) | | Estimated population at increased risk of cancer ≥1-in-1 million | | Estimated annual cancer incidence (cases per year) | | Maximum chronic noncancer TOSHI [1] | | Maximum screening acute noncancer HQ [2] |
|---|---|---|---|---|---|---|---|---|---|
| | Based on actual emissions | Based on allowable emissions | Based on actual emissions | Based on allowable emissions | Based on actual emissions | Based on allowable emissions | Based on actual emissions | Based on allowable emissions | Based on actual emissions |
| Source Category | 0.7 | 0.7 | 0 | 0 | 0.0003 | 0.0003 | 0.04 | 0.04 | HQREL = 0.09 |
| Whole Facility | 0.7 | | 0 | | 0.0004 | | 0.04 | | |

[1] The target organ specific hazard index (TOSHI) is the sum of the chronic noncancer HQs for substances that affect the same target organ or organ system.
[2] The maximum estimated acute exposure concentration was divided by available short-term threshold values to develop HQ values.

The results of the inhalation risk modeling, as shown above, indicate that the maximum individual cancer risk based on actual and allowable emissions (lifetime) is 0.7-in-1 million (driven by trace amounts of chromium, arsenic, nickel, and cadmium emissions from tunnel kilns) and the total estimated annual cancer incidence (national) from these facilities based on actual and allowable emission levels is 0.0003 excess cancer cases per year or one case every 3,333 years. The maximum chronic noncancer TOSHI value based on actual and allowable emissions is 0.04 (driven by HF from tunnel kilns).

2. Screening Level Acute Risk Assessment Results

Table 1 of this preamble shows the acute risk results for the Refractory Products Manufacturing source category. The screening analysis for acute impacts was based on an estimate of acute emissions developed for each emissions source using compliance test report data and engineering calculations. The maximum screening acute noncancer HQ value (off-facility site) is 0.09 (driven by HF). For more detailed acute risk screening results, refer to the *Refractory Products Risk Assessment Report,* in the Docket for this action.

3. Multipathway Risk Screening Results

The emissions data for Refractory Products Manufacturing source category indicate that five PB–HAP are emitted by sources within this source category: Arsenic, cadmium, POM, mercury (divalent mercury and methyl mercury), and lead. The cadmium emissions from these facilities did not exceed the Tier 1 multipathway SV of 1 for cancer or noncancer. The arsenic, methyl mercury, and POM emissions exceeded the Tier 1 multipathway SV of 1 for cancer. Therefore, a Tier 2 screening

[23] Thus, while we believe that there are metal HAP emissions, the lack of data showing measurable emissions leads the EPA to conclude that the application of measurement methodology to this class of sources is not practicable due to technological and economic limitations. See CAA 112(h)(2)(B).

assessment was conducted for arsenic, menthyl mercury and POM. Emissions of arsenic, POM, and methyl mercury from these facilities did not exceed the Tier 2 multipathway SV of 1 for cancer. The Tier 2 noncancer screening assessment resulted in an SV less than 1 for mercury emissions.

An exceedance of a screening threshold emission rate or SV in any of the tiers cannot be equated with a risk value or an HQ (or HI). Rather, it represents a high-end estimate of what the risk or hazard may be. For example, an SV of 2 for a non-carcinogen can be interpreted to mean that we are confident that the HQ would be lower than 2. Similarly, a Tier 2 cancer SV of 5 means that we are confident that the risk is lower than 5-in-1 million. Our confidence comes from the conservative, or health-protective, assumptions encompassed in the screening tiers: we choose inputs from the upper end of the range of possible values for the influential parameters used in the screening tiers, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. Based upon the results of this screening assessment no further screening or site-specific assessments were conducted for this source category.

In evaluating the potential for multipathway effects from emissions of lead, modeled maximum annual-average lead concentrations were compared to the NAAQS for lead (0.15 µg/m3). Results of this analysis confirmed that the NAAQS for lead would not be exceeded by any facility.

4. Environmental Risk Screening Results

As described in section III.A of this preamble, we conducted an environmental risk screening assessment for the Refractory Products Manufacturing source category for the following pollutants: Arsenic, cadmium, HCl, HF, lead, mercury (divalent mercury and methyl mercury), and POM.

In the Tier 1 screening analysis for PB–HAP (other than lead, which was evaluated differently), arsenic, cadmium, divalent mercury, and POM had no Tier 1 exceedances for any ecological benchmark. Methyl mercury emissions at one facility had a Tier 1 exceedance for the surface soil NOAEL (avian ground insectivores) by a maximum SV of 2. A Tier 2 screening assessment was performed for methyl mercury. Methyl mercury had no Tier 2 exceedances for any ecological benchmark.

For lead, we did not estimate any exceedances of the secondary lead NAAQS.

For HCl and HF, the average modeled concentration around each facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, each individual modeled concentration of HCl (*i.e.,* each off-site data point in the modeling domain) was below the ecological benchmarks for all facilities. For HF, the maximum facility SV (based on the average concentration of all off-site data points over the modeling domain) was well below 1 (0.007) and the maximum area that exceeded the ecological benchmark was only 0.002 percent of the modeled area.

Based on the results of the environmental risk screening analysis, we do not expect an adverse environmental effect as a result of HAP emissions from this source category.

5. Facility-Wide Risk Results

As shown in Table 1 of this document, the maximum facility-wide cancer MIR is 0.7-in-1 million, driven by chromium, arsenic, nickel, and cadmium emissions from tunnel kilns. The total estimated cancer incidence from the whole facility is 0.0004 excess cancer cases per year, or one excess case in every 2,500 years. No people were estimated to have cancer risks above 1-in-1 million from exposure to HAP emitted from both MACT and non-MACT sources at the three facilities in this source category. The maximum facility-wide TOSHI for the source category is estimated to be 0.04, driven by HF emissions from tunnel kilns.

6. What demographic groups might benefit from this regulation?

To examine the potential for any environmental justice issues that might be associated with the source category, we performed a demographic analysis, which is an assessment of risks to individual demographic groups of the populations living within 5 km and within 50 km of the facilities. In the analysis, we evaluated the distribution of HAP-related cancer and noncancer risks from the Refractory Products Manufacturing source category across different demographic groups within the populations living near facilities.[24]

Results of the demographic analysis indicate that the minority population is significantly lower within 5 km of the facilities than the national percentage (18 percent versus 38 percent). This difference is accounted for by smaller population percentages around the facilities for all minority demographic groups. Specifically, African American (6 percent versus 12 percent nationally), Native American (0.1 percent versus 0.8 percent nationally), Other and Multiracial (5 percent versus 7 percent nationally), and Hispanic or Latino (6 percent versus 18 percent nationally). In addition, the percentage of the population living within 5 km of facilities in the source category is lower than the corresponding national percentage for the demographic groups, ''Over 25 Without a HS Diploma'' (10 percent versus 14 percent nationally) and ''Below the Poverty Level'' (11 percent versus 14 percent nationally). When examining the risk levels of those exposed to emissions from Refractory Products Manufacturing facilities, we find that no one is exposed to a cancer risk at or above 1-in-1 million or to a chronic noncancer TOSHI greater than 1.

The methodology and the results of the demographic analysis are presented in a technical report titled *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Refractory Products Manufacturing Source Category Operations,* September 2020 (hereafter referred to as the *Refractory Products Manufacturing Demographic Analysis Report*), in the docket for this action.

*C. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effect?*

1. Risk Acceptability

As noted in section III.A of this preamble, we weigh all health risk factors in our risk acceptability determination, including the cancer MIR, the number of persons in various cancer and noncancer risk ranges, cancer incidence, the maximum noncancer TOSHI, the maximum acute noncancer HQ, the extent of noncancer risks, the distribution of cancer and noncancer risks in the exposed population, and risk estimation uncertainties (54 FR 38044, September 14, 1989).

For the Refractory Products Manufacturing source category, the risk analysis indicates that cancer risk due to actual emissions or allowable emissions is 0.7-in-1 million. The risks are considerably less than 100-in-1 million, which is the presumptive upper limit of acceptable risk. The risk analysis also

[24] Demographic groups included in the analysis are: White, African American, Native American, other races and multiracial, Hispanic or Latino, children 17 years of age and under, adults 18 to 64 years of age, adults 65 years of age and over, adults without a high school diploma, people living below the poverty level, people living two times the poverty level, and linguistically isolated people.

shows we did not identify a potential for adverse chronic noncancer health effects. The acute noncancer risks based on actual emissions are low at an HQ of less than 1 (based on the REL) for HF. Therefore, we find there is little potential concern of acute noncancer health impacts from actual emissions. In addition, the risk assessment indicates no significant potential for multipathway health effects.

Considering all of the health risk information and factors discussed above, including the uncertainties discussed in section III.C.7 of this preamble, we propose to find that the risks from the Refractory Products Manufacturing source category are acceptable.

3. Ample Margin of Safety Analysis

We are proposing that the risks from the Refractory Products Manufacturing source category are acceptable. There are no individuals in the exposed population with lifetime cancer risks above 1-in-1 million as a result of actual or allowable emissions from this category. In addition, in our risk analysis we did not identify a potential for adverse chronic noncancer, acute noncancer, or multipathway health effects. Therefore, we are proposing that the current standards provide an ample margin of safety to protect public health.

4. Adverse Environmental Effect

The emissions data for the Refractory Products Manufacturing source category indicate that the following environmental HAP are emitted by this category: Arsenic, cadmium, HCl, HF, lead, mercury (divalent mercury and methyl mercury), and POM. The screening-level evaluation of the potential for adverse environmental effects associated with emissions of these environmental HAP from the Refractory Products Manufacturing source category indicated that there are no exceedances of Tier 2 SVs for PB–HAP, no exceedances of the average modeled concentration around each facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) for acid gases, and for lead we did not estimate any exceedances of the secondary lead NAAQS. In addition, we are unaware of any adverse environmental effects caused by HAP emitted by this source category. Therefore, we do not expect there to be an adverse environmental effect as a result of HAP emissions from this source category, and taking into consideration costs, energy, safety, and other relevant factors, we are proposing that it is not necessary to set a more stringent standard to prevent an adverse environmental effect.

*D. What are the results and proposed decisions based on our technology review?*

As described in section III.B of this preamble, our technology review focused on identifying developments in practices, processes, and control technologies for the Refractory Products source category. We reviewed various information sources regarding emission sources that are currently regulated by the Refractory Products Manufacturing NESHAP to support the technology review. The information sources included the following: The RBLC; state regulations; facility operating permits; regulatory actions, including technology reviews promulgated for other similar NESHAP subsequent to the Surface Coating of Metal Cans NESHAP; and discussions with individual refractory product manufacturing facilities.

A brief discussion of our review of these various information sources follows. Based on our review of facility operating permits and discussions with individual refractory product manufacturing facilities, we identified an advance in practice that we are proposing under CAA section 112(d)(6) in this action.

Our search of the RBLC database for improvements in refractory products manufacturing technologies did not identify any new developments in practices, processes, or control technologies for the Refractory Products Manufacturing source category under CAA section 112(d)(6).

We also reviewed requirements for other similar source categories. During development of the Refractory Products Manufacturing NESHAP, we identified two other source categories that operate kilns that are similar in design and operation to kilns that manufacture clay refractory products: The Clay Ceramics Manufacturing Industry and the Brick and Structural Clay Products Manufacturing Industry. Since the promulgation of the Refractory Products Manufacturing NESHAP, the NESHAP for these two other source categories were vacated, and new NESHAP for Brick and Structural Clay Products Manufacturing Industry and NESHAP for Clay Ceramics Manufacturing Industry were promulgated on October 26, 2015 (80 FR 65470). However, the control devices have not changed since the promulgation of the Refractory Products Manufacturing NESHAP. Therefore, no developments in practices, processes, and control technologies were identified in the NESHAP for Brick and Structural Clay Products Manufacturing Industry and NESHAP for Clay Ceramics Manufacturing Industry that were not considered during the Refractory Products Manufacturing NESHAP development.

We also contacted representatives for the three major source facilities subject to the Refractory Products Manufacturing NESHAP and the industry trade association, The Refractories Institute, and asked them to identify facility-specific developments in practices, processes, and control technologies. Two of the three facilities indicated they had not made changes in raw materials or manufacturing practices and processes because such changes would detrimentally affect their products. One facility had installed a wet scrubber to control opacity/particulate matter (a surrogate for metal HAP) emitted by its tunnel kilns used to manufacture both clay and nonclay refractory products. Since wet scrubbers were previously considered during the Refractory Products Manufacturing NESHAP development, we did not consider this to be a development in control technology.

We also conducted a review of the state operating permits for the three major source facilities that are subject to the Refractory Products Manufacturing NESHAP and three synthetic area source refractory facilities to determine whether any are using technologies that exceed the MACT level of control or are using technologies that were not considered during the development of the original NESHAP. We found the HAP control devices described in the permits were considered and included in the 2003 Refractory Products Manufacturing NESHAP for the relevant refractory products. Therefore, the permit review did not identify any new developments in processes or control technologies for the refractory manufacturing source category under CAA section 112(d)(6).

Based on our review of facility operating permits and discussions with individual refractory product manufacturing facilities, we identified an advance in practice that we are proposing in this action. The current NESHAP has a work practice standard that applies during periods of scheduled maintenance of emission controls for continuous kilns during bypass periods. We are proposing to limit the provision to THC emission controls and add additional requirements to reflect the best practices for one facility as part of the technology review required by CAA section 112(d)(6). In addition to the best practices, we are proposing an additional reporting requirement. We are aware of only one major source facility that uses this provision and will be affected by these proposed requirements.

To comply with current NESHAP work practice standard, the owner or operator must request approval from the Administrator to bypass the control device, minimize THC emissions during the period when the kiln is operating and the control device is out of service, and minimize the amount of time that the kiln is operating and the control device is out of service. Approval from the Administrator must be requested in advance for each scheduled maintenance event of the control device if the bypass of the control device is required to conduct the maintenance. The procedures for minimizing the THC emissions during the time the control device is out of service and the amount of time the control device is out of service for maintenance must be included in the facility's OM&M plan, and records of the maintenance performed are also required.

Consistent with the demonstrated best practices for one facility, we are proposing a revision to the existing requirements to limit the number of hours bypass of the emission controls can occur to no more than 750 hours per kiln per year. If the control being bypassed is for THC control, the facility is also required to manufacture products with lower HAP binder and limit production to no more than five cars with higher THC binder levels during these periods, Therefore, we are also proposing to require sources to schedule the manufacture of product with binder percentages at the lower end of the range produced (*i.e.,* below the typical average of product binder content) and the number of kiln cars with products for which the mass fraction of organic HAP in the resins, binders, and additives greater than the average must not exceed five for the year on a 12-month rolling basis, consistent with the best practices of the facility. Based on 2017 raw material and production data provided by the facility, we estimate that if the regenerative thermal oxidizer was offline for all 750 hours allowed by the permit for maintenance, the HAP emissions during that 750 hours would be about 61 pounds per year. This estimate is considered conservative because it does not take into account any HAP emission reductions that were achieved by implementing the best practices described in this paragraph for periods when the control device is offline (scheduling products with low HAP binder and limiting higher THC binder levels to five cars).

Finally, we are also proposing to add new reporting requirements for these periods. We are proposing to require reporting of the THC emissions and other information for control device maintenance and bypass periods in semi-annual compliance reports (in addition to the current NESHAP provision to document the planned maintenance procedures in the OM&M plan and to maintain records of continuous kiln maintenance). Reporting of this information in the semi-annual compliance reports will help to ensure compliance with the revised requirements that we are proposing.

As part of the technology review, we also identified previously unregulated HAP, and are proposing new standards under CAA sections 112(d)(2) and (3), as described in section IV.A, above. Additional information supporting the revised standard is provided in the memorandum titled *Technology Review for the Refractory Products Manufacturing NESHAP,* available in the docket for this action.

*E. What other actions are we proposing?*

In addition to the proposed actions described above, we are proposing additional revisions to the NESHAP. We are proposing revisions to the SSM provisions of the MACT rule in order to ensure that they are consistent with the decision in *Sierra Club* v. *EPA,* 551 F. 3d 1019 (D.C. Cir. 2008), in which the court vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We also are proposing various other changes to require electronic submittal of notification of compliance status (NOCS) reports, performance test and performance evaluation reports for refractory products manufacturing facilities, new test methods and incorporation by reference (IBR) of alternative test methods, and making technical and editorial revisions. Our analyses and proposed changes related to these issues are discussed in the sections below.

1. SSM

a. Proposed Elimination of the SSM Exemption

In its 2008 decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), the court vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some CAA section 112 standards apply continuously.

We are proposing the elimination of the SSM exemption in this rule, which appears at 40 CFR 63.9792(a)(1). Consistent with *Sierra Club* v. *EPA,* we are proposing standards in this rule that apply at all times. We are also proposing several revisions to Table 11 of 40 CFR part 63, subpart SSSSS (*Applicability of General Provisions to Subpart SSSSS,* hereafter referred to as the ''General Provisions table to subpart SSSSS''). For example, we are proposing to eliminate the incorporation of the General Provisions' requirement that the source develop an SSM plan. Further, we are proposing to eliminate and revise certain recordkeeping and reporting requirements related to the SSM exemption as further described below. The EPA has attempted to ensure that the provisions we are proposing to eliminate are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are seeking comment on the specific proposed deletions and revisions and also whether additional provisions should be revised to achieve the stated goal.

In proposing these rule amendments, the EPA has taken into account startup and shutdown periods and, for the reasons explained below, is not proposing alternate standards for those periods. Nonclay refractory sources employ the use of continuous and periodic kilns that use air pollution control devices, including thermal oxidizers, regenerative thermal oxidizers, and catalytic oxidizers, to meet the THC limit in the rule. Facility representatives for these sources indicated that startups and shutdowns of the kilns and air pollution control devices are part of normal operations and they experience no difficulties in meeting the existing THC emission limit during these periods. Therefore, alternative standards are not needed.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition, sudden, infrequent and not reasonably preventable failures of emissions control, process, or monitoring equipment. (40 CFR 63.2) (Definition of malfunction). The EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards and this reading has been upheld as reasonable by the court in *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016). Under CAA section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category. There is nothing in CAA section 112 that directs the Agency to consider malfunctions in determining the level ''achieved'' by the best performing sources when setting emission standards. As the court has recognized, the phrase ''average emissions limitation achieved by the best performing 12 percent of'' sources ''says nothing about how the performance of the best units is to be calculated.'' *Nat'l Ass'n of Clean Water Agencies* v. *EPA,* 734 F.3d 1115, 1141 (D.C. Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 112 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to treat a malfunction in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a ''normal or usual manner'' and no statutory language compels the EPA to consider such events in setting CAA section 112 standards.

As the court recognized in *U.S. Sugar Corp,* accounting for malfunctions in setting standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree, and duration of various malfunctions that might occur. *Id.* at 608 (''the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor mechanical defects. Any possible standard is likely to be hopelessly generic to govern such a wide array of circumstances.''). As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g., Sierra Club* v. *EPA,* 167 F.3d 658, 662 (D.C. Cir. 1999) (''The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' ''). See also, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.''). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99 percent removal goes off-line as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99 percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well-performing non-malfunctioning source. It is reasonable to interpret CAA section 112 to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

Although no statutory language compels the EPA to set standards for malfunctions, the EPA has the discretion to do so where feasible. For example, in the Petroleum Refinery Sector RTR, the EPA established a work practice standard for unique types of malfunctions that result in releases from pressure relief devices or emergency flaring events because we had information to determine that such work practices reflected the level of control that applies to the best performing sources (80 FR 75178, 75211 through 75214, December 1, 2015). The EPA will consider whether circumstances warrant setting standards for a particular type of malfunction and, if so, whether the EPA has sufficient information to identify the relevant best performing sources and establish a standard for such malfunctions. We also encourage commenters to provide any such information.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA will determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA will also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, sudden, infrequent, not reasonably preventable, and was not instead caused, in part, by poor maintenance or careless operation. 40 CFR 63.2 (Definition of malfunction).

If the EPA determines in a particular case that an enforcement action against a source for violation of an emission standard is warranted, the source can raise any and all defenses in that enforcement action and the federal district court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions. Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

In summary, the EPA interpretation of the CAA and, in particular, CAA section 112, is reasonable and encourages practices that will avoid malfunctions. Administrative and judicial procedures for addressing exceedances of the standards fully recognize that violations may occur despite good faith efforts to comply and can accommodate those situations. *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

b. 40 CFR 63.9792(b) General Duty

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.6(e)(1)(i) by changing the ''yes'' in column 4 to a ''no.'' Section 63.6(e)(1)(i) describes the general duty to minimize emissions. Some of the language in that section is no longer necessary or appropriate in light of the elimination of the SSM exemption. We are proposing instead to add general duty regulatory text at 40 CFR 63.9792(b) that reflects the general duty to minimize emissions while eliminating the reference to periods covered by an SSM exemption. The current language in 40 CFR 63.6(e)(1)(i) characterizes what the general duty entails during periods of SSM. With the elimination of the SSM exemption, there is no need to differentiate between normal operations, startup and shutdown, and malfunction events in describing the general duty. Therefore, the language the EPA is proposing for 40 CFR 63.9792(b) does not include that language from 40 CFR 63.6(e)(1)(i).

We are also proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.6(e)(1)(ii) by changing the ''yes'' in column 4 to a ''no.'' Section 63.6(e)(1)(ii) imposes requirements that are not necessary with the elimination of the SSM exemption or are redundant with the general duty requirement being added at 40 CFR 63.9792(b).

c. SSM Plan

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.6(e)(3) by changing the ''yes'' in column 4 to a ''no.'' Generally, these paragraphs require development of an SSM plan and specify SSM recordkeeping and reporting requirements related to the SSM plan. We are also proposing to remove from 40 CFR part 63, subpart SSSSS, the current provisions requiring the SSM plan at 40 CFR 63.9792(c). As noted, the EPA is proposing to remove the SSM exemptions. Therefore, affected units will be subject to an emission standard during such events. The applicability of a standard during such events will ensure that sources have ample incentive to plan for and achieve compliance, and, thus, the SSM plan requirements are no longer necessary.

d. Compliance With Standards

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.6(f)(1) by changing the ''yes'' in column 4 to a ''no.'' The current language of 40 CFR 63.6(f)(1) exempts sources from non-opacity standards during periods of SSM. As discussed above, the court in *Sierra Club* vacated the exemptions contained in this provision and held that the CAA requires that some CAA section 112 standards apply continuously. Consistent with *Sierra Club,* the EPA is proposing to revise the standards in this rule to apply at all times.

e. 40 CFR 63.9800 Performance Testing

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.7(e)(1) by changing the entry in column 4 to a ''no.'' Section 63.7(e)(1) describes performance testing requirements. The EPA is instead proposing to add a performance testing requirement at 40 CFR 63.9800(d). The performance testing requirements we are proposing to add differ from the General Provisions performance testing provisions in several respects. The regulatory text does not include the language in 40 CFR 63.7(e)(1) that restated the SSM exemption and language that precluded startup and shutdown periods from being considered ''representative'' for purposes of performance testing. The proposed performance testing provisions will also not allow performance testing during startup or shutdown. As in 40 CFR 63.7(e)(1), performance tests conducted under this subpart should not be conducted during malfunctions because conditions during malfunctions are often not representative of normal operating conditions. Section 63.7(e) requires that the owner or operator maintain records of the process information necessary to document operating conditions during the test and include in such records an explanation to support that such conditions represent normal operation. The EPA is proposing to add language clarifying that the owner or operator must make such records available to the Administrator.

f. Monitoring

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.8(c)(1) by changing the ''yes'' in column 4 to a ''no.'' The cross-references to the general duty and SSM plan requirements in 40 CFR 63.8(c)(1) are not necessary in light of other requirements of 40 CFR 63.8 that require good air pollution control practices (40 CFR 63.8(c)(1)) and that set out the requirements of a quality control program for monitoring equipment (40 CFR 63.8(d)). Further, we are proposing to revise 40 CFR 63.9804(a)(13) and 63.9808(b) to add requirements to maintain the monitoring equipment at all times in accordance with 40 CFR 63.9792(b) and keep the parts readily available for routine repairs of the monitoring equipment, consistent with the requirements in 40 CFR 63.8(c)(1)(ii).

g. 40 CFR 63.9816 Recordkeeping

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.10(b)(2)(i) by changing the ''yes'' in column 4 to a ''no.'' Section 63.10(b)(2)(i) describes the recordkeeping requirements during startup and shutdown. These recording provisions are no longer necessary because the EPA is proposing that recordkeeping and reporting applicable to normal operations will apply to startup and shutdown. In the absence of special provisions applicable to startup and shutdown, such as a startup and shutdown plan, there is no reason to retain additional recordkeeping for startup and shutdown periods.

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.10(b)(2)(ii) by changing the ''yes'' in column 4 to a ''no.'' Section 63.10(b)(2)(ii) describes the recordkeeping requirements during a malfunction, requiring a record of ''the occurrence and duration of each malfunction.'' A similar record is already required in 40 CFR 63.9816(c)(5), which requires a record of ''the date, time, and duration of each deviation,'' which the EPA is retaining. The regulatory text in 40 CFR 63.9816(c)(5) differs from the General Provisions in that the General Provisions requires the creation and retention of a record of the occurrence and duration of each malfunction of process, air pollution control, and monitoring equipment; whereas 40 CFR 63.9816(c)(5) applies to any failure to meet an applicable standard and is requiring that the source record the date, time, and duration of the failure rather than the ''occurrence.'' For this reason, the EPA is proposing to add to 40 CFR 63.9816(c)(5) a requirement that sources also keep records that include a list of the affected source or equipment and actions taken to minimize emissions, an estimate of the quantity of each regulated pollutant emitted over the emission limit for which the source failed to meet the standard, and a description of the method used to estimate the emissions. Examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters (*e.g.,* process throughput, rate, operating temperature, organic HAP content, and control device efficiencies). The EPA is proposing to require that sources keep records of this information to ensure that there is adequate information to allow the EPA to determine the severity of any failure to meet a standard, and to provide data that may document how the source met the general duty to minimize emissions when the source has failed to meet an applicable standard.

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR

63.10(b)(2)(iv) and (v) by changing the ''yes'' in column 4 to a ''no.'' When applicable, the provision requires sources to record actions taken during SSM events when actions were inconsistent with their SSM plan. The requirement in 40 CFR 63.10(b)(2)(iv) is no longer appropriate because SSM plans will no longer be required. The requirement previously applicable under 40 CFR 63.10(b)(2)(iv)(B) to record actions to minimize emissions and record corrective actions is now applicable by reference to 40 CFR 63.9816(c)(5). When applicable, the provision in 40 CFR 63.10(b)(2)(v) requires sources to record actions taken during SSM events to show that actions taken were consistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required.

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.10(b)(2)(vi) by changing the ''yes'' in column 4 to a ''no.'' The provision requires sources to maintain records during continuous monitoring system (CMS) malfunctions. Section 63.9816(c)(5) covers records of periods of deviation from the standard, including instances where a CMS is inoperative or out-of-control.

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.10(c)(15) by changing the ''yes'' in column 4 to a ''no.'' When applicable, the provision allows an owner or operator to use the affected source's SSM plan or records kept to satisfy the recordkeeping requirements of the SSM plan, specified in 40 CFR 63.6(e), to also satisfy the requirements of 40 CFR 63.10(c)(10) through (12). The EPA is proposing to eliminate this requirement because SSM plans would no longer be required, and, therefore, 40 CFR 63.10(c)(15) no longer serves any useful purpose for affected units.

We are proposing to remove the requirement in 40 CFR 63.9816(a)(2) that deviation records specify whether deviations from a standard occurred during a period of SSM. This revision is being proposed due to the proposed removal of the SSM exemption and because, as discussed above in this section, we are proposing that deviation records must specify the cause of each deviation, which could include a malfunction period as a cause. We are also proposing to remove the requirement to report the SSM records in 40 CFR 63.6(e)(3)(iii) through (v) by deleting 40 CFR 63.9816(a)(2).

h. 40 CFR 63.9814 Reporting

We are proposing to revise the General Provisions table to subpart SSSSS (Table 11) entry for 40 CFR 63.10(d)(5) by changing the ''yes'' in column 4 to a ''no.'' Section 63.10(d)(5) describes the reporting requirements for SSM. To replace the General Provisions reporting requirement, the EPA is proposing to remove the immediate SSM report from Table 10 referenced at 40 CFR 63.9814(a) and add reporting requirements to 40 CFR 63.9814(d) and (e). The replacement language differs from the General Provisions requirement in that it eliminates the SSM report as a stand-alone report. We are proposing language that requires sources that fail to meet an applicable standard at any time to report the information concerning such events in the semi-annual compliance report already required under this rule. For deviations from an applicable emission limitation that occur at an affected source where a CPMS is not used to demonstrate compliance, 40 CFR 63.9814(d) already requires that the semi-annual compliance report must contain the number, duration, and the cause of such events (including unknown cause, if applicable). We are proposing that the report also include the date and time of each deviation, a list of the affected source or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit for which the source failed to meet the standard, and a description of the method used to estimate the emissions. Similarly, for deviations from an applicable emission limitation that occur at an affected source where a CPMS is used to demonstrate compliance, we are retaining the current requirements in 40 CFR 63.9814(e) to report the date, time, and cause of each deviation. We are proposing that the report must also contain the number and duration of deviations, a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit, and a description of the method used to estimate the emissions.

Regarding the proposed new requirement discussed above to estimate the quantity of each regulated pollutant emitted over any emission limit for which the source failed to meet the standard and a description of the method used to estimate the emissions, examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters (*e.g.,* process throughput, rate, operating temperature, organic HAP content, and control device efficiencies). The EPA is proposing this requirement to ensure that the EPA has adequate information to determine compliance, to allow the EPA to determine the severity of the failure to meet an applicable standard, and to provide data that may document how the source met the general duty to minimize emissions during a failure to meet an applicable standard.

We will no longer require owners or operators to determine whether actions taken to correct a malfunction are consistent with an SSM plan, because plans would no longer be required. The proposed amendments, therefore, eliminate the requirement in Table 10 to 40 CFR part 63, subpart SSSSS to report whether the source deviated from its SSM plan, including required actions to communicate with the Administrator, and the cross-reference to 40 CFR 63.10(d)(5)(ii) that contains the description of the previously required SSM report format and submittal schedule from this section. These specifications are no longer necessary because the events will be reported in otherwise required reports with similar format and submittal requirements.

Section 63.10(d)(5)(ii) describes an immediate report for SSM when a source failed to meet an applicable standard but did not follow the SSM plan. We will no longer require owners and operators to report when actions taken during an SSM event were not consistent with an SSM plan, because plans would no longer be required.

We are proposing to remove the requirement in 40 CFR 63.9814(e)(5) that deviation reports must specify whether deviation from an operating limit occurred during a period of SSM. We are also proposing to remove the requirements in 40 CFR 63.9814(e)(8) to break down the total duration of deviations into the startup and shutdown categories. As discussed above in this section, we are proposing to require reporting of the cause of each deviation. Further, the startup and shutdown categories no longer apply because these periods are proposed to be considered normal operation.

2. Electronic Reporting Requirements

The EPA is proposing that owners and operators of refractory products manufacturing facilities submit electronic copies of NOCS required by 40 CFR 63.7(b) and (c), 40 CFR 63.8(f)(4), and 40 CFR 63.9 (b) through (e) and (h), and 40 CFR 63.9812, and performance test results and performance evaluation results required by 40 CFR 63.9(h) and 40 CFR 63.9800, and 40 CFR 63.9814 through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* available in the docket for this action. The proposal requires that all NOCS be submitted as portable document format (PDF) files and uploaded to CEDRI. For performance test and performance evaluation results the proposal requires test results that use test methods supported by the EPA's Electronic Reporting Tool (ERT) listed on the ERT website [25] at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website. Performance test results using test methods that are not supported by the ERT at the time of the test are required to submitted as a PDF file using the attachment module of the ERT.

Additionally, the EPA has identified two broad circumstances in which electronic reporting extensions may be provided. These circumstances are (1) outages of the EPA's CDX or CEDRI that preclude an owner or operator from accessing the system and submitting required reports and (2) *force majeure* events, which are defined as events that will be or have been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevent an owner or operator from complying with the requirement to submit a report electronically. Examples of *force majeure* events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible.

The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [26] to implement Executive Order 13563 and is in keeping with the EPA's Agency-wide policy [27] developed in response to the White House's Digital Government Strategy.[28] For more information on the benefits of electronic reporting, see the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* referenced earlier in this section.

3. Incorporation by Reference Under 1 CFR Part 51

The EPA is proposing regulatory text that includes IBR. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the following documents described in the amendments to 40 CFR 63.14:

- ANSI/ASME PTC 19.10–1981, ''Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus],'' issued August 31, 1981, IBR proposed for Table 4 to 40 CFR part 63, subpart SSSSS. This document specifies methods, apparatus, and calculations which are used to determine quantitatively, the gaseous constituents of the exhausts including oxygen and carbon dioxide resulting from station combustions sources.
- ASTM D6348–12e1, ''Standard Test Method for Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform Infrared (FTIR) Spectroscopy,'' Approved February 1, 2012, IBR proposed for Table 4 to 40 CFR part 63, subpart SSSSS.
- ASTM D6784–16, ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),'' (Approved March 1, 2016), IBR proposed for Table 4 to 40 CFR part 63, subpart SSSSS.
- EPA–454/R–98–015, Office of Air Quality Planning and Standards (OAQPS), ''Fabric Filter Bag Leak Detection Guidance,'' September 1997, IBR proposed for 40 CFR 63.9804(f). This document provides guidance on the use of triboelectric monitors as fabric filter bag leak detectors. The document includes fabric filter and monitoring system descriptions; guidance on monitor selection, installation, setup, adjustment, and operation; and quality assurance procedures.

The EPA has made, and will continue to make, the EPA document generally available electronically through *https://www.regulations.gov/* and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information). The ANSI/ASME document is available from the American Society of Mechanical Engineers (ASME) at *http://www.asme.org;* by mail at Three Park Avenue, New York, NY 10016–5990; or by telephone at (800) 843–2763. The ASTM methods are available from ASTM International at *http://www.astm.org;* by mail at 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or by telephone at (610) 832–9585.

4. Technical and Editorial Changes

The following lists additional proposed changes that address technical and editorial corrections:

- Revise 40 CFR 63.9824 and Table 4 to subpart SSSSS of part 63 to clarify the location in 40 CFR part 60 of applicable EPA test methods; and
- Revise 40 CFR 63.9814 and 40 CFR 63.9816 to include the requirements to record and report information on failures to meet the applicable standard.

### *F. What compliance dates are we proposing?*

We are proposing that affected sources that commence construction or reconstruction after January 14, 2021, must comply with all requirements of

[25] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[26] EPA's Final Plan for Periodic Retrospective Reviews, August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[27] E-Reporting Policy Statement for EPA Regulations, September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[28] Digital Government: Building a 21st Century Platform to Better Serve the American People, May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

the subpart, including the amendments being proposed, no later than the effective date of the final rule or upon startup, whichever is later. The final action is not expected to be a ''major rule'' as defined by 5 U.S.C. 804(2), so the effective date of the final rule will be the promulgation date as specified in CAA section 112(d)(10).

We are proposing that affected sources that commence construction or reconstruction on or before January 14, 2021, must comply with the all requirements of the subpart, including the amendments being proposed, no later than the dates described below. We are also proposing that existing nonclay affected sources must comply with the requirement to use natural gas as fuel, or an equivalent fuel, as the kiln fuel (except during periods of natural gas curtailment or supply interruption) immediately upon the effective date of the final rule.

Also, we are proposing that existing affected sources must comply with the following two amendments no later than 181 days after the effective date of the final rule (*i.e.,* 181 days after the date of publication of the final rule in the **Federal Register**). First, for existing affected sources, we are proposing a requirement that notifications, performance test results, and performance evaluation results be electronically submitted. Second, for existing affected sources with continuous kilns using THC emission control devices, we are proposing improvements to the existing work practice standard as a result of the CAA section 112(d)(6) technology review *i.e.,* limit the number of hours for bypass of the control device to conduct scheduled maintenance to 750 hours per year per kiln, schedule the manufacture of product with binder percentages at the lower end of the range during periods of control device bypass, and report THC emissions in the semi-annual compliance report. Existing affected facilities would have to continue to meet the current requirements of 40 CFR part 63, subpart SSSSS, until the applicable compliance date of the amended rule (*i.e.,* 181 days after the date of publication of the final rule in the **Federal Register**).

Finally, we are proposing that affected clay refractory product sources that commenced construction or reconstruction on or before January 14, 2021 must meet new limits for PM/metal HAP and mercury no later than 1 year after the effective date of the final rule. The EPA determined that a 1-year compliance date allows sufficient time for notification and testing to demonstrate initial compliance with the new PM/metal HAP and mercury limits.

We are proposing the immediate compliance date for the removal of the SSM exemptions in 40 CFR 63.6(f)(1) in accordance with the SSM court decision. For other SSM changes, excluding the revised requirements for the SSM described above (40 CFR 63.6(f)(1)), our experience with similar industries further shows that this sort of regulated facility generally requires a time period of 181 days to read and understand the amended rule requirements; make any necessary adjustments; to read and understand the rule and adjust computer systems, evaluate whether changes are needed, and to update their OM&M plan to reflect the revised requirements.

We also determined that an immediate compliance date is practicable for the natural gas requirement and is based on current practices and other information provided by the facilities.

We are proposing the 181-day compliance date for electronic reporting and the scheduled maintenance work practice to require facilities to implement these changes as expeditiously as practicable. For electronic reporting, our experience with similar industries that are required to convert reporting mechanisms to install necessary hardware and software, become familiar with the process of submitting performance test results electronically through the EPA's CEDRI, test these new electronic submission capabilities, and reliably employ electronic reporting shows that a time period of a minimum of 90 days, and, more typically, 180 days, is generally necessary to successfully accomplish these revisions. For the scheduled maintenance work practice, we expect facilities would also need this time to seek approval from the Administrator before taking the control device on the affected kiln out of service for scheduled maintenance and update their operation, maintenance, and monitoring plan to reflect the revised requirements.

For the new PM/metal HAP and mercury requirements, we determined the 1-year compliance date would provide existing clay sources with sufficient time to plan and schedule facility resources to meet the notification and compliance demonstration testing requirements associated with the new limits.

We solicit comment on these proposed compliance periods, and we specifically request submission of information from sources in this source category regarding specific actions that would need to be undertaken to comply with the proposed amended requirements and the time needed to make the adjustments for compliance with any of the revised requirements. We note that information provided may result in changes to the proposed compliance dates.

## V. Summary of Cost, Environmental, and Economic Impacts

### *A. What are the affected sources?*

Currently, three major sources subject to the Refractory Products Manufacturing NESHAP are operating in the United States. The NESHAP applies to each new, reconstructed, and existing affected source located at a refractory products manufacturing facility that is a major source of HAP emissions, is located at a major source of HAP emissions, or is part of a major source of HAP emissions. A refractory products manufacturing facility is a plant site that manufactures refractory products, such as refractory bricks, refractory shapes, monolithics, kiln furniture, crucibles, and other materials used for lining furnaces and other high temperature process units. Refractory products manufacturing facilities typically process raw material by crushing, grinding, and screening; mixing the processed raw materials with binders and other additives; forming the refractory mix into shapes; and drying and firing the shapes. The NESHAP lists the affected sources for four subcategories across the industry as the shape dryers, curing ovens, and kilns that are used to manufacture refractory products that use organic HAP; shape preheaters, pitch working tanks, defumers, and coking ovens that are used to produce pitch-impregnated refractory products; kilns that are used to manufacture chromium refractory products; and kilns that are used to manufacture clay refractory products. The three major sources currently operating in the U.S. can be grouped into two of the subcategories and use curing ovens and kilns that are used to manufacture nonclay refractory products that use organic HAP and kilns that are used to manufacture clay refractory products.

### *B. What are the air quality impacts?*

At the current level of control, the estimated emissions of HAP from the Refractory Products Manufacturing source category are approximately 40 tpy. The proposed amendments require that all three major sources in the Refractory Products Manufacturing source category comply with the relevant emission standards at all times, including periods of SSM. The proposed amendments also limit the number of hours a continuous kiln control device can be bypassed during scheduled maintenance and require minimizing emissions of THC during bypass periods. We were unable to quantify the emissions that occur during periods of SSM or the specific emissions reductions that would occur as a result of this action. However, eliminating the SSM exemption has the potential to reduce emissions by requiring facilities to meet the applicable standard during SSM periods. Requiring the use of natural gas as kiln fuel also ensures a reduction in metal HAP emissions from combustion of coal, fuel oil, or waste-derived fuels.

Indirect or secondary air emissions impacts are impacts that would result from the increased electricity usage associated with the operation of control devices (*e.g.,* increased secondary emissions of criteria pollutants from power plants). Energy impacts consist of the electricity and steam needed to operate control devices and other equipment. The proposed amendments would have no effect on the energy needs of the affected facilities in either of the two source categories and would, therefore, have no indirect or secondary air emissions impacts.

*C. What are the cost impacts?*

We estimate that each facility in this source category will experience costs as a result of these proposed amendments. Estimates for reporting and recordkeeping costs for each facility are associated with the electronic reporting requirements, elimination of the SSM exemption, and scheduled maintenance of continuous kiln control devices. The costs associated with the electronic reporting requirements are attributed to submittal of notifications and semi-annual compliance reports using CEDRI and include time for becoming familiar with CEDRI. The costs associated with the revised SSM requirements were estimated for re-evaluating previously developed SSM record systems. The costs associated with recordkeeping to document the frequency and duration of scheduled maintenance of control devices for continuous kilns were also estimated. The recordkeeping and reporting costs are presented in section VIII.C of this preamble.

We also estimated the costs associated with the proposed new compliance testing requirements for the clay refractory sources in this action. Two of the major source refractories manufacture clay refractory and are required to conduct periodic compliance testing for PM/metal HAP and mercury once every 5 years. One clay refractory source has two continuous kilns and the other has two continuous kilns and three batch kilns. The costs associated with conducting the combined PM/metal HAP and mercury test for each continuous kiln stack is estimated to be about $23,600. The costs associated with conducting the combined PM/metal HAP and mercury test for each batch kiln stack is estimated to be about $31,800. We also assumed that tests for additional stacks at the same facility would be conducted in the same trip, so the additional cost is less due to reduced travel costs. The total costs for the two facilities to test the seven kilns in a single year would be $115,300. In addition to the testing costs, each facility performing the testing will have an additional $6,800 in reporting costs per facility in the year in which the test occurs.

For kilns that meet the limits without any controls, owners or operators are required to conduct VE monitoring to demonstrate compliance. One of the continuous kilns is controlled with a wet scrubber, but the other six kilns are expected to need to conduct VE monitoring. We estimate that the monitoring will cost $3,740 per year per stack, for a total of $22,400 per year.

For further information on the potential testing and monitoring costs, see the memorandum titled *Development of Proposed Standards and Impacts for the Refractory Products Manufacturing NESHAP,* located in the docket for this action.

*D. What are the economic impacts?*

The economic impact analysis is designed to inform decision makers about the potential economic consequences of the compliance costs outlined in section V.C of this preamble. To assess the maximum potential impact, the largest cost expected to be experienced in any one year is compared to the total sales for the ultimate owner of the affected facilities to estimate the total burden for each owner. For these proposed amendments, the total cost of testing, monitoring, and recordkeeping and reporting is estimated to be $158,140. The total annual costs associated with the requirements range from 0.00008 to 0.18 percent of annual sales revenue per ultimate owner. These costs are not expected to result in a significant market impact, regardless of whether they are passed on to customers or absorbed by the firms.

The EPA also prepared a small business screening assessment to determine whether any of the identified affected facilities are small entities, as defined by the U.S. Small Business Administration. One of the facilities affected by these amendments is a small entity. However, the annual cost associated with the requirements is 0.18 percent of annual sales revenue for the owner of that facility. Therefore, there are no significant economic impacts on a substantial number of small entities from these amendments.

*E. What are the benefits?*

As stated above in section V.C of this preamble, we were unable to quantify the specific emissions reductions associated with eliminating the SSM exemption, although this proposed change has the potential to reduce emissions of volatile organic HAP.

Because these proposed amendments are not considered economically significant, as defined by Executive Order 12866, we did not monetize the benefits of reducing these emissions. This does not mean that there are no benefits associated with the potential reduction in volatile organic HAP from this rule.

## VI. Request for Comments

We solicit comments on this proposed action. In addition to general comments on this proposed action, we are also interested in additional data that may improve the risk assessments and other analyses. We are specifically interested in receiving any improvements to the data used in the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

## VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the project website at *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the project website, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.

2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2020–0148 (through the method described in the **ADDRESSES** section of this preamble).

5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility (or facilities). We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the project website at *https://www.epa.gov/stationary-sources-air-pollution/refractory-products-manufacturing-national-emissions-standards* .

## VIII. Statutory and Executive Order 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 not a significant regulatory action and was, therefore, not submitted to OMB for review.

### *B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

### *C. Paperwork Reduction Act (PRA)*

The information collection activities in this proposal have been submitted for approval to OMB under the PRA. The ICR document that the EPA prepared has been assigned EPA ICR number 2040.08. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

As part of the RTR for the Refractory Products Manufacturing NESHAP, the EPA is not proposing to revise the existing emission limit requirements but is adding new emission limit requirements for existing clay refractory sources and is adding new work practices for existing nonclay refractory sources. The EPA is also proposing to revise the SSM provisions of the rule and proposing the use of electronic data reporting for future performance test data submittals, notifications, and reports. This information is being collected to assure compliance with 40 CFR part 63, subpart SSSSS.

*Respondents/affected entities:* Facilities manufacturing refractory products.

*Respondent's obligation to respond:* Mandatory (40 CFR part 63, subpart SSSSS).

*Estimated number of respondents:* In the 3 years after the amendments are final, approximately three respondents per year would be subject to the NESHAP and no additional respondents are expected to become subject to the NESHAP during that period.

*Frequency of response:* The total number of responses is 21 per year.

*Total estimated burden:* The average annual burden to the three refractory products manufacturing facilities over the 3 years if the amendments are finalized is estimated to be 230 hours (per year). The average annual burden to the Agency over the 3 years after the amendments are final is estimated to be 202 hours (per year). Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* The average annual cost to the refractory products manufacturing facilities is $27,100 in labor costs in the first 3 years after the amendments are final. The average annual capital and operation and maintenance cost is $69,900. The total average annual Agency cost over the first 3 years after the amendments are final is estimated to be $9,990.

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 the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than February 16, 2021. The EPA will respond to any ICR-related comments in the 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. The annualized costs associated with the proposed requirements in this action for the affected small entities is described in section V.D. above.

### *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 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. No tribal facilities are known to be engaged in any of the industries that would be affected by this action. In addition, the EPA conducted a proximity analysis for this source category and found that no refractory products manufacturing facilities are located within 50 miles of tribal lands. Thus, Executive Order 13175 does not apply to this action.

### *H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in sections

III.A, IV.B, and IV.C of this preamble and are further documented in the Refractory Products Manufacturing Docket.

*I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

*J. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51*

This action involves technical standards. Therefore, the EPA conducted searches for the Refractory Products Manufacturing RTR through the Enhanced National Standards Systems Network Database managed by the American National Standards Institute (ANSI). We also contacted voluntary consensus standards (VCS) organizations and accessed and searched their databases. We conducted searches for EPA Methods 1, 1A, 2, 2A, 2C, 2D, 2F, 2G, 3, 3A, 3B, 4, 5, 25, 25A, 26, 26A, and 29 of 40 CFR part 60, and EPA Methods 311 and 320 of 40 CFR part 63, appendix A. No applicable VCS were identified for EPA Methods 1A, 2A, 2D, 2F, 2G, 5A, 5B, 5D, and 5F.

The EPA is incorporating by reference the VCS ANSI/ASME PTC 19.10–1981, ''Flue and Exhaust Gas Analyses.'' This method determines quantitatively the gaseous constituents of exhausts resulting from stationary combustion sources. The manual procedures (but not instrumental procedures) of VCS ANSI/ASME PTC 19.10–1981—Part 10 may be used as an alternative to EPA Method 3B for measuring the oxygen or carbon dioxide content of the exhaust gas. The gases covered in ANSI/ASME PTC 19.10–1981 are oxygen, carbon dioxide, CO, nitrogen, $SO_2$, sulfur trioxide, nitric oxide, nitrogen dioxide, hydrogen sulfide, and hydrocarbons, however the use in this rule is only applicable to oxygen and carbon dioxide and is an acceptable alternative to the manual portion only and not the instrumental portion.

The EPA is incorporating by reference the VCS ASTM D6348–12e1, ''Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy,'' as an acceptable alternative to EPA Method 320. ASTM D6348–03(2010) was determined to be equivalent to EPA Method 320 with caveats. ASTM D6348–12e1 is a revised version of ASTM D6348–03(2010) and includes a new section on accepting the results from the direct measurement of a certified spike gas cylinder, but lacks the caveats placed on the ASTM D6348–03(2010) version. The VCS ASTM D6348–12e1, ''Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy,'' is an extractive FTIR field test method used to quantify gas phase concentrations of multiple analytes from stationary source effluent and is an acceptable alternative to EPA Method 320 at this time with caveats requiring inclusion of selected annexes to the standard as mandatory. When using ASTM D6348–12e1, the following conditions must be met:

(1) The test plan preparation and implementation in the Annexes to ASTM D6348–03, Sections A1 through A8 are mandatory; and

(2) In ASTM D6348–03, Annex A5 (Analyte Spiking Technique), the percent (%) R must be determined for each target analyte (Equation A5.5).

In order for the test data to be acceptable for a compound, percent R must be 70 percent $\geq R \leq$ 130 percent. If the %R value does not meet this criterion for a target compound, the test data is not acceptable for that compound and the test must be repeated for that analyte (*i.e.,* the sampling and/or analytical procedure should be adjusted before a retest). The percent R value for each compound must be reported in the test report, and all field measurements must be corrected with the calculated percent R value for that compound by using the following equation:

Reported Results = ((Measured Concentration in Stack))/(%R) × 100.

Finally, the EPA is incorporating by reference the VCS ASTM D6784–16), ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),'' as an acceptable alternative to EPA Method 29 (portion for mercury only) as a method for measuring elemental, oxidized, particle-bound, and total mercury concentrations ranging from approximately 0.5 to 100 micrograms per normal cubic meter. This test method describes equipment and procedures for obtaining samples from effluent ducts and stacks, equipment and procedures for laboratory analysis, and procedures for calculating results. VCS ASTM D6784–16 allows for additional flexibility in the sampling and analytical procedures for the earlier version of the same standard VCS ASTM D6784–02 (Reapproved 2008).

*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 human 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 section IV.B of this preamble and the technical report titled *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Refractory Products Manufacturing Source Category Operations,* September 2020, available in the Refractory Products Manufacturing Docket, respectively.

As discussed in section IV.B of this preamble, we performed a demographic analysis for each source category, which is an assessment of risks to individual demographic groups, of the population close to the facilities (within 50 km and within 5 km). In this analysis, we evaluated the distribution of HAP-related cancer risks and noncancer hazards from the Refractory Products Manufacturing source category across different social, demographic, and economic groups within the populations living near operations identified as having the highest risks.

The results of the Refractory Products Manufacturing source category demographic analysis indicate that no one is exposed to a cancer risk at or above 1-in-1 million and no one is exposed to a chronic noncancer HI greater than 1.

The proximity results (irrespective of risk) indicate that the population percentages for ''ages 18 to 64'' and ''ages 65 and up'' demographic categories located within 5 km of refractory products manufacturing facilities and ''ages 65 and up'' demographic categories located within 50 km of refractory products manufacturing facilities are slightly higher than their respective nationwide percentages.

We do not expect this proposal to achieve significant reductions in HAP emissions. The EPA anticipates that this action does not have disproportionately high and adverse human 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) because it does not significantly affect the level of protection provided to human health or the environment. The documentation for this decision is contained in section IV of this preamble and the technical report titled *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Refractory Products Manufacturing Source Category Operations,* September 2020, which are available in the Refractory Products Manufacturing Docket, respectively.

### List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

**Andrew Wheeler,**

*Administrator.*

[FR Doc. 2021–00137 Filed 1–13–21; 8:45 am]

**BILLING CODE 6560–50–P**

# Notices

Federal Register

Vol. 86, No. 9

Thursday, January 14, 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.

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### Privacy Act of 1974; System of Records

**AGENCY:** Agency for International Development (USAID).

**ACTION:** Notice of a Modified System of Records.

**SUMMARY:** The United States Agency for International Development proposes to significantly modify the ''United States Agency for International Development, Partner-Vetting Enhancement Project, USAID–27, Partner-Vetting System, System of Records.'' The purpose of the system is to support the vetting of directors, officers, and other employees of non-governmental organizations that apply to USAID for contracts, grants, cooperative agreements, or other funding. The Agency specifically uses the information collected from the individuals to conduct screening and to mitigate the risk that USAID's funds and USAID-funded activities purposefully or inadvertently provide support to entities or individuals deemed a risk to national security.

**DATES:** Submit comments on or before 12 February 2021. This modified system of records will be effective 12 February 2021 upon publication. The Routine Uses are effective at the close of the comment period.

**ADDRESSES:** You may submit comments:

*Electronic*

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on the website for submitting comments.
- *Email: Privacy@usaid.gov.*

*Paper*

- *Fax:* 202–916–4946.
- *Mail:* Chief Privacy Officer, United States Agency for International Development, 1300 Pennsylvania Avenue NW, Washington, DC 20523.

**FOR FURTHER INFORMATION CONTACT:** Ms. Celida A. Malone, USAID Privacy Program at United States Agency for International Development, Bureau for Management, Office of the Chief Information Officer, Information Assurance Division: ATTN: USAID Privacy Program, 1300 Pennsylvania Avenue NW, Washington, DC 20523, or by phone number at 202–916–4605.

**SUPPLEMENTARY INFORMATION:** For purposes of national-security and counterterrorism vetting, USAID staff use the Partner-Vetting System (PVS) to receive, store, and process organizational information and Personally Identifiable Information (PII) by using USAID Form 500–13, the Partner-Information Form (PIF). See *https://www.usaid.gov/forms/aid-500-13.* The Office of Management and Budget has approved the use of the PIF under the Paperwork Reduction Act. The PII gathered on the PIF, and in PVS, as stated in the current SORN, includes full name (including any aliases or variations of spelling); date and place of birth; government-issued identification information (including, but not limited to, Social Security Number, passport number, or other numbers originated by a government that specifically identify an individual); current mailing address; telephone numbers; email addresses; citizenship; gender; and occupation or other employment data.

USAID is modifying the SORN to delete ''Individuals who are officers or other officials of non-profit, non-governmental organizations who apply for registration with USAID as Private and Voluntary Organizations (PVOs)'' from the ''Categories of Individuals Covered by the System,'' as a result of the Agency's decision to change the registration processes for PVOs. PVOs only must register for the Limited Excess Property Program and the Ocean Freight Reimbursement Program, and to self-certify as part of the application process. USAID also are clarifying under ''Categories of Records in the System'' that the government-issued identification information listed in its existing SORN includes photographic biometric data. We further are adding more detail to the SORN's Routine-Uses Statement, including that we share information with other Federal Departments and Agencies for vetting purposes, and clarifying that the PVS does not contain any classified information.

Dated: October 8, 2020.

**Mark Joseph Johnson,**

*Chief Privacy Officer, United States Agency for International Development.*

**SYSTEM NAME AND NUMBER:**

Partner-Vetting System, USAID–27.

**SECURITY CLASSIFICATION:**

Sensitive but Unclassified.

**SYSTEM LOCATION:**

Amazon Web Services, US–EAST–1, 7600 Doane Drive, Manassas VA 20109.

**SYSTEM MANAGER:**

Chief, Counterterrorism Vetting, Office of Security, United States Agency for International Development, Ronald Reagan Building, 1300 Pennsylvania Avenue NW, Washington, DC 20523.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Foreign Assistance Act of 1961 (FAA), as amended, permits the Administrator of USAID to consider a range of foreign-policy and national-security interests in determining how to provide foreign assistance. Sections 7034 and 7039 of the Department of State, Foreign Operations, and Related Programs Appropriations Act for Fiscal Year 2020 (FY 2020) contain provisions and requirements for the oversight of USAID's programs. Executive Order (E.O.) 9397 created and governs the use of Social Security Numbers.

**PURPOSE OF THE SYSTEM:**

PVS supports the vetting of directors, officers, and other employees of non-governmental organizations that apply to USAID for contracts, grants, cooperative agreements or other funding. The Agency specifically uses the information collected from the individuals to conduct screening, and to mitigate the risk that USAID's funds and USAID-funded activities purposefully or inadvertently provide support to entities or individuals deemed a risk to national security.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals who are directors, officers, or are otherwise employed by either for-profit or non-profit non-governmental organizations that apply for and receive contracts, grants, cooperative agreements, or other types of instruments from USAID; individuals who apply for and receive Personal Services Contracts or other contracts, grants, or cooperative agreements; individuals or organizations that attempt to obtain other assistance or benefits from USAID (excluding for PVOs).

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Full name, Social Security Number, date of birth, place of birth, passport number or permanent resident card number, tax identification number, home address, home telephone number, personal cell phone number, personal email address, work telephone number, work email address, citizenship, sex or gender, photographic biometric information, employment or salary record.

#### RECORD SOURCE CATEGORIES:

USAID may obtain information in this system from a non-governmental organization (USAID contractor or recipient official who is responsible for completing the application package required to obtain funds or assistance from USAID as an award or as a sub-award. In the case of applications by an individual in his/her own capacity, the Agency will collect the information directly from the individual applicant. USAID also may obtain information in this system from public sources, Federal Departments and Agencies that conduct national-security screening, law-enforcement and intelligence-agency record systems, and other Federal Government databases.

#### 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 the Privacy Act (Section 552a (b) of Title 5 of the U.S.C.), the Agency could disclose all or a portion of the records or information contained in this system outside of USAID as a routine use, as follows:

(1) To another Federal Department or Agency, to a court, magistrate, or other administrative body, or to a party in litigation before a court or in an administrative proceeding being conducted by a Federal Department or Agency, when the Government is a party to the judicial or administrative proceedings or has a significant interest in the proceeding where the Department or Agency determines the information to be necessary and relevant.

(2) To any component of the U.S. Department of Justice, or in a proceeding before a court, adjudicative body, or other administrative body before which the Department or Agency is authorized to appear, when; (a) the Department or Agency or any component thereof; or (b) any employee of the Department or Agency in her or his official capacity; or (c) any employee of the Department or Agency in his or her individual capacity where the U.S. Department of Justice or the Department or Agency has agreed to represent the employee; or (d) the United States, when the Department or Agency determines that litigation is likely to affect it or any of its components, is a party to litigation or has an interest in such litigation, and the Department or Agency deems the use of such records by the U.S. Department of Justice or the Department or Agency is relevant and necessary to the litigation provided, however, that in each case the Department or Agency has determined that the disclosure is compatible with the purpose for which the records were collected.

(3) To the U.S. Department of Justice for the purpose of obtaining legal counsel, including whether USAID should disclose the records or information in this system of records outside the Agency.

(4) To a Federal Government Department or Agency that assists USAID for the purpose of vetting, and for the purposes of ensuring accuracy of existing records and updating government records when a match between an applicant and another database is identified.

(5) To disclose information to contractors (Personal Service Contractors or institutional support contractors) in furtherance of the contractor's performance on behalf of USAID under a contract, including contracts that support the partner-vetting program.

(6) To the National Archives and Records Administration (NARA), for the purposes of records-management inspections conducted under the authority of Sections 2904 and 2906 of Title 44 of the U.S.C. and in its role as Archivist.

(7) To appropriate Federal Departments and Agencies, entities, and persons when: (a) USAID suspects or has confirmed that there has been a breach of the system of records; (b) USAID has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, USAID (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such Departments and Agencies, entities, and persons is reasonably necessary to assist in connection with USAID's efforts to respond to the suspected or confirmed breach, or to prevent, minimize, or remedy such harm.

(8) To the Office of Management and Budget (OMB), in connection with review of private relief legislation, as set forth in OMB Circular A–19, at any stage of the legislative coordination and clearance process, as set forth in that Circular.

(9) To another Federal Department or Agency or Federal entity, when USAID determines information from this system of records is reasonably necessary to assist the recipient Department or Agency or entity in: (a) Responding to a suspected or confirmed breach; or (b) 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, that might result from a suspected or confirmed Breach.

#### POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

USAID stores records in this system in electronic format. USAID's staff collect paper records that contain information for counterterrorism vetting when USAID's partners need to submit required information other than electronically. USAID's policy is that, following the entry of information contained in such paper copies into PVS, our staff must dispose of the paper copies properly, in accordance with the Agency's procedures for handling information.

#### POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

USAID's staff retrieves records in PVS by individual name, date of birth, place of birth, passport numbers, or other identifying data specified under ''Categories of Records'' in the system, as well as Mission/Program/Department, old awardee identification number (ID), awardee ID, alias, city, vetting status, vetting priority, vetting date, date of final determination, or date USAID created the record.

#### POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

PVS follows NARA Records Schedule Number DAA–0286–2017–0001. USAID maintains vetting records for nine years after making an eligible or ineligible decision, regardless of award status.

#### ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

*For electronic records:* USAID maintains PVS records in a secure cloud database managed by Amazon Web Services on behalf of the Agency. The database is subject to non-disclosure agreement rules of engagement administered by AID Form 545–5. USAID restricts access to vetting requests and results stored in the PVS database to users who are U.S. Government personnel and authorized contractors who need to know this information to perform their duties, who can include the USAID workforce hired and/or appointed by our Missions, Bureaus, and Independent Offices involved in conducting or supporting vetting. The PVS database is housed on, and accessed from, an unclassified computer network. USAID stores vetting results, the analysis of their content, and classified comments separately, outside of PVS, on appropriately classified networks. Computer networks and the PVS database require a user authentication and Agency approval. The Agency maintains and periodically reviews an audit trail to monitor access to the system. Authorized U.S. Government personnel receive instructions in the proper use and protection of PII.

*For paper records:* USAID keeps paper vetting records in an approved security container at our Washington headquarters, and at the relevant locations that conduct vetting-related activities. Access to these records is limited to those authorized U.S. Government personnel and authorized contractors who have a need for the records in the performance of their official duties. USAID does not keep classified records within PVS.

**RECORD ACCESS PROCEDURES:**

Under the Privacy Act, individuals may request access to records about themselves. These individuals must be limited to citizens of the United States or aliens lawfully admitted for permanent residence. If a Federal Department or Agency or a person who is not the individual who is the subject of the records, requests access to records about an individual, the written consent of the individual who is the subject of the records is required.

*Requesters may submit requests to USAID for records under the Privacy Act in the following ways:* (1) By mail to the Freedom of Information Act (FOIA) Office in the Information and Records Division of the Office of Management Services within USAID's Bureau for Management, 1300 Pennsylvania Avenue NW, Room 2.07C, Ronald Reagan Building, Washington, DC 20523–2701; (2) via facsimile to 202–216–3070; (3) via email to *foia@usaid.gov;* (4) on the USAID website, at *www.usaid.gov/foia-requests;* or, (5) in person during regular business hours at USAID, 1300 Pennsylvania Avenue NW, Room 2.07C, Ronald Reagan Building, Washington, DC 20523–2701, or at USAID's overseas Missions.

Requesters who use methods 1 through 4 above may provide a written statement, or may complete and submit USAID Form 507–2, Freedom of Information/Privacy Act Record Request Form, which is available in the following ways: (a) On the USAID website, at *www.usaid.gov/foia-requests;* (b) by email request to *foia@usaid.gov;* or, (c) by writing to USAID's FOIA Office in the Information and Records Division of the Office of Management Services within USAID's Bureau for Management, 1300 Pennsylvania Avenue NW, Room 2.07C, Ronald Reagan Building, Washington, DC 20523–2701. Requesters must provide information that is necessary to identify the records, including the following: The requester's full name; present mailing address; home telephone; work telephone; name of subject, if other than the requester; the requester's relationship to subject; a description of the type of information or specific records; and the purpose of requesting the information. Requesters should provide the system of record (in this case, PVS) identification name and number, if known; and, to facilitate the assembly of records retrieved by Social Security Numbers, the Social Security Number of the individual to whom the record or records pertain.

In addition, requesters who use methods 1 through 4 above must include proof of their identity by providing copies of two (2) source documents notarized by a valid, unexpired notary public. Acceptable proof-of-identity source documents include an unexpired United States passport; Social Security Card (both sides); unexpired U.S. Government employee identity card; unexpired driver's license or identification card issued by a state or United States possession, provided that it contains a photograph; a certificate of United States citizenship; a certificate of naturalization; a card that shows permanent residence in the United States; a United States alien registration receipt card with photograph; a United States military identification card or draft record; or a United States military dependent's identification card.

A requester who use methods 1 through 4 above also must provide a signed and notarized statement that he or she is the person named in the request; that he or she understands that any falsification of this statement is punishable under the provision of Section 1001 of Title 18 of the U.S.C. by a fine, or by imprisonment of not more than five years or, if the offense involves international or domestic terrorism (as defined in Section 2331 of the statute), imprisonment of not more than eight years, or both; and that requesting or obtaining records under false pretenses is punishable under the provisions of Section 552a(i)(3) of Title 5 of the U.S.C. as a misdemeanor, and by a fine of not more than $5,000.

Requesters who use method 5 above must provide such personal identification as is reasonable under the circumstances to verify their identity, including the following: An unexpired United States passport; Social Security Card; unexpired U.S. Government employee identity card; un-expired driver's license or identification card issued by a state or United States possession, provided that it contains a photograph; a certificate of United States citizenship; a certificate of naturalization; a card that shows permanent residence in the United States; a United States alien registration receipt card with photograph; a United States military identification card or draft record; or a United States military dependent's identification card.

**CONTESTING RECORD PROCEDURES:**

See Record Access Procedure.

**NOTIFICATION PROCEDURES:**

See Record Access Procedure.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

Portions of USAID's PVS are exempt from one or more provisions of the Privacy Act (74 FR 9).

Exempt information in this system includes, but is not limited to, the following:

• Results generated from the screening of individuals covered by this notice;

• Intelligence and law-enforcement information related to national security; and

• National-security vetting and counterterrorism screening information, provided to USAID by other Departments and Agencies.

*Section 215.13 of Part 215 of Title 22 of the Code of Federal Regulations,* General Exemptions:

(c) The systems of records USAID is exempt under Section (j)(2) of the Act, the provisions of the Act from which the Agency is exempting them, and the justification for the exemptions, appear below:

(2) Partner-Vetting System (PVS). This system is exempt from Subsections (c)(3) and (4); (d); (e)(1), (2), and (3); (e)(4)(G), (H), and (I); (e)(5) and (8); (f), (g), and (h) of Section 552a of Title 5 of the U.S.C. These exemptions are

necessary to insure the proper functioning of the law-enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to maintain the integrity of law-enforcement procedures, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary basis of possible enforcement actions, to prevent interference with law-enforcement proceedings, to avoid the disclosure of investigative techniques, to avoid endangering law-enforcement personnel, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources, and to facilitate the proper selection or continuance of the best applicants or persons for a given position or contract. Although the primary functions of USAID are not of a law-enforcement nature, the mandate to ensure USAID's funding does not purposefully or inadvertently support entities or individuals deemed to be a risk to national security necessarily requires coordination with law-enforcement and intelligence agencies as well as use of their information. The use of the information by these other Departments or Agencies necessitates the conveyance of these other systems exemptions to protect the information as stated. [57 FR 38277, Aug. 24, 1992, as amended at 74 FR 16, Jan. 2, 2009]

*Section 215.14 of Part 215 of Title 22 of the Code of Federal Regulation,* Specific Exemptions:

(c) The systems of records to be exempted under Section (k) of the Act, the provisions of the Act from which the Agency is exempting them, and the justification for the exemptions, appear below:

(6) Partner Vetting System (PVS). This system is exempt under Subsections (k)(1), (k)(2), and (k)(5) of Section 552a of Title 5 of the U.S.C., and from the provisions of Subsections (c)(3); (d); (e)(1); (e)(4)(G), (H), (I); and (f).5 of Section 552a of U.S.C. 552a. USAID claims these exemptions to protect the materials required by Executive Order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to ensure the proper functioning and integrity of law-enforcement activities, to prevent the disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources, and to facilitate the proper selection or continuance of the best applicants or persons for a given position or contract. [57 FR 38277, Aug. 24, 1992, as amended at 74 FR 17, Jan. 2, 2009]

**HISTORY:**

USAID established the PVS as a new system of records on August 27, 2007 (72FR 39042).

USAID modified the PVS system of records on January 10, 2013 (77 FR 72319).

**Celida Ann Malone,**

*Government Privacy Task Lead.*

[FR Doc. 2021–00450 Filed 1–13–21; 8:45 am]

**BILLING CODE 6116–02–P**

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Food Distribution Program on Indian Reservations 2018 Farm Bill Demonstration Project for Tribal Organizations: Solicitation of Proposals

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Notice.

**SUMMARY:** The Department of Agriculture (USDA) Food and Nutrition Service (FNS) is soliciting proposals from eligible Tribal Organizations to participate in a demonstration project to purchase agricultural commodities for the Food Distribution Program on Indian Reservations (FDPIR). This demonstration project is authorized under the Agriculture Improvement Act of 2018. Participation in this demonstration project is available to Tribal Organizations that administer FDPIR. Tribal organizations will be selected on a competitive basis and funding will be awarded through a self-determination contract.

**DATES:** Proposals will be accepted until 11:59 p.m. ET on March 15, 2021. See **ADDRESSES** section for submission details.

**ADDRESSES:** Email proposals to *FDPIR-RC@usda.gov* with subject line ''FDPIR Demonstration Project''. Proposals received and date-stamped after the time listed in the **DATES** section of this notice will not be considered. FNS will accept proposals at any time before the deadline and will send a notification of receipt to the return email address on the proposal package, along with a determination of whether the proposal is complete.

**FOR FURTHER INFORMATION CONTACT:** Barbara Lopez, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place, Alexandria, Virginia 22314, 703–305–2465, or email *FDPIR-RC@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Program Background
II. 2018 Farm Bill: Demonstration Project for Tribal Organizations
III. Eligibility and Criteria
A. Eligibility of Tribal Organization
B. Agricultural Commodity Criteria
IV. Review, Selection and Evaluation
A. Review and Selection Process
B. Evaluation Criteria
V. Proposal Template

### I. Program Background

The Food Distribution Program on Indian Reservations (FDPIR) is administered by the Food and Nutrition Service (FNS) of the USDA and provides a food package of 100 percent domestically grown foods to income-eligible households living on Indian reservations and to American Indian households residing in approved areas near reservations or in Oklahoma. FDPIR was authorized under the Food Stamp Act of 1977 (Pub. L. 95–113), which was later renamed the Food and Nutrition Act of 2008 (FNA). FDPIR is currently administered by 102 Tribal Organizations and three State agencies and provides benefits and nutrition education services to approximately 276 Federally recognized Tribes across the United States. In FY 2020, the program served approximately 75,500 individuals on an average monthly basis. Each month, participating FDPIR households receive a defined food package to help maintain a nutritionally balanced diet. Based on FNS guidance, participants may select from over 100 domestically grown and produced foods, including fresh fruits and vegetables, a variety of frozen and nonperishable items, and a selection of traditional foods.

FDPIR administering agencies order foods from USDA (*i.e.,* USDA Foods), and the foods are purchased and shipped to Tribal Organizations and State agencies that administer FDPIR. These administering agencies store and distribute the foods, determine applicant eligibility, and provide nutrition education to participants. USDA provides the administering agencies with funds for program administrative costs.

### II. 2018 Farm Bill: Demonstration Project for Tribal Organizations

Currently, the USDA Foods provided in the FDPIR food package are procured by USDA's Agricultural Marketing Service (AMS) in collaboration with FNS. USDA purchases and ships the

USDA Foods to Tribal Organizations and State agencies that administer FDPIR. Tribal Organizations and State agencies store and distribute the foods, determine applicant eligibility, and provide nutrition education to recipients. Section 4003(b) of the Agriculture Improvement Act of 2018 (Pub. L. 115–334, the 2018 Farm Bill) establishes a demonstration project for one or more Tribal Organization(s) within FDPIR to enter into self-determination contracts for them to purchase foods for their Indian Tribe, instead of USDA, for inclusion in the FDPIR food package. Section 4003(b)(1)(E) of the 2018 Farm Bill defines self-determination contract as: *The term ''self-determination contract'' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).* Under Section 4003(b)(2), the 2018 Farm Bill further states that the ''*Secretary shall establish a demonstration project under which 1 or more tribal organizations may enter into self-determination contracts to purchase agricultural commodities under the food distribution program for the Indian reservation of that tribal organization.*'' Given the 2018 Farm Bill's specific reference to 25 U.S.C. 5304 and self-determination contracts only, Tribal Organizations selected to participate in this demonstration project would need to enter into a self-determination contract with FNS. No other type of funding agreement will be allowed.

Self-determination contracts, as defined under Section 4 of the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93–638 (25 U.S.C. 5304), as amended, allow a Tribal Organization to have more control over the governmental affairs of their Organizations, fostering further self-governance. The 2018 Farm Bill provision under Section 4003(b) supports Tribal Organization self-governance by specifically allowing Tribal Organizations to procure FDPIR food instead of USDA. This provision also allows FNS to familiarize itself with these types of contracts and to assess how FDPIR could operate under such a food distribution program model.

FNS received $3.0 million to support this demonstration project through the Further Consolidated Appropriations Act of 2020 (Pub. L. 116–94). Section 4003(b)(6)(B) of the 2018 Farm Bill states that only funds appropriated to the Secretary of Agriculture in advance to carry out Section 4003(b) may be used to carry out this demonstration project. Per this statutory language, the only funds currently available to carry out this demonstration project is the $3.0 million appropriated by Congress in the Further Consolidated Appropriations Act of 2020 (Pub. L. 116–94). This appropriated amount must cover all costs associated with the demonstration project, including food procurement costs and contract support costs. In addition, FNS is interested in ensuring that more than one Tribal Organization participates in this demonstration project. Given the amount of available funds, individual proposals may not exceed $1.5 million. Should additional funding be appropriated by Congress for this demonstration project, FNS reserves the right to use this solicitation to select additional proposals or extend an existing contract already awarded under this demonstration project.

The 2018 Farm Bill outlined the following criteria for Tribal Organization participation and procurement of agricultural commodities:

- Selection of Tribal Organization (Section 4003(b)(3)(B) of the 2018 Farm Bill): The Secretary of USDA shall select for participation in the demonstration project Tribal Organizations that: Are successfully administering FDPIR under section 4(b)(2)(B) of the Food and Nutrition Act of 2008 (7 U.S.C. 2013(b)(2)(B)); have the capacity to purchase agricultural commodities for their FDPIR program; and meet any other criteria determined by the Secretary of USDA after consultation with the Secretary of the Interior and Indian Tribes to participate in the demonstration project.
- Procurement of Agricultural Commodities (Section 4003(b)(4) of the 2018 Farm Bill): Tribal Organizations selected to participate in the demonstration project shall only purchase agricultural commodities that: Are domestically produced; will supplant, not supplement, the type of agricultural commodities in the existing FDPIR food package; are of similar or higher nutritional value as the food(s) it is replacing in the existing food package; and meet any other criteria as determined by the Secretary of USDA.

## III. Eligibility and Criteria

During fiscal years (FY) 2019, 2020 and 2021, FNS engaged in six Tribal consultation meetings with Tribal leaders to receive input and feedback on the criteria for FDPIR Tribes to participate in the demonstration project. This feedback has been incorporated into the criteria outlined below to the greatest extent possible.

### *A. Eligibility of Tribal Organization*

1. Tribal Organization must administer FDPIR at the time a proposal is due, either under a direct agreement with FNS or under an agreement with a State agency. The self-determination contract will be between FNS and the Tribal Organization.

2. Prior to contract negotiations, a Tribal Resolution from the Tribal Council authorizing the Tribal Organization to participate in this demonstration project must be submitted with the proposal. Tribal Organizations are encouraged to submit a Tribal Resolution with its proposal. However, if the Tribal Resolution is unavailable at the time the proposal is due, a Tribal Organization may alternatively submit a statement affirming that a Tribal Resolution with this authorization has been requested of the Tribal Council and provide the date the Tribal Resolution is expected to be received in their proposal. Tribal Resolutions must be received no later than 30 days after notification of being selected or the proposal will be disqualified and will not be selected for funding.

3. Tribal Organization must demonstrate success in administering FDPIR. FNS will evaluate this based on the following:

- Tribal Organization must have a current Plan of Operation on file with FNS or with the State agency, if applicable, that meets the regulatory requirements of 7 CFR part 253;
- Tribal Organization must be in compliance with regulatory inventory storage and inventory management requirements at 7 CFR 250.12; and
- Tribal Organization must have no outstanding financial or inventory-related FNS management evaluation findings. If an FNS management evaluation has not been conducted within the last three years, a copy of the most recent Tribal audit report must be submitted.

4. Tribal Organization must have capacity to purchase one or more agricultural commodities meeting all the criteria under III.B. of this notice.

5. Tribal Organization must provide a budget proposal and narrative with all associated costs that will be carried out under the contract. The budget proposal, including all contract support costs (CSC), may not exceed $1.5 million.

6. Tribal Organization must submit a complete proposal by the published due date. A proposal template is provided as part of this notice in section V. The template is not mandatory; a proposal will be accepted for review as long as it

meets all the applicable criteria in this notice.

*B. Agricultural Commodity Criteria*

In addition to the information and documentation required under III.A. of this notice, a Tribal Organization must also provide the following information in its proposal:

1. Identification of the current FDPIR food(s) the Tribal Organization intends to supplant (*i.e.,* replace) in the food package. All foods currently offered by USDA for the FDPIR program, including foods offered intermittently (*e.g.,* traditional foods, bonus foods), are eligible to be supplanted if proposed by the Tribal Organization.

2. A description of the available food(s) proposed for purchase and inclusion in the Tribal Organization's FDPIR program. In its description, Tribal Organization must provide the following:

▪ An attestation that the proposed food(s) is a product grown, processed, and otherwise prepared for sale or distribution exclusively in the United States.

▪ A description of the nutritional value of the proposed food(s) and an explanation of how the proposed food(s) is of similar or higher nutritional value than the food(s) being supplanted. The proposed food(s) does not need to provide the same specific nutrient profile as the food it is replacing. Alternately, Tribal Organizations may describe how the proposed food(s) is nutritionally similar to items in the FDPIR food package category it is replacing. It is not necessary to draw a direct comparison to the specific food being supplanted. For example:

• If a Tribal Organization proposes to supplant frozen blueberries in the FDPIR food package fruit category with a berry traditional to its culture, the Tribal Organization may explain how the traditional berry is nutritionally similar to other fruits currently offered in the fruit category. A comparison of the specific nutrients in frozen blueberries compared to the traditional berry is not required.

• For FDPIR food package categories, please reference Exhibit O: Food Distribution Program on Indian Reservations Monthly Distribution Guide Rates by Household Size (Distribution Rates).

▪ A description of Tribal Organization's capacity to obtain the proposed food(s) in a quantity that meets estimated participant demand. In its description, the Tribal Organization must confirm proposed food(s) will be offered to all participants served by its program.

▪ The estimated number of months the proposed food(s) will be distributed to Tribal Organization's existing FDPIR caseload. A minimum six-month distribution is required (consecutive or non-consecutive).

▪ Documentation that the proposed food(s) is commercially available (*i.e.,* presently being sold through commercial channels to the public by the vendor(s) from which the Tribal Organization is proposing to procure the food(s)).

▪ Letter(s) of Support from vendor(s) which will supply the food(s). Letter(s) should certify that vendor(s) sells food(s) commercially and offers food(s) that is a product grown, processed, and otherwise prepared for sale or distribution entirely in the United States.

**IV. Review, Selection and Evaluation**

*A. Review and Selection Process*

Funding, under this solicitation, will be provided via self-determination contracts, as defined by Section 4 of the ISDEAA, to at least two Tribal Organizations that meet the eligibility criteria established under section III. above. As part of the selection process, FNS will pre-screen and review all proposals to ensure they contain the required documents and information. Upon receiving a proposal, FNS will determine whether the proposal is complete within 7 calendar days. If a proposal is received before the deadline but is determined to be incomplete, the applicant will be notified and given the opportunity to submit missing items within 7 calendar days of being notified. If there are less than 7 calendar days from the date of notification and the deadline or the notification occurs after the deadline has passed, the applicant will still be given 7 calendar days to submit the missing items, but this is only available to proposals that were initially received before the deadline. Any initial proposals, whether complete or incomplete, received after the deadline will not be considered.

Timely, complete proposals will be given to the FNS review panel to be evaluated and scored against the ranking criteria. Proposals will be evaluated using the four ranking criteria listed below, under section IV.B. Evaluation Criteria, with a maximum achievable total of 100 points. The FNS review panel may ask applicants for additional clarification prior to final selection.

Final award selections will be approved by the FNS Administrator. Tribal Organizations not selected for award will be notified in writing. FNS reserves the right to use this solicitation to select additional proposals or extend an existing contract already awarded under this demonstration project should additional funds be made available through future appropriations.

*B. Evaluation Criteria*

The following selection criteria will be used to evaluate proposals for this demonstration project. FNS reserves the right to select proposals to meet geographical representation or project diversity notwithstanding the points awarded to each proposal. To the extent possible, FNS will ensure that the selected proposals, when considered as a group, test a range of geographic location, program size, and diversity in food selection. Tribal leaders, during consultation, also requested FNS consider selecting proposals that test a range of programs as much as possible.

*Program Administration: 20 points.* A proposal will be evaluated under this criterion for applicant's effectiveness in successfully administering FDPIR. Evaluation will be based on the factors listed under section III.A.3 of this notice.

*Project Viability: 30 points.* A proposal will be evaluated on its strength in demonstrating Tribal Organization capacity to purchase agricultural commodities for the FDPIR program. The panel will evaluate the project viability by examining: (1) The applicant's ability to obtain the proposed food(s) in a quantity that meets estimated participant demand; (2) the applicant's ability to obtain the proposed food(s) for a minimum six-month distribution (consecutive or non-consecutive); and (3) the vendor letter(s) of support included with proposal.

*Agricultural Commodity Description: 20 points.* A proposal will be evaluated under this criterion for the agricultural commodity it proposes to introduce to the FDPIR program and the degree to which the proposed food meets project requirements, including that: (1) The proposed food(s) is a product grown, processed, and otherwise prepared for sale or distribution entirely in the United States; and (2) the proposed food(s) is of similar or higher nutritional value than the food(s) being supplanted.

*Budget: 30 points.* A proposal will be evaluated under this criterion for the degree to which its proposed budget is reasonable, necessary, and allocable to costs associated with this demonstration project during its proposed period of performance. The budget narrative should correspond with the proposed line item budget and must justify and support the bona fide needs of the budget's line item costs. Proposal budgets must not exceed $1.5 million, including contract support costs.

**V. Proposal Template**

The following proposal template is provided for the convenience of applicants. The use of this template is recommended but not mandatory. A proposal will be accepted for review as long as it meets all the applicable criteria in this notice. Email completed proposals to *FDPIR-RC@usda.gov* with subject line ''FDPIR Demonstration Project''. Proposals will be accepted until 11:59 p.m. ET on March 15, 2021.

*A. Tribal Organization Information*

Please provide the following information:

1. Full name, address, and telephone number of Tribal Organization proposing to contract.
2. Full name, address, telephone number, and email of Tribal Organization's main contact for this proposal.
3. A copy of signed Federal-State Agreement (FNS–74) with FNS or of signed agreement with the FDPIR State agency.
4. A copy of current FDPIR Plan of Operation.
5. A copy of most recent FNS FDPIR management evaluation within the last three (3) years or, if the management evaluation is not available, copy of most recent Tribal audit report.
6. A Tribal Resolution from the Tribal Council authorizing the Tribal Organization to participate in this demonstration project or a statement affirming that a Tribal Resolution with this authorization has been requested of the Tribal Council and will be submitted prior to contract negotiations and within 30 days, if selected.
7. A detailed description of Tribal Organization's capacity to purchase the proposed food(s) for its FDPIR program.

*B. Agricultural Commodity Procurement*

Please provide the following information:

1. Identification of food(s) from the current FDPIR food package the Tribal Organization intends to supplant (*i.e.,* replace).
2. A detailed description of food(s) proposed for purchase and inclusion in the FDPIR program by Tribal Organization. Specifically, the following information must be included:

a. An attestation that the proposed food(s) is a product grown, processed, and otherwise prepared for sale or distribution exclusively in the United States. See also #5 of this proposal template.

b. A description of the nutritional value of the proposed food(s) and explanation of how the proposed food(s) is of similar or higher nutritional value than the food(s) being supplanted. Alternately, Tribal Organizations may describe how the proposed food(s) is nutritionally similar to the items in the FDPIR food package category of the food it is replacing rather than drawing a direct nutritional comparison to the specific food being supplanted. For example:

▪ If a Tribal Organization proposes to supplant frozen blueberries in the FDPIR food package fruit category (Exhibit O) with a berry traditional to its culture, the Tribal Organization may explain how the traditional berry is nutritionally similar to other fruits currently offered in the fruit category. A comparison of the specific nutrients in frozen blueberries compared to the traditional berry is not required.

c. A description of Tribal Organization's capacity to obtain the proposed food(s) in a quantity that meets estimated participant demand. In the description, Tribal Organization must confirm proposed food(s) will be offered to all FDPIR participants served by its program.

d. The estimated number of months the proposed food(s) will be distributed to Tribal Organization's existing FDPIR caseload. A minimum six-month distribution is required (consecutive or non-consecutive).

e. Documentation that the proposed food(s) is commercially available (*i.e.,* presently being sold to the public through commercial channels by the vendor(s) from which the Tribal Organization is proposing to procure the food(s)). See also #5 of this proposal template.

3. A proposed budget and narrative of estimated costs. Budget proposal, including all contract support costs, may not exceed $1.5 million. The proposed budget must include the following:

a. The total amount of funds requested.

b. A budget narrative that describes all major line-item expenditures that are proposed.

c. A breakout of the amount of funds requested by the following categories:

▪ Food purchases
▪ Personnel
▪ Equipment
▪ Materials and supplies
▪ Travel
▪ Other allowable costs

d. An estimate and description of all contract support costs.

4. A proposed period of performance to perform contract activities.
5. Letter(s) of Support from vendor(s) which will supply the food(s). Letter(s) should certify that vendor(s):

▪ Sells food(s) commercially; and
▪ Offers food(s) that is a product grown, processed, and otherwise prepared for sale or distribution exclusively in the United States.

**Pamilyn Miller,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2021–00529 Filed 1–13–21; 8:45 am]

**BILLING CODE 3410–30–P**

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## DEPARTMENT OF AGRICULTURE

### Forest Service

### Newspapers Used for Publication of Legal Notices by the Pacific Northwest Region; Oregon, Washington, and Parts of California

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice lists the newspapers that will be used by the Ranger Districts, Forests and Regional Office of the Pacific Northwest Region to publish legal notices required under Agency regulations. The intended effect of this action is to inform interested members of the public which newspapers the Forest Service will use to publish notices of proposed actions and notices of decision. This will provide the public with constructive notice of Forest Service proposals and decisions, provide information on the procedures to comment, object, or appeal, and establish the date that the Forest Service will use to determine if comments, appeals, or objection were timely.

**DATES:** Publication of legal notices in the listed newspapers begins on the date of this publication. This list of newspapers will remain in effect until a new list is published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Sue Dixon, Regional Environmental Coordinator, Pacific Northwest Region, 1220 Southwest Third Avenue, Portland, OR 97204 and by phone at (503) 808–2276 or by email at *sue.dixon@usda.gov.*

**SUPPLEMENTARY INFORMATION:** The administrative procedures at 36 CFR 218, and 219 require the Forest Service to publish notices in a newspaper of general circulation. The content of the notices is specified in 36 CFR 218 and 219. In general, the notices will identify: The decision or project by title or subject matter; the name and title of the official making the decision; how to obtain additional information; and where and how to file comments or appeals/objection. The date the notice is published will be used to establish the official date for the beginning of the comment, appeal, or objection period.

**Pacific Northwest Regional Office**

**Regional Forester**

Notices for Comment and Decisions and Objections affecting Oregon Forests:-''*The Oregonian*'', Portland, Oregon, for National Forest System Lands in the State of Oregon for any projects of Region-wide impact, or for any projects affecting more than one National Forest or National Grassland in Oregon.

Notices for Comment and Decisions and Objections affecting Washington Forests:—''*The Seattle Times*'', Seattle, Washington, for National Forest System Lands in the State of Washington for any projects of Region-wide impact, or for any projects affecting more than one National Forest or National Grassland in Washington.

**Columbia River Gorge National Scenic Area**

Notices for Comment and Decisions and Objections by the Area Manager/ Forest Supervisor are published in:— ''*Hood River News*'', Hood River, Oregon.

**Oregon National Forests and Grassland**

*Deschutes National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Bend/ Fort Rock District Ranger, Crescent District Ranger, Redmond Air Center Manager, and Sisters District Ranger are published in:—''*The Bulletin*'', Bend, Oregon.

*Fremont-Winema National Forests*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Bly District Ranger, Lakeview District Ranger, Paisley District Ranger, Silver Lake District Ranger, Chemult District Ranger, Chiloquin District Ranger, Klamath District Ranger, are published in:—''*Herald and News*'', Klamath Falls, Oregon.

*Malheur National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Blue Mountain District Ranger, Prairie City District Ranger, are published in:-''*Blue Mountain Eagle*'', John Day, Oregon.

Notices for Comments, Decisions, and Objections by Emigrant Creek District Ranger are published in:—''*Burns Times Herald*'', Burns, Oregon.

*Mt. Hood National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Clackamas River District Ranger, Zigzag District Ranger, Hood River District Ranger, Barlow District Ranger, are published in:—''*The Oregonian*'', Portland, Oregon.

Ochoco National Forest and Crooked River National Grassland

Notices for Comments, Decisions, and Objections by Forest Supervisor, Crooked River National Grassland Area Manager, Lookout Mountain District Ranger, Paulina District Ranger, are published in:—''*The Bulletin*'', Bend, Oregon.

*Rogue River-Siskiyou National Forests*

Notices for Comments, Decisions, and Objections by Forest Supervisor, High Cascades District Ranger, J. Herbert Stone Nursery Manager, Siskiyou Mountains District Ranger, are published in:—''*Mail Tribune*'', Medford, Oregon.

Notices for Comments, Decisions, and Objections by Wild Rivers District Ranger are published in:-''*Grants Pass Daily Courier*'', Grants Pass, Oregon.

Notices for Comments, Decisions, and Objections by Gold Beach District Ranger are published in:—''*Curry County Reporter*'', Gold Beach, Oregon.

Notices for Comments, Decisions, and Objections by Powers District Ranger are published in:—''*The World*'', Coos Bay, Oregon.

*Siuslaw National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor are published in:—''*Corvallis Gazette-Times*'', Corvallis, Oregon.

Notices for Comments, Decisions, and Objections by Central Coast Ranger— Oregon Dunes National Recreation Area District Ranger are published in:—''*The Register-Guard*'', Eugene, Oregon.

Notices for Comments, Decisions, and Objections by Hebo District Ranger are published in:—''*Tillamook Headlight Herald*'', Tillamook, Oregon.

*Umatilla National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, North Fork John Day District Ranger, Heppner District Ranger, Pomeroy District Ranger, Walla Walla District Ranger, are published in:—''*East Oregonian*'', Pendleton, Oregon.

*Umpqua National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Cottage Grove District Ranger, Diamond Lake District Ranger, North Umpqua District Ranger, Tiller District Ranger, Dorena Genetic Resource Center Manager, are published in:—''*The News-Review*'', Roseburg, Oregon.

*Wallowa-Whitman National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Whitman District Ranger, are published in:—''*Baker City Herald*'', Baker City, Oregon

Notices for Comments, Decisions, and Objections by La Grande District Ranger are published in:—''*The Observer*'', La Grande, Oregon.

Notices for Comments, Decisions, and Objections by Hells Canyon National Recreation Area Manager, Eagle Cap District Ranger, Wallowa Valley District Ranger, are published in:—''*Wallowa County Chieftain*'', Enterprise, Oregon.

*Willamette National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Middle Fork District Ranger, McKenzie River District Ranger, Sweet Home District Ranger, are published in:—''*The Register-Guard*'', Eugene, Oregon.

Notices for Comments, Decisions, and Objections by Detroit District Ranger are published in:—''*Statesman Journal*'', Salem, Oregon.

**Washington National Forests**

*Colville National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Three Rivers District Ranger, are published in:—''*Statesman-Examiner*'', Colville, Washington.

Notices for Comments, Decisions, and Objections by Sullivan Lake District Ranger, Newport District Ranger, are published in:—''*The Newport Miner*'', Newport, Washington.

Notices for Comments, Decisions, and Objections by Republic District Ranger are published in:—''*Ferry County View*'', Republic, Washington.

*Gifford Pinchot National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Mount Adams District Ranger, Mount St. Helens National Volcanic Monument Manager, are published in:—''*The Columbian*'', Vancouver, Washington.

Notices for Comments, Decisions, and Objections by Cowlitz Valley District Ranger are published in: —.''*The Chronicle*'', Chehalis, Washington.

*Mt. Baker-Snoqualmie National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Darrington District Ranger, Skykomish District Ranger, are published in:— ''*Everett Herald*'', Everett, Washington.

Notices for Comments, Decisions, and Objections by Mt. Baker District Ranger are published in:—''*Skagit Valley Herald*'', Mt. Vernon, Washington (south half of the district); ''*Bellingham Herald*'', Bellingham, Washington (north half of the district).

Notices for Comments, Decisions, and Objections by Snoqualmie District Ranger are published in:—''*Snoqualmie Valley Record*'', North Bend, Washington (north half of district); ''*Enumclaw Courier Herald*'', Enumclaw, Washington (south half of district).

*Okanogon-Wenatchee National Forests*

Notices for Comments, Decisions, and Objections by Forest Supervisor, Chelan District Ranger, Entiat District Ranger, Tonasket District Ranger, Wenatchee River District Ranger, are published in:—''*The Wenatchee World*'', Wenatchee, Washington.

Notices for Comments, Decisions, and Objections by Naches District Ranger are published in:—''*Yakima Herald*'', Yakima, Washington.

Notices for Comments, Decisions, and Objections by Methow Valley District Ranger are published in:—''*Methow Valley News*'', Twisp, Washington.

Notices for Comments, Decisions, and Objections by Cle Elum District Ranger are published in:—''*Ellensburg Daily Record*'', Ellensburg, Washington.

*Olympic National Forest*

Notices for Comments, Decisions, and Objections by Forest Supervisor are published in:—''*The Olympian*'', Olympia, Washington.

Notices for Comments, Decisions, and Objections by Hood Canal District Ranger are published in:—''*Peninsula Daily News*'', Port Angeles, Washington.

Notices for Comments, Decisions, and Objections by Pacific District Ranger are published in:—''*The Daily World*'', Aberdeen, Washington (south portion of district); ''*Peninsula Daily News*'', Port Angeles, Washington (north portion of district).

**Christine Dawe,**

*Acting Associate Deputy Chief, National Forest System.*

[FR Doc. 2021–00724 Filed 1–13–21; 8:45 am]

**BILLING CODE 3411–15–P**

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## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[B–1–2021]**

### Foreign-Trade Zone 114—Peoria, Illinois; Application for Reorganization under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Economic Development Council, Inc., grantee of FTZ 114, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on January 8, 2021.

FTZ 114 was approved by the FTZ Board on December 21, 1984 (Board Order 288, 50 FR 1606, January 11, 1985) and expanded on October 16, 2009 (Board Order 1647, 74 FR 55813, October 29, 2009).

The current zone includes the following sites: *Site 1* (88 acres)—Peoria Barge Terminal, Inc., 1925 Darst St., Peoria; *Site 2* (150 acres)—United Facilities, Inc., 603 N. Main St., East Peoria; *Site 4* (2 acres)—CDO Distribution, Inc., 5703 Smithville Rd., Bartonville; *Site 5* (37 acres)—KMI Sales, Inc., 278 Koch St., Pekin; *Site 6* (17 acres)—Export Packaging Company, 6409 West Smithville Rd., Bartonville; *Site 7* (360 acres)—Rantoul Airport, 601 S. Century Boulevard, Rantoul; *Site 8* (333 acres)—Logistics Park Galesburg, 659 Knox Road, Galesburg; and, *Site 9* (3 acres)—HK Logistics, 2314 East Wilkins Dr., Mossville.

The grantee's proposed service area under the ASF would be Peoria, Cass, Champaign, Dewitt, Ford, Fulton, Knox, Livingston, Logan, Macon, Marshall, Mason, McDonough, McLean, Menard, Piatt, Putnam, Sangamon, Schuyler, Stark, Tazewell, Woodford and portions of Bureau and LaSalle Counties, Illinois, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The application indicates that the proposed service area is within and adjacent to the Peoria Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its zone to include existing Sites 7 and 8 as ''magnet'' sites and existing Sites 1, 2, 4, 5 and 6 as ''usage-driven'' sites. The applicant is proposing that existing Site 9 be removed from the zone. The applicant is also requesting approval of a subzone for Rivian Automotive, LLC at the following sites: *Proposed Site 1* (528 acres)—110 N. Rivian Motorway, Normal, McLean County; *Proposed Site 2* (16 acres)—2601 W. College Avenue, Normal, McLean County; and, *Proposed Site 3* (65.6 acres)—301 W. Kerrick Road, Normal, McLean County. The application would have no impact on FTZ 114's previously authorized subzones.

In accordance with the FTZ Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is March 15, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to March 30, 2021.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.* For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov.*

Dated: January 8, 2021.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2021–00713 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Request for Appointment of a Technical Advisory Committee

**AGENCY:** Bureau of Industry and Security, 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 15, 2021.

**ADDRESSES:** Interested persons are invited to submit comments by email to Mark Crace, IC Liaison, Bureau of Industry and Security, at *mark.crace@bis.doc.gov* or to *PRAcomments@doc.gov.* Please reference OMB Control Number 0694–0100 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 Mark Crace, IC Liaison, Bureau of Industry and Security, phone 202–482–8093 or by email at *mark.crace@bis.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

The Technical Advisory Committees (TACs) were established to advise and assist the U.S. Government on export control matters. In managing the operations of the TACs, the Department of Commerce is responsible for implementing the policies and procedures prescribed in the Federal Advisory Committee Act. The Bureau of Industry and Security provides technical and administrative support for the TACs, such as scheduling a conference room, publishing TAC meeting notices in the **Federal Register**, circulating an agenda, copying documents, etc. The TACs advise the government on proposed revisions to export control lists, licensing procedures, assessments of the foreign availability of controlled products, and export control regulations.

## II. Method of Collection

Supplement No. 2 to Part 730 of the Export Administration Regulations, states that any producers of articles, materials, or supplies, including technology, software, and other information, that are subject to export controls, or are being considered for such controls because of their significance to the national security of the United States, may request (via a letter or an attachment to an email) the Secretary of Commerce to establish a technical advisory committee. Such requests are sent to the Assistant Secretary of Export Administration.

## III. Data

*OMB Control Number:* 0694–0100.

*Form Number(s):* None.

*Type of Review:* Regular submission.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 1.

*Estimated Time per Response:* 5 hours.

*Estimated Total Annual Burden Hours:* 5.

*Estimated Total Annual Cost to Public:* 0.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Section 4812(b)(7) and 4814(b)(1)(B) of the Export Control Reform Act (ECRA).

## 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. 2021–00596 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–33–P**

# DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–580–876]**

## Welded Line Pipe From the Republic of Korea: Notice of Court Decision Not in Harmony With the Amended Final Results in the Antidumping Duty Administrative Review and Notice of Amended Final Results

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** On January 4, 2021, the U.S. Court of International Trade (CIT) sustained the Department of Commerce's (Commerce's) second remand results pertaining to the first administrative review of the antidumping duty order on welded line pipe (WLP) from the Republic of Korea (Korea) covering the period of review (POR) of May 22, 2015 through November 30, 2016. Commerce is notifying the public that the CIT's final judgment in this case is not in harmony with Commerce's amended final results in the first administrative review of WLP from Korea. Consistent with the CIT's final judgment, Commerce is amending the weighted-average dumping margins calculated for Hyundai Steel Company/Hyundai HYSCO (Hyundai Steel), SeAH Steel Corporation (SeAH), and the 22 non-selected companies

**DATES:** Applicable January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** David Goldberger or Joshua Tucker, AD/CVD Operations Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4136 and (202) 482–2044, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

On July 18, 2018, Commerce published its *Final Results* in the first administrative review of WLP from Korea.[1] Subsequently, on August 10, 2018, Commerce published its *Amended Final Results.*[2] As reflected in the *Amended Final Results,* Commerce calculated weighted-average dumping margins of 18.77 percent for Hyundai

[1] *See Welded Line Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015–2016,* 83 FR 33919 (July 18, 2018) (*Final Results*).

[2] *See Welded Line Pipe from the Republic of Korea: Amended Final Results of Antidumping Duty Administrative Review; 2015–2016,* 83 FR 39682 (August 10, 2018) (*Amended Final Results*).

Steel, 14.39 percent for SeAH, and 16.58 percent for the 22 companies receiving the review-specific average rate.[3]

Hyundai Steel, SeAH, NEXTEEL Co., Ltd. (NEXTEEL), and Husteel Co., Ltd. appealed Commerce's *Final Results,* as amended by the *Amended Final Results,* to the CIT. On January 3, 2020, the CIT remanded for Commerce to explain or reconsider its: (1) Rejection of SeAH's third country sales to calculate normal value (NV); (2) finding of a particular market situation (PMS) in the Korean market for the hot-rolled coil input; and (3) PMS adjustment to the respondents' cost of production (COP) for the purposes of the sales-below-cost test.[4] On April 1, 2020, Commerce issued the First Remand Results, in which, under protest, it: (1) Relied on SeAH's third-country sales to calculate NV; (2) determined that there is no PMS that distorts the COP of WLP; and (3) recalculated the weighted-average dumping margins for Hyundai Steel and SeAH without the PMS adjustment to the COP for the sales-below-cost test.[5] As a result, Commerce calculated revised weighted-average dumping margins for Hyundai Steel and SeAH of 9.24 percent and 4.70 percent, respectively. In addition, as a result of Commerce's recalculation of the weighted-average dumping margins for the mandatory respondents, Commerce revised the review-specific average rate applied to the non-selected respondents to 6.97 percent.

The CIT sustained Commerce's First Remand Results with respect to these issues.[6] In addition, the CIT granted Commerce's request for a remand to consider whether to apply a constructed export price (CEP) offset to SeAH's Canadian sales.[7] On September 16, 2020, Commerce issued its Second Remand Results, in which it: (1) Granted SeAH a CEP offset; (2) calculated a revised weighted-average dumping margin for SeAH of 4.23 percent; and (3) and revised the review-specific average rate applied to the non-selected respondents to 6.74 percent.[8] On January 4, 2021, the CIT sustained Commerce's Second Remand Results.

## Timken Notice

In its decision in *Timken,*[9] as clarified by *Diamond Sawblades,*[10] the Court of Appeals for the Federal Circuit held that, pursuant to section 516A(c) and (e) of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of a court decision that is not ''in harmony'' with a Commerce determination and must suspend liquidation of entries pending a ''conclusive'' court decision.[11] The CIT's January 4, 2021 judgment in this case constitutes a final decision of that court that is not in harmony with Commerce's *Final Results,* as amended by the *Amended Final Results.* This notice is published in fulfillment of the publication requirements of *Timken* and section 516A of the Act.

## Amended Final Results

Because there is now a final court decision, Commerce is amending its *Amended Final Results* with respect to the weighted-average dumping margins for Hyundai Steel, SeAH, and the non-selected respondents.[12] The revised weighted-average dumping margins are as follows:

| Exporter/producer | Weighted-average dumping margin (percent) |
|---|---|
| Hyundai Steel Company/ Hyundai HYSCO | 9.24 |
| SeAH Steel Corporation | 4.23 |
| AJU BESTEEL CO., Ltd | 6.74 |
| Daewoo International Corporation | 6.74 |
| Dong Yang Steel Pipe | 6.74 |
| Dongbu Incheon Steel Co | 6.74 |
| Dongbu Steel Co., Ltd | 6.74 |
| Dongkuk Steel Mill | 6.74 |
| EEW Korea Co, Ltd | 6.74 |
| HISTEEL Co., Ltd | 6.74 |
| Husteel Co., Ltd | 6.74 |
| Keonwood Metals Co., Ltd | 6.74 |
| Kolon Global Corp | 6.74 |
| Korea Cast Iron Pipe Ind. Co., Ltd | 6.74 |
| Miju Steel MFG Co., Ltd | 6.74 |
| MSTEEL Co., Ltd | 6.74 |
| NEXTEEL Co., Ltd | 6.74 |
| Poongsan Valinox (Valtimet Division) | 6.74 |
| POSCO | 6.74 |
| Sam Kang M&T Co., Ltd | 6.74 |
| Sin Sung Metal Co., Ltd | 6.74 |
| Soon-Hong Trading Company | 6.74 |
| Steel Flower Co., Ltd | 6.74 |
| TGS Pipe | 6.74 |

## Cash Deposit Requirements

Because there have been subsequent administrative reviews involving Hyundai Steel, SeAH, and the non-selected respondents covered by the review-specific average rate, the cash deposit rates for these exporters will remain the rate established in the most recently-completed administrative review in which they received a cash deposit rate.

## Liquidation of Suspended Entries

In the event that the CIT's final judgment is not appealed or, if appealed, is upheld by a final and conclusive court decision, Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on unliquidated entries of subject merchandise based on the importer-specific assessment rates recalculated for: (1) Hyundai Steel in the First Remand Results; and (2) SeAH and the non-selected respondents covered by the review-specific average rate (subject to this litigation) in the Second Remand Results.

Consistent with Commerce's assessment practice, for entries of subject merchandise during the POR produced by Hyundai Steel or SeAH for which they did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all others rate if there is no rate for the intermediate company(ies) involved in the transaction.[13]

Finally, during the pendency of litigation, including any appeal, Commerce remains enjoined by Court order from liquidating entries: (1) Produced and/or exported by Hyundai Steel, SeAH, NEXTEEL, or Husteel; (2) the subject of *Final Results,* as amended by the *Amended Final Results;* (2) entered, or were withdrawn from

[3] *Id.,* 83 FR at 39682–83.

[4] *See Husteel Co., Ltd. et al.* v. *United States,* 426 F. Supp. 3d 1376 (CIT 2020).

[5] *See* Final Results of Redetermination Pursuant to Court Remand, Consol. Court No. 18–00169, dated April 1, 2020 (First Remand Results), at 1–2.

[6] *See Husteel Co., Ltd. et al.* v. *United States,* 463 F. Supp. 3d 1334 (CIT 2020) (*Husteel II*).

[7] *See Husteel II,* 463 F. Supp. 3d at 1343–1344.

[8] *See* Final Results of Redetermination Pursuant to Second Court Remand, Consol. Court No. 18–00169, dated September 16, 2020 (Second Remand Results).

[9] *See Timken Co.* v. *United States,* 893 F.2d 337, 341 (Fed. Cir. 1990) (*Timken*).

[10] *See Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

[11] *See* sections 516A(c) and (e) of the Act.

[12] The review-specific average rate is based on the simple average margin for those companies selected for individual review. Because we cannot apply our normal methodology of calculating a weighted-average margin due to requests to protect business proprietary information, we find this rate to be the best proxy of the actual weighted-average margin determined for the mandatory respondents. *See Ball Bearings and Parts Thereof from France, et al.: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[13] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

warehouse, for consumption on or after May 22, 2015, up to and including November 30, 2016; and (3) remain unliquidated as of the date the Court issued the applicable statutory injunction.

**Notification to Interested Parties**

This notice is issued and published in accordance with sections 516A(e)(1), 751(a)(1), and 777(i)(1) of the Act.

Dated: January 8, 2021.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2021–00723 Filed 1–13–21; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Organization of Scientific Area Committees for Forensic Science (OSAC) Membership Application

**AGENCY:** National Institute of Standards and Technology (NIST), 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 15, 2021.

**ADDRESSES:** Interested persons are invited to submit written comments by mail to Maureen O'Reilly, Management Analyst, NIST, at *PRAcomments@doc.gov.* Please reference OMB Control Number 0693–0070 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 John Paul Jones II, Program Manager, Office of Special Programs, NIST, 301–975–2782; *john.jones@nist.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

NIST established the Organization of Scientific Area Committees for Forensic Science (OSAC) to enable a coordinated U.S. approach to standards for the forensic science disciplines. NIST seeks broad participation from forensic science practitioners, researchers, meteorologists, statisticians, accreditation bodes, defense, and prosecution. NIST solicits self-nominations from these communities, using the OSAC Membership Application, to identify individuals interested and qualified to contribute.

**II. Method of Collection**

The OSAC Membership Application may be completed and submitted only via web-based application.

**III. Data**

*OMB Control Number:* 0693–0070.

*Form Number(s):* None.

*Type of Review:* Regular submission, extension of a current information collection.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 1,000.

*Estimated Time per Response:* 30 minutes.

*Estimated Total Annual Burden Hours:* 500.

*Estimated Total Annual Cost to Public:* $0.

*Respondent's Obligation:* Voluntary.

*Legal Authority:*

**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. 2021–00583 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA748]**

### 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's (Council) Scallop Plan Team will meet February 17, 2021.

**DATES:** The meeting will be held on Wednesday, February 17, 2021, from 9 a.m. to 1 p.m., Alaska Time.

**ADDRESSES:** The meeting will be a web conference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/1846.*

*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**

*Wednesday, February 17, 2021*

The Council's Scallop Plan Team will update the status of the Alaska weathervane scallop stocks and the Stock Assessment and Fishery

Evaluation (SAFE) report, including OFL/ABC recommendations for the 2021 fishing year. Additionally, there will be discussion of 2020 survey results, stock assessment development, EFH updates, survey plans for 2021, and a review of research priorities. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/1846* 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/1846.*

**Public Comment**

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/1846.*

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00716 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XA760]**

## 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 of its Skate 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 webinar will be held on Thursday, March 25, 2021 at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/4163676123767056652.*

**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 Skate Committee will review supplemental scoping comments and background work of the Plan Development Team; Committee work on tasking the PDT, developing alternatives or other aspects of Amendment 5 to the Northeast Skate Complex Fishery Management. They will receive an update on progress and timeline of the Skate 2022–23 Specifications. Other business may be discussed, as necessary.

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 meeting. 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**

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.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00718 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XA731]**

## Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; public meeting.

**SUMMARY:** The Mid-Atlantic Fishery Management Council's (MAFMC's) Tilefish Monitoring Committee (MC) will hold a public meeting.

**DATES:** The meeting will be held on Tuesday, March 16, 2021, from 10 a.m. to 11:30 a.m. For agenda details, see **SUPPLEMENTARY INFORMATION.**

**ADDRESSES:** The meeting will be held via webinar, which can be accessed at: *http://mafmc.adobeconnect.com/tf2021mc/.* Meeting audio can also be accessed via telephone by dialing 1–800–832–0736 and entering room number 5068609.

*Council address:* Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

**FOR FURTHER INFORMATION CONTACT:** Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

**SUPPLEMENTARY INFORMATION:** The purpose of this meeting is for the Tilefish MC to set blueline tilefish specifications for 2022–24. The MC will review annual catch limits, trip limits, discard estimates, and other management measures for the blueline tilefish fishery.

**Special Accommodations**

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00715 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XA793]**

## 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 of its Skate 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 webinar will be held on Wednesday, March 17, 2021 at 12 p.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/5196739866204475664.*

**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 Skate Advisory Panel will review supplemental scoping comments and background work of the Plan Development Team (PDT); make recommendations to the Skate Committee on tasking the PDT, developing alternatives or other aspects of Amendment 5 to the Northeast Skate Complex Fishery Management Plan. The Panel will also receive an update on progress and timeline of the Skate 2022–23 Specifications. Other business may be discussed, as necessary.

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 meeting. 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

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.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00720 Filed 1–13–21; 8:45 am]

BILLING CODE 3510–22–P

# DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XA756]**

## North Pacific Fishery Management Council; Public Meeting

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of a public meeting.

**SUMMARY:** The North Pacific Fishery Management Council's (Council) Halibut and Sablefish Individual Fishing Quota Committee (IFQ Committee) will meet via web conference March 25, 2021 through March 26, 2021.

**DATES:** The meeting will be held on Thursday, March 25, 2021 through Friday, March 26, 2021, from 9 a.m. to 4 p.m., Alaska Time.

**ADDRESSES:** The meeting will be a web conference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/1853.*

*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**, below.

**FOR FURTHER INFORMATION CONTACT:** Sam Cunningham, Council staff; phone; (907) 271–2809; email: *sam.cunningham@noaa.gov.* For technical support please contact our admin Council staff, email: *npfmc.admin@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Agenda

*Thursday, March 25, 2021 through Friday, March 26, 2021*

The IFQ Committee agenda will include the review of a discussion paper on a proposal to promote access to the IFQ fisheries, a report of the use of longline pot gear in the Gulf of Alaska sablefish IFQ fishery, an opportunity to provide feedback on a new annual fishery status report from National Marine Fisheries Service, a stakeholder proposal to allow jig gear for use in the IFQ fisheries, and discussion of recommendations for future tasking and prioritization of actions relating to the IFQ program. The committee may also address other items of business as necessary. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/1853* 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/1853.*

### Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/1853.*

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00717 Filed 1–13–21; 8:45 am]

BILLING CODE P

# DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XA791]**

## North Pacific Fishery Management Council; Public Meeting

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of webconference.

**SUMMARY:** The North Pacific Fishery Management Council (Council) Bering Sea Fishery Ecosystem Plan Local Knowledge, Traditional Knowledge, and Subsistence Taskforce (LKTKS) will be held March 16, 2021 through March 17, 2021.

**DATES:** The meeting will be held on Tuesday, March 16, 2021 through Wednesday, March 17, 2021, from 8:30 a.m. to 1:30 p.m., Alaska Time.

**ADDRESSES:** The meeting will be a webconference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/1864.*

*Council address:* North Pacific Fishery Management Council, 1007 W 3rd Ave, Anchorage, Alaska 99501–2252; telephone (907) 271–2809. Instructions for attending the meeting are given under **SUPPLEMENTARY INFORMATION**, below.

**FOR FURTHER INFORMATION CONTACT:** Kate Haapala Council staff; phone: (907) 271–2809 and email: *kate.haapala@noaa.gov.* For technical support please contact our administrative staff; email: *npfmc.admin@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Agenda

*Tuesday, March 16, 2021 through Wednesday, March 17, 2021*

The agenda will include (a) updates on LKTKS search engine work; (b) LKTKS onramps; (c) protocol development; and (d) other business.

The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/1864* 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/1864.*

## Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/1864* by 5 p.m. Alaska time on Monday, March 15, 2021. An opportunity for oral public testimony will also be provided during the meeting.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00719 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XA799]**

## Pacific Fishery Management Council; Public Meeting

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of a public meeting.

**SUMMARY:** The Pacific Fishery Management Council's (Pacific Council) will convene a webinar meeting of its Groundfish Management Team (GMT) to discuss items on the Pacific Council's March 2021 meeting agenda. This meeting is open to the public.

**DATES:** The online meeting will be held Wednesday, February 17, 2021, from 1 p.m. to 4 p.m., Pacific Standard Time (PST). The scheduled ending time for this GMT meeting is an estimate, the meeting will adjourn when business for the day is completed.

**ADDRESSES:** This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

**FOR FURTHER INFORMATION CONTACT:** Todd Phillips, Staff Officer, Pacific Council; telephone: (503) 820–2426; email: *todd.phillips@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The primary purpose of the GMT webinar is to prepare for the Pacific Council's March 2021 agenda items. The GMT will discuss items primarily related to the Pacific Council's groundfish management and administrative agenda items. A detailed agenda for the webinar will be available on the Pacific Council's website prior to the meeting. The GMT may also address other assignments relating to groundfish management. No management actions will be decided by the GMT.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

## Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least 10 business days prior to the meeting date.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00721 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XA809]**

## Mid-Atlantic Fishery Management Council (MAFMC); Public Meetings

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of public meetings.

**SUMMARY:** The Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (ASMFC) will hold a joint public meeting.

**DATES:** The joint meeting of the Council and ASMFC will take on Monday, February 1, 2021, from 10:30 a.m. to 4:30 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION.**

**ADDRESSES:** Due to public health concerns related to the spread of COVID–19 (coronavirus), this meeting will be conducted by webinar only. Webinar instructions and additional meeting details will be posted on the Council's website at *https://www.mafmc.org/meetings.*

*Council address:* Mid-Atlantic Fishery Management Council, 800 N. State St., Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

**FOR FURTHER INFORMATION CONTACT:** Christopher M. Moore, Ph.D. Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526–5255. The Council's website (*www.mafmc.org)* also has details on the meeting agenda, webinar connection instructions, and briefing materials.

**SUPPLEMENTARY INFORMATION:** The following items are on the agenda, though agenda items may be addressed out of order (changes will be noted on the Council's website when possible.)

## Monday, February 1, 2021

*Recreational Management Reform Initiative*

Review and discuss next steps, timeline, and process.

*Black Sea Bass Commercial State Allocation Amendment and Draft Addendum XXXIII*

Review and consider for final action.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

### Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Kathy Collins, (302) 526–5253, at least 5 days prior to the meeting date.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00722 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA763]**

### 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 of its Herring 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 webinar will be held on Thursday, February 25, 2021 at 9:30 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/5921431278316794638.*

**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 Committee will meet to review and discuss 2021 work priorities for the Atlantic Herring Fishery Management Plan including: (1) A framework action that is considering spawning closures on Georges Bank; (2) development of a formal rebuilding plan for Atlantic herring; (3) review and potentially adjust accountability measures (AMs) in the herring plan; and (4) coordinate with the Mid-Atlantic Fishery Management Council (MAFMC) and Atlantic States Marine Fisheries Commission (ASMFC) on various herring management issues (*i.e.,* river herring and shad (RH/S)). Other business will be discussed, as necessary.

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 meeting. 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

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.

(Authority: 16 U.S.C. 1801 *et seq.*)

Dated: January 8, 2021.

**Rey Israel Marquez,**

*Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2021–00569 Filed 1–13–21; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 20–0K]**

### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(5)(C) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–0K with attached Policy Justification.

Dated: January 8, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001–06–P**

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

DEC 28 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(5)(C) of the Arms Export Control Act (AECA), as amended, we are forwarding Transmittal No. 20-0K. This notification relates to enhancements or upgrades from the level of sensitivity of technology or capability described in the Section 36(b)(1) AECA certification 15-25 of July 7, 2015.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 20–0K

*REPORT OF ENHANCEMENT OR UPGRADE OF SENSITIVITY OF TECHNOLOGY OR CAPABILITY (SEC. 36(B)(5)(C), AECA)*

(i) *Prospective Purchaser*: Government of Egypt

(ii) Sec. 36(b)(1), AECA Transmittal No.: 15–25

Date: July 7, 2015

Military Department: Air Force

(iii) *Description*: On July 7, 2015, Congress was notified by Congressional certification transmittal number 15–25 of the possible sale under Section 36(b)(l) of the Arms Export Control Act of procurement and construction of one (1) commercial off-the-shelf border security mobile surveillance sensor security system that will include the following sub-systems: mobile surveillance sensor towers, mobile command and control (C2) systems, a regional C2 system, voice/data communications equipment, spare parts, support equipment, personnel training, training equipment, publications and technical documentation, U.S. Government and contractor technical and logistics support services, and other related elements of logistics and program support. The estimated total cost was $100 million. This total was all non-MDE since no Major Defense Equipment (MDE) was purchased.

This transmittal reports the inclusion of the procurement and construction of twenty-three (23) commercial off-the-shelf border security mobile surveillance sensor security (MS3) systems, thirty-six (36) integrated fixed towers, and mobile field workshops and the following sub-systems: mobile and fixed surveillance sensor towers, mobile command and fixed control (C2) systems, a regional C2 system, voice/data communications equipment, spare parts, support equipment, personnel training, training equipment, publications and technical documentation, U.S. Government and contractor technical and logistics support services, and other related elements of logistics and program support. There are no MDE items being added. These additional items of non-MDE will result in an increase in non-MDE cost of $125 million. The MDE cost will remain $0. The total case value will increase to $225 million.

(iv) *Significance*: This notification is being provided to report the inclusion of additional border surveillance systems to complete Egypt's western land border and extend the coverage to Egypt's southern land border were not included in the original notification. Their inclusion represents an increase in capability over what was previously notified. The purpose of the additional border surveillance system is to detect border incursions and communicate information for leadership to determine best methods of interdiction in areas outside of fixed land-based Points of Entry. Further employment of the MS3 capability along the southern border provides sensor depth and network integration to allow for response times to mitigate risks to its forces and population.

(v) *Justification*: This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a Major Non-NATO Ally country that continues to be an important strategic partner in the Middle East.

(vi) *Date Report Delivered to Congress:* December 28, 2020

[FR Doc. 2021–00621 Filed 1–13–21; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 21–09]**

### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–09 with attached Policy Justification and Sensitivity of Technology.

Dated: January 8, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001–06–P**

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

December 22, 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-09 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Kazakhstan for defense articles and services estimated to cost $128.1 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 21–09

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Kazakhstan

(ii) *Total Estimated Value:*

| | |
|---|---|
| Major Defense Equipment * | $ 6.1 million |
| Other | $122.0 million |
| TOTAL | $128.1 million |

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

*Major Defense Equipment (MDE):*
Three (3) Raytheon AST TITAN Communications Intelligence (COMINT) Sensor Suites (2 installed, 1 spare)

*Non-MDE:* Also included are two (2) King Air B300ER Scorpion aircraft; three (3) Leonardo Osprey 30 Active Electronically Scanned Array (AESA) radars (2 installed, 1 spare); three (3) WESCAM MX-15HDi Elector Optical Infrared Turret Electro Optical Infrared Sensors (2 installed, 1 spare); three (3) Sierra Nevada Small SWAP Auto Electronic Intelligence (ELINT) Systems (2 installed, 1 spare); secure communications; fixed and transportable ground control station; ground support equipment; aircraft integration and test support; publications and technical documentation; personnel training and training equipment; spare, component and repair parts; software and software support; US Government and contractor engineering, technical, and logistical support services, and other related elements of program and logistical support.

(iv) *Military Department:* Air Force (KZ–D–SAA)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* December 22, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

*POLICY JUSTIFICATION*

*Kazakhstan—King Air B300ER Scorpion Aircraft with Intelligence, Surveillance, Reconnaissance (ISR) Mission Systems*

The Government of Kazakhstan has requested to buy three (3) Raytheon AST TITAN Communications Intelligence (COMINT) Sensor Suites (2 installed, 1 spare). Also included are two (2) King Air B300ER Scorpion aircraft; three (3) Leonardo Osprey 30 Active Electronically Scanned Array (AESA) radars (2 installed, 1 spare); three (3) WESCAM MX-15HDi Elector Optical Infrared Turret Electro Optical Infrared Sensors (2 installed, 1 spare); three (3) Sierra Nevada Small SWAP Auto Electronic Intelligence (ELINT) Systems (2 installed, 1 spare); secure communications; fixed and transportable ground control station; ground support equipment; aircraft integration and test support; publications and technical documentation; personnel training and training equipment; spare, component and repair parts; software and software support; US Government and contractor engineering, technical, and logistical support services, and other related elements of program and logistical support. The estimated total cost is $128.1 million.

This proposed sale will support the foreign policy goals and national security objectives of the United States by improving the security of a partner country that is a force for political stability and economic progress in Central Asia.

The proposed sale will improve Kazakhstan's capability to meet current and future threats by improving its capability to deter regional threats and conduct border security operations. Kazakhstan will have no difficulty absorbing this equipment and services into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Sierra Nevada Corporation, Hagerstown, MD. There are no known offset agreements proposed in conjunction with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Kazakhstan.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 21–09

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The King Air B300ER Scorpion is a twin turbo prop aircraft that provides manned surveillance. The King Air B300ER Scorpion provides persistent, real-time route surveillance and border security, counter-terrorism, and smuggling interdiction support for naval and coastal operations, internal defense, and search and rescue operations.

2. The Leonardo Osprey 30 is an Active Electronically Scanned Array (AESA) Radar System that provides the King Air aircraft with all-weather, multi-mission capability for performing Air-to-Air, Air-to-Ground, and Air-to-Maritime surveillance. Air surveillance mode provides a capability for single target tracking and weather mode. Land surveillance mode provides high-resolution ground mapping and navigation. Maritime surveillance mode provides for small target detection and embedded automatic identification system.

3. The WESCAM MX–15HDi Elector Optical Infrared Turret provides high definition video with laser illuminator and laser range-finding capabilities. The sensor is on an electrically operated lift which is located in the extended nose.

4. The Raytheon AST TITAN System provides communications intelligence which searches, collects, analyzes, identifies, locates, records, and disseminates emitter data with range and bearing information. The TITAN System will also include a cellular intercept capability.

5. The Sierra Nevada Small SWAP Auto ELINT system analyses the electromagnetic spectrum to identify and provide the location of the active emitter. The threat library is not being provided but will be developed by the end-user as they conduct missions.

6. The highest level of classification of defense articles, components, and services included in this potential sale is UNCLASSIFIED.

7. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

8. A determination has been made that Kazakhstan can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

9. All defense articles and services listed in this transmittal have been authorized for release and export to Kazakhstan.

[FR Doc. 2021–00634 Filed 1–13–21; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 20–19]**

### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–19 with attached Policy Justification and Sensitivity of Technology.

Dated: January 8, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

BILLING CODE 5001–06–P

**DEFENSE SECURITY COOPERATION AGENCY**
**201 12TH STREET SOUTH, SUITE 101**
**ARLINGTON, VA 22202-5408**

DEC 2 8 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-19 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Kuwait for defense articles and services estimated to cost $4.0 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 20–19

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Kuwait

(ii) *Total Estimated Value*:

| | |
|---|---|
| Major Defense Equipment * | $2.0 billion |
| Other | $2.0 billion |
| TOTAL | $4.0 billion |

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*: The Government of Kuwait has requested to buy eight (8) AH-64E Apache Longbow Attack Helicopters and remanufacture sixteen (16) of their AH-64D Apache Longbow Attack Helicopters to the AH-64E configuration.

*Major Defense Equipment (MDE):*

Eight (8) AH-64E Apache Helicopters (new procurement)

Sixteen (16) AH-64E Apache Helicopters (remanufacture)

Twenty-two (22) T700-GE 701D Engines

Thirty-six (36) Remanufactured T700-GE 701D Engines

Twenty-seven (27) AN/AAR-57 Counter Missile Warning Systems (CMWS)
Eighteen (18) Embedded Global Position Systems with Inertial Navigation (EGI) with Multi-Mode Receiver (MMR)
Thirty-six (36) Remanufactured EGIs with MMR
Eight (8) AN/ASQ-170(V) Modernized Target Acquisition and Designation Sight/AN/AAQ-11 Pilot Night Vision Sensor (MTADS/PNVS)
Seventeen (17) AN/APG-78 Longbow Fire Control Radars (FCR) with Radar Electronics Units (REU)
Seventeen (17) APR-48B Modernized Radar Frequency Interferometers (M-RFI)
Eighteen (18) M299 AGM-114 Hellfire Missile Launchers
Four (4) Remanufactured M299 AGM-114 Hellfire Missile Launchers
Eighteen (18) Hydra 70 (70mm) 2.75 Inch Rocket M260 Rocket Launchers
Four (4) Remanufactured Hydra 70 (70mm) 2.75 Inch Rocket M260 Rocket Launchers
Nine (9) M230El 30mm Chain Gun M139 Area Weapons System (AWS) Guns
Two (2) Remanufactured M230El 30mm Chain Gun M139 AWS Guns
One (1) Longbow Crew Trainers (LCT)
One (1) Remanufactured LCT

*Non-MDE:* Also included are fifty-four (54) AN/ARC-201 non-COMSEC Very-High Frequency/Frequency Modulation (VHF/FM) Radios; fifty-four (54) Ultra-High Frequency (UHF) Radios (AN/ARC 231 or MXF 4027); twenty-eight (28) Identify Friend or Foe Transponders (APX 123 or APX 119); twenty-seven (27) IDM 401 (Improved Data Modem); twenty-seven (27) Link 16 Datalinks; twenty-seven (27) AN/APR-39D (V)2 Radar Warning Receivers; twenty-seven (27) AN/AVR-2 Laser Warning Receivers; twenty-seven (27) Infrared Countermeasures Dispensers (2 flares, 1 chaff); nine (9) ASN-157 Doppler Radar Velocity Sensors; nine (9) AN/ARN-149 (V)3 Automatic Direction Finders (ADF); sixteen (16) remanufactured AN/ARN-149 (V)3 ADFs; nine (9) AN/APN-209 Radar Altimeters; twenty-seven (27) AN/ARN-153 Tactical Airborne Navigation (TACAN) systems; sixteen (16) Manned-Unmanned Teaming International (MUM-Ti) (UPR) Air to Air to Ground Data Link Systems; twenty-four (24) MUM-Ti (Ground) Air to Air to Ground Data Link Systems; twenty-four (24) 100 gallon Internal Auxiliary Fuel Systems (IAFS); twenty-four (24) 125 gallon Reduced Capacity Crashworthy External Fuel Systems (RCEFS); two (2) IAFS Spares; two (2) IAFS Publications; six (6) IAFS Ground Support Equipment (GSE) Apache Magazine and Auxiliary Tank Transfer Systems (AMATTS); five (5) IDM Software Loader Verifiers (SLV); training devices; helmets; simulators; generators; transportation; wheeled vehicles and organizational equipment; spare and repair parts; support equipment; tools and test equipment; technical data and publications; personnel training and training equipment; U.S. government and contractor engineering, technical, and logistics support services; and other related elements of logistics support.

(iv) *Military Department*: Army (KU-B-UXF)

(v) *Prior Related Cases, if any*: KU-B-UKS

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex

(viii) *Date Report Delivered to Congress*: December 28, 2020

*As defined in Section 47(6) of the Arms Export Control Act.

*POLICY JUSTIFICATION*

*Kuwait — AH-64E Apache Helicopter*

The Government of Kuwait has requested to buy eight (8) AH-64E Apache Longbow Attack Helicopters and remanufacture sixteen (16) of their AH-64D Apache Longbow Attack Helicopters to the AH-64E configuration consisting of: eight (8) AH-64E Apache Helicopters (new procurement); sixteen (16) AH-64E Apache Helicopters (remanufacture); twenty-two (22) T700-GE 701D engines; thirty-six (36) remanufactured T700-GE 701D engines; twenty-seven (27) AN/AAR-57 Counter Missile Warning Systems (CMWS); eighteen (18) Embedded Global Position Systems with Inertial Navigation (EGI) with Multi-Mode Receiver (MMR); thirty-six (36) remanufactured EGIs with MMR; eight (8) AN/ASQ-170(V) Modernized Target Acquisition and Designation Sight/AN/AAQ-11 Pilot Night Vision Sensor (MTADS/PNVS); seventeen (17) AN/APG-78 Longbow Fire Control Radars (FCR) with Radar Electronics Units (REU); seventeen (17) APR-48B Modernized Radar Frequency Interferometers (M-RFI); eighteen (18) M299 AGM-114 Hellfire Missile Launchers; four (4) remanufactured M299 AGM-114 Hellfire Missile Launchers; eighteen (18) Hydra 70 (70mm) 2.75 Inch Rocket M260 Rocket Launchers; four (4) remanufactured Hydra 70 (70mm) 2.75 Inch Rocket M260 Rocket Launchers; nine (9) M230El 30mm Chain Gun M139 Area Weapons System (AWS) Guns; two (2) remanufactured M230El 30mm Chain Gun M139 AWS Guns; one (1) Longbow Crew Trainers (LCT); and one (1) remanufactured LCT. Also included are fifty-four (54) AN/ARC-201 non-COMSEC Very-High Frequency/Frequency Modulation (VHF/FM) radios; fifty-four (54) Ultra-High Frequency (UHF) radios (AN/ARC-231 or MXF 4027); twenty-eight (28) Identify Friend or Foe Transponders (APX 123 or APX 119); twenty-seven (27) IDM 401 (Improved Data Modem); twenty-seven (27) Link 16 Datalinks; twenty-seven (27) AN/APR-39D (V)2 Radar Warning Receivers; twenty-seven (27) AN/AVR-2 Laser Warning Receivers; twenty-seven (27) Infrared Countermeasures Dispensers (2 flares, 1 chaff); nine (9) ASN-157 Doppler Radar Velocity Sensors; nine (9) AN/ARN-149 (V)3 Automatic Direction Finders (ADF); sixteen (16) remanufactured AN/ARN-149 (V)3 ADFs; nine (9) AN/APN-209 Radar Altimeters; twenty-seven (27) AN/ARN-153 Tactical Airborne Navigation (TACAN) systems; sixteen (16) Manned-Unmanned Teaming International (MUM-Ti) (UPR) Air to Air to Ground Data Link Systems; twenty-four (24) MUM-Ti (Ground) Air to Air to Ground Data Link Systems; twenty-four (24) 100 gallon Internal Auxiliary Fuel Systems (IAFS); twenty-four (24) 125 gallon Reduced Capacity Crashworthy External Fuel Systems (RCEFS); two (2) IAFS Spares; two (2) IAFS Publications; six (6) IAFS Ground Support Equipment (GSE) Apache Magazine and Auxiliary Tank Transfer Systems (AMATTS); five (5) IDM Software Loader Verifiers (SLV); training devices; helmets; simulators; generators; transportation; wheeled vehicles and organizational equipment; spare and repair parts; support equipment; tools and test equipment; technical data and publications; personnel training and training equipment; U.S. government and contractor engineering, technical, and logistics support services; and other related elements of logistics support. The total estimated cost is $4.0 billion.

The proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a Major Non-NATO Ally that is an important force for political stability and economic progress in the Middle East.

The proposed sale of the AH-64E Apache helicopters will supplement and improve Kuwait's capability to meet current and future threats by enhancing Kuwait's close air support, armed reconnaissance, and antitank warfare mission capabilities. Kuwait will have no difficulty absorbing these helicopters into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors associated with this sale will be The Boeing Company, Mesa, AZ; Lockheed Martin Corporation, Orlando, FL; General Electric, Cincinnati, OH; Lockheed Martin Mission Systems and Sensors, Owego, NY; Longbow Limited Liability Corporation, Orlando, FL; and Raytheon Corporation, Tucson, AZ. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the temporary assignment of approximately three U.S. Government personnel and five contractor representatives to Kuwait to support delivery of the helicopters and provide support and equipment familiarization. In addition, Kuwait has expressed an interest in a Technical Assistance Fielding Team (TAFT) to provide in-country pilot and maintenance training. Execution of a TAFT will require a team of twelve additional personnel (one military and eleven contractors) to be deployed to Kuwait for the period of approximately three years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–19

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The AH-64E Apache Attack Helicopter is the Army's advanced attack helicopter equipped for performing close air support, anti-armor, and armed reconnaissance missions. The aircraft contains the following sensitive communications and target identification equipment, navigation equipment, aircraft survivability equipment, displays, and sensors:

a. The AN/ARC-201 Very High Frequency-Frequency Modulation (VHF-FM) Single Channel Ground and Airborne Radio System (SINCGARS) airborne radio is a reliable, field-proven voice and data communication system used with the AH-64E. A country-unique non-COMSEC export variant of this radio will be provided that meets Kuwait's requirements.

b. The AN/ARC-231 Ultra High Frequency (UHF) radio is a software defined radio for military aircraft that provides two-way multi-mode voice and data communications over a 30hz to 512hz frequency range. The MFX 4027 is a variant system based on the AN/ARC-231 architecture but incorporating commercial encryption. The radio offered to Kuwait will be determined based on U.S. and Kuwaiti requirements.

c. The Identify Friend-or-Foe (IFF) digital transponder set provides pertinent platform information in response to an IFF interrogator. The digital transponder provides cooperative Mark XII IFF capability using full diversity selection, as well as Mode Select (Mode S) capability. In addition, transponder operation provides interface capability with the aircraft's Traffic Collision and Avoidance System (TCAS). The transponder receives pulsed radio frequency interrogation signals in any of six modes (1, 2, 3/A, S, and 5), decodes the signals, and transmits a pulsecoded reply. The Mark XII IFF operation includes Selective Identification Feature (SIF) Modes 1, 2, 3/A and C, as well as secure cryptographic Mode 5 operational capability.

d. Link 16 Datalink is a military tactical data link network. Link 16 provides aircrews with enhanced situational awareness and the ability to exchange target information to Command and Control (C2) assets via Tactical Digital Information Link-Joint (TADIL-J). Link 16 can provide a range of combat information in near-real time to U.S. and allies' combat aircraft and C2 centers. The AH-64E uses the Harris Small Tactical Terminal (SIT) KOR-24A to provide Airborne and Maritime/Fixed Station (AMF) Small Airborne Link 16 Terminal (SALT) capability. The SIT is the latest generation of small, two-channel, Link 16 and VHF/UHF radio terminals. While in flight, the SIT provides simultaneous communication, voice or data, on two key waveforms.

e. The AN/APR-39 Radar Warning Receiver Signal Detecting Set is a system that provides warning of a radar directed air defense threat and allows appropriate countermeasures. This is the 1553 databus compatible configuration.

f. The AN/AVR-2B Laser Warning Set is a passive laser warning system that receives, processes and displays threat information resulting from aircraft illumination by lasers on the aircraft's multi-functional display.

g. The AAR-57 Common Missile Warning System (CMWS) detects energy emitted by threat missile in-flight, evaluates potential false alarm emitters in the environment, declares validity of threat and selects appropriate counter-measures for defeat. The CMWS consists of an Electronic Control Unit (ECU), Electro-Optic Missile Sensors (EOMSs), and Sequencer and Improved Countermeasures Dispenser (ICMD).

h. The ICMD Countermeasures Dispensing M211 Flare is a countermeasure decoy in a ''xl''x8'' form factor in an aluminum case cartridge. It consists of case, piston, special material payload foils, and end cap. The special material is a pyrophoric metal (iron) foil that reacts with oxygen to generate infrared energy. The M211 decoys are dispersed from an aircraft to be used as a decoy in combination with the currently fielded M206 and M212 countermeasure flares to protect against advanced air-to-air and surface-to-air missile threats.

i. Embedded Global Positioning System (GPS)/Inertial Navigation System (INS) (EGI) with Multi-Mode Receiver (MMR) uses GPS satellite signals to correct or calibrate a solution for precise positioning from an Inertial Navigation System (INS). The aircraft has two EGIs with MMR which use internal accelerometers, rate gyro measurements, and external sensor measurements to estimate the aircraft state, provides aircraft flight and position data to aircraft systems. The EGI is a velocity-aided, strap down, ring laser gyro based inertial unit. The EGI unit houses a GPS receiver. The receiver is capable of operating in either non-encrypted or encrypted. When keyed, the GPS receiver will automatically use anti-spoof/jam capabilities when they are in use. The EGI will retain the key through power on/off/on cycles. Because of safeguards built into the EGI, it is not considered classified when keyed. Integrated within the EGI is an Inertial Measurement Unit (IMU) for processing functions. Each EGI also houses a Multi-Mode Receiver (MMR). The MMR is incorporated to provide for reception of ground based NA VAID signals for instrument aided flight. Provides IMC I IFR integration and certification of improved Embedded Global Positioning System and Inertial (EGI) unit, with attached MMR, with specific cockpit instrumentation allows Apaches to operate within the worldwide IFR route structure. Also includes integration of the Common Army Aviation Map (CAAM), Area Navigation (RNA V), Digital Aeronautical Flight Information File (DAFIF) and Global Air Traffic Management (GATM) compliance.

j. The AN/ASQ-170 Modernized Target Acquisition and Designation Sight/AN/AAQ-11 Pilot Night Vision Sensor (MTADS/PNVS) provides day, night, limited adverse weather target information, as well as night navigation capabilities. The PNVS provides thermal imaging that permits nap-of-the-earth flight to, from, and within the battle area, while TADS provides the co-pilot gunner with search, detection, recognition, and designation by means of Direct View Optics (DVO), television, and Forward Looking Infrared (FLIR) sighting systems that may be used singularly or in combinations.

k. The AN/APR-48B Modernized Radar Frequency Interferometer (M-RFI) is an updated version of the passive radar detection and direction finding system. It utilizes a detachable UDM on the M-RFI processor, which contains the Radar Frequency (RF) threat library.

l. The AN/APG-78 Longbow Fire Control Radar (FCR) with Radar Electronics Unit (REU) is an active, low-probability of intercept, millimeter wave radar. The active radar is combined with a passive Radar Frequency Interferometer (RFI) mounted on top of the helicopter mast. The FCR Ground Targeting Mode detects, locates, classifies and prioritizes stationary or moving armored vehicles, tanks and mobile air defense systems as well as hovering helicopters, helicopters, and fixed wing aircraft in normal flight. If desired, the radar data can be used to refer targets to the regular electro-optical Modernized Target Acquisition and Designation Sight (MTADS).

m. The Manned-Unmanned Teaming International (MUM-Ti) data link system provides cross-platform communication and teaming between Apache, unmanned aerial systems (UAS), and other interoperable aircraft and ground platforms. It provides the ability to display real-time UAS sensor information and MTADs full motion video feeds across MUM-T equipped platforms and ground stations. The MUM-Ti is the multi-band export version of the datalink for the AH-64E.

n. The M299 Missile Launcher, commonly known as the Longbow Hellfire Launcher (LBHL), is a four rail launcher designed to carry the complete family of AGM-114 Hellfire missiles.

o. The M261 2.75 Inch Rocket Launcher is a nineteen tube, three zone rocket launcher utilized on heavy attack aircraft.

p. The Longbow Crew Trainer (LCT) is a containerized, deployable, high-fidelity flight simulator used to train Apache crew members. The LCT provided will be configured to reflect Kuwait's AH-64E Operational Flight Program software.

2. The highest level of information that may be transferred in support of this proposed sale is classified SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that Kuwait can provide substantially the same degree of protection of this technology as the U.S. Government. This proposed sale is necessary in furtherance of U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles, technical data, and services listed in this transmittal are authorized for release and export to the Government of Kuwait.

[FR Doc. 2021–00624 Filed 1–13–21; 8:45 am]

**BILLING CODE 5001–06–P**

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 20–55]**

### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–55 with attached Policy Justification and Sensitivity of Technology.

Dated: January 8, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001–06–P**

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

DEC 2 8 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-55 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Egypt for defense articles and services estimated to cost $104 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 20–55

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Egypt

(ii) *Total Estimated Value:*

| | |
|---|---|
| Major Defense Equipment * | $ 10 million |
| Other | $ 94 million |
| TOTAL | $104 million |

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*: The Government of Egypt has requested to buy one (1) AN/AAQ-24(V)N Large Aircraft Infrared Countermeasures (LAIRCM) system to protect one (1) Airbus 340–200 Head-of-State aircraft. Each LAIRCM system consists of three (3) Guardian Laser Turret Assemblies (GLTA), one (1) LAIRCM System Processor Replacement (LSPR), five (5) Missile Warning Sensors (MWS), one (1) Control Indicator Unit Replacement (CIUR), one (1) Smart Card Assembly (SCA), and one (1) High Capacity Card (HCC/User Data Memory (UDM) card.

*Major Defense Equipment (MDE):*

Six (6) Guardian Laser Turret Assemblies (GLTA) (3 installed, 3 spares)

Four (4) LAIRCM System Processor Replacements (LSPR) (1 installed, 3 spares)

Ten (10) Missile Warning Sensors (MWS) (5 installed, 5 spares)

*Non-MDE:* Also included are LAIRCM CIURs; SCAs; HCCs; UDM cards; simple key loaders; initial spares, consumables, and repair/return support; support and test equipment; integration and test support; personnel training, publications and technical documentation; U.S. Government and contractor engineering, technical and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (EG–D–QFO)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* December 28, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

*POLICY JUSTIFICATION*

*Egypt—Large Aircraft Infrared Countermeasures (LAIRCM) System for Head-of-State Aircraft*

The Government of Egypt has requested to buy one (1) AN/AAQ-24(V)N Large Aircraft Infrared Countermeasures (LAIRCM) system to protect one (1) Airbus 340–200 Head-of-State aircraft. Each LAIRCM system consists of three (3) Guardian Laser Turret Assemblies (GLTA), one (1) LAIRCM System Processor Replacement (LSPR), five (5) Missile Warning Sensors (MWS), one (1) Control Indicator Unit Replacement (CIUR), one (1) Smart Card Assembly (SCA), and one (1) High Capacity Card (HCC/User Data Memory (UDM) card. This proposed sale will include: six (6) Guardian Laser Turret Assemblies (GLTA) (3 installed, 3 spares); four (4) LAIRCM System Processor Replacements (LSPR) (1 installed, 3 spares); ten (10) Missile Warning Sensors (MWS) (5 installed, 5 spares). Also included are LAIRCM CIURs; SCAs; HCCs; UDM cards; simple key loaders; initial spares, consumables, and repair/return support; support and test equipment; integration and test support; personnel training, publications and technical documentation; U.S. Government and contractor engineering, technical and logistics support services; and other related elements of logistical and program support. The estimated total cost is $104 million.

This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a Major Non-NATO Ally country that continues to be an important strategic partner in the Middle East.

The self-protection suite will improve the survivability of the Airbus from missile attack. Egypt will have no difficulty absorbing this equipment and capability into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Northrup Grumman, Rolling Meadows, IL. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of one U.S. contractor representative in an advisory role to Egypt for one base year with two option years to support operator/maintenance system orientation and original equipment manufacturer factory support.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–55

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AN/AAQ-24(V)N LAIRCM system is a self-contained, directed-energy countermeasures system designed to protect aircraft from infrared-guided surface-to-air missiles. The LAIRCM system features digital technology micro-miniature solid-state electronics. The system operates in all conditions, detecting incoming missiles and jamming infrared-seeker equipped missiles with aimed bursts of laser energy. The LAIRCM system consists of the Guardian Laser Transmitter Assembly (GLTA), LAIRCM System Processor Replacement (LSPR), multiple Missile Warning Sensors, the Control Interface Unit Replacement (CIUR), and the Classified Memory Card User Data Module. The AN/PYQ-10 Simple Key Loader is also a necessary device.

2. The Guardian Laser Transmitter Assembly (GLTA) is a laser transmitter pointer/tracker subsystem designed to track the inbound threat missile and point the laser jam source at the missile's seeker. The GLTA automatically deploys the countermeasure.

3. The LAIRCM System Processor Replacement (LSPR) analyzes the data from each Missile Warning Sensor and automatically deploys the appropriate countermeasure via the GLTA. The LSPR contains Built-in-Test (BIT) circuitry.

4. The AN/PYQ-10 Simple Key Loader is a portable, hand-held device used for securely receiving, storing, and transferring data between compatible cryptographic and communications equipment.

5. The Missile Warning Sensors detect and declare threat missiles. The sensors are mounted on the aircraft exterior to provide omni-directional protection. The sensors detect the rocket plume of missiles and send appropriate data signals to the LSPR for processing.

6. The Control Interface Unit Replacement (CIUR) displays the incoming threat for the pilot to take appropriate action. The CIUR also provides operator interface to program the LAIRCM system to initiate built-in-test (BIT), to display system status, and to provide the crew with bearing to threat missile launch.

7. The Classified Memory Card User Data Module contains the laCser jam codes. The Classified Memory Card User Data Module is loaded into the LSPR prior to flight; when not in use, the Classified Memory Card User Data Module is removed from the LSPR and put in secure storage.

8. The highest level of classification of information included in this potential sale is SECRET.

9. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

10. A determination has been made that Egypt can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objective outlined in the Policy Justification.

11. All defense articles and services listed in this transmittal have been authorized for release and export to Egypt.

[FR Doc. 2021–00631 Filed 1–13–21; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 20–53]**

### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–53 with attached Policy Justification and Sensitivity of Technology.

Dated: January 8, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

DEC 2 8 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-53 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Kuwait for defense articles and services estimated to cost $200 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

**BILLING CODE 5001–06–C**

Transmittal No. 20–53

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Kuwait

(ii) *Total Estimated Value:*

| | |
|---|---|
| Major Defense Equipment * | $ 0 million |
| Other | $200 million |
| TOTAL | $200 million |

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* The Government of Kuwait has requested to buy spare parts to support its upgraded Patriot systems.

*Major Defense Equipment (MDE):* None

*Non-MDE:* Included is one (1) set of Authorized Stockage List (ASL), Prescribed Load List (PLL) and Higher Headquarters Battery (HHB) spare parts; one (1) set of Authorized Stockage List (ASL), Prescribed Load List (PLL) and Higher Headquarters Battery (HHB) spare parts; one (1) set of Fixed Site Antenna Mast Group (ATG)/Information and Coordination Central (ICC) Tethered Manstation Kit (ITMK) spare parts, transportation, organizational equipment, support equipment, tools and test equipment, technical data and publications, personnel training and training equipment, maintenance services, U.S. government and contractor engineering, technical, and logistics support services, and other related elements of logistical and program support.

(iv) *Military Department:* Army (KU–B–UXG)

(v) *Prior Related Cases, if any:* KU–B–ULV, KU–B–UXI, KU–B–UXS, KU–B–UXH

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* December 28, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

*POLICY JUSTIFICATION*

*Kuwait—System Spares for Patriot Configuration 3+*

The Government of Kuwait has requested to buy spare parts to support their upgraded Patriot systems. Included is one (1) set of Authorized Stockage List (ASL), Prescribed Load List (PLL) and Higher Headquarters Battery (HHB) spare parts; one (1) set of Authorized Stockage List (ASL), Prescribed Load List (PLL) and Higher Headquarters Battery (HHB) spare parts; one (1) set of Fixed Site Antenna Mast Group (ATG)/Information and Coordination Central (ICC) Tethered Manstation Kit (ITMK) spare parts, transportation, organizational equipment, support equipment, tools and test equipment, technical data and publications, personnel training and training equipment, maintenance services, U.S. government and contractor engineering, technical, and logistics support services, and other related elements of logistical and program support. The total estimated program cost is $200 million.

The proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a Major Non-NATO Ally that is an important force for political stability and economic progress in the Middle East.

The proposed sale of these spare parts for Kuwait's Patriot System will improve Kuwait's capability to meet current and future threats and provide greater security for critical civilian and military infrastructure. The procurement of these spare parts represents a commitment by Kuwait to field and maintain systems that are interoperable with U.S. forces. Kuwait will have no difficulty absorbing this equipment and support into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Raytheon Missile Systems, Waltham, MA. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Kuwait.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–53

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The spares associated with this sale include unclassified and classified parts associated with the Patriot PAC–3 Configuration 3+. The parts will support sustainment of the critical components of the Patriot whose primary combat element is made up of a radar set, engagement control station, and launching stations. All classified spares in this sale are associated with the Patriot radar set.

2. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements associated with the Patriot missile system, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the Government of Kuwait can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Kuwait.

[FR Doc. 2021–00626 Filed 1–13–21; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 20–13]**

### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–13 with attached Policy Justification and Sensitivity of Technology.

Dated: January 8, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001–06–P**

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

DEC 2 8 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-13 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Kingdom of Saudi Arabia for defense articles and services estimated to cost $290 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 20–13

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Kingdom of Saudi Arabia

(ii) *Total Estimated Value:*

| | |
|---|---|
| Major Defense Equipment * | $250 million |
| Other | $ 40 million |
| TOTAL | $290 million |

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

*Major Defense Equipment (MDE):* Three thousand (3,000) GBU–39/B Small Diameter Bomb I (SDB I)

*Non-MDE:* Also included are containers; weapon support and support equipment; spare and repair parts; U.S. Government and contractor engineering, technical and logistical support services; and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (SR–D–YAE)

(v) *Prior Related Cases, if any:* SR–D–YBD

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* December 28, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

*POLICY JUSTIFICATION*

*Saudi Arabia—GBU–39 Small Diameter Bomb I (SDB I) Munitions*

The Kingdom of Saudi Arabia has requested to buy three thousand (3,000) GBU–39 SDB I munitions. Also included are containers; weapon support and support equipment; spare and repair parts; U.S. Government and contractor engineering, technical and logistical support services; and other related elements of logistical and program support. The total estimated program cost will be $290 million.

This proposed sale will support U.S. foreign policy and national security objectives by helping to improve the security of a friendly country that continues to be an important force for political stability and economic growth in the Middle East.

The proposed sale will improve Saudi Arabia's capability to meet current and future threats by increasing its stocks of long-range, precision air-to-ground munitions. The size and accuracy of the SDB I allows for an effective munition with less collateral damage. The potential sale will further strengthen the interoperability between the United States and Saudi Arabia. Saudi Arabia will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Boeing, St. Louis, MO. There are no known offset agreements in connection with this potential sale; however the purchaser typically requests offsets. Any offset agreement will be defined in negotiations between the purchaser and the contractor.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the Kingdom of Saudi Arabia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–13

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The GBU–39/B Small Diameter Bomb Increment I (SDB I) is a 250-pound class weapon designed as a small, all weather, autonomous, conventional, air-to-ground, precision glide weapon able to strike fixed and stationary re-locatable targets from standoff range. The SDB I weapon system consists of the weapons, the BRU–61/A (4-place pneumatic carriage system), shipping and handling containers for a single weapon and the BRU–61/A either empty or loaded, and a weapon planning module. It has integrated diamond-back type wings that deploy after release, which increases the glide time and therefore maximum range. The SDB I Anti-Jam Global Positioning System aided Inertial Navigation System (AJGPS/INS) provides guidance to the coordinates of a stationary target. The payload/warhead is a very effective multipurpose penetrating and blast fragmentation warhead couples with a cockpit selectable electronic fuze. Its size and accuracy allow for an effective munition with less collateral damage. A proximity sensor provides height of burst capability.

2. The highest level of classification of information included in this potential sale is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the Kingdom of Saudi Arabia can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal are authorized for release and export to the Kingdom of Saudi Arabia.

[FR Doc. 2021–00625 Filed 1–13–21; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal No. 20–65]**

### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–65 with attached Policy Justification and Sensitivity of Technology.

Dated: January 8, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

DEC 28 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-65 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Egypt for defense articles and services estimated to cost $65.6 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 20–65

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Government of Egypt

(ii) *Total Estimated Value:*

| | |
|---|---|
| Major Defense Equipment * | $56.8 million |
| Other | $ 8.8 million |
| TOTAL | $65.6 million |

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

*Major Defense Equipment (MDE):* Twenty (20) AN/AAQ-33 Sniper Advanced Targeting Pods (ATPs)

*Non-MDE:* Also included are pylons; shipping containers; spare and repair/return parts; ground handling equipment; publications and technical documentation; software and software support; personnel training; U.S. Government and contractor engineering, technical, and logistical support services; and other related elements of program and logistical support.

(iv) *Military Department:* Air Force (EG–D–QFP)

(v) *Prior Related Cases, if any:* EG–D–SAB

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* December 28, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

*POLICY JUSTIFICATION*

*Egypt—Sniper Advanced Targeting Pods (ATPs)*

The Government of Egypt has requested to buy twenty (20) AN/AAQ-33 Sniper ATPs. Also included are pylons; shipping containers; spare and repair/return parts; ground handling equipment; publications and technical documentation; software and software support; personnel training; U.S. Government and contractor engineering, technical, and logistical support services; and other related elements of program and logistical support. The estimated total program cost is $65.6 million.

This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a Major Non-NATO Ally country that continues to be an important strategic partner in the Middle East.

The proposed sale will improve Egypt's capability and effectiveness to meet current and future threats by providing additional precision targeting capability to conduct border security and counterterrorism operations. The added precision strike capability will better enable Egypt to conduct operations while minimizing collateral damage. Egypt will have no difficultly absorbing the additional equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Lockheed Martin Aeronautics Company in Fort Worth, TX. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Egypt.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–65

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AN/AAQ-33 SNIPER Pod is a multi-sensor, electro-optical targeting pod incorporating infrared, low-light television camera, laser range finder/target designator, and laser spot tracker. It is used to provide navigation and targeting for military aircraft in adverse weather and using precision-guided weapons such as laser-guided bombs. It also provides positive target identification, autonomous tracking, coordinate generation, and precise weapons guidance from extended standoff ranges. It offers much greater target resolution and imagery accuracy than previous systems.

2. The highest level of classification of information included in this potential sale is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that Government of Egypt can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Egypt.

[FR Doc. 2021–00630 Filed 1–13–21; 8:45 am]

**BILLING CODE 5001–06–P**

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## DEPARTMENT OF DEFENSE

### Corps of Engineers

### Inland Waterways Users Board Meeting Notice

**AGENCY:** Corps of Engineers, Department of the Army, DoD.

**ACTION:** Notice of open Federal advisory committee virtual meeting.

**SUMMARY:** The Department of the Army is publishing this notice to announce the Federal advisory committee online virtual meeting of the U.S. Army Corps of Engineers, Inland Waterways Users Board (Board). This meeting is open to the public. For additional information about the Board, please visit the committee's website at *http://www.iwr.usace.army.mil/Missions/Navigation/InlandWaterwaysUsersBoard.aspx.*

**DATES:** The Army Corps of Engineers, Inland Waterways Users Board will conduct an online virtual meet from 9:00 a.m. to 1:00 p.m. EDT on February 9, 2021.

**ADDRESSES:** Online Virtual Meeting. The Inland Waterways Users Board will be an online virtual meeting. The online virtual meeting can be accessed at *https://usace1.webex.com/meet/ndc.nav,* Public Call-in: USA Toll-Free 844–800–2712, USA Caller Paid/International Toll: 1–669–234–1177 Access Code: 199 117 3596, Security Code 1234.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark R. Pointon, the Designated Federal Officer (DFO) for the committee, in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–GN, 7701 Telegraph Road, Casey Building, Alexandria, VA 22315–3868; by telephone at 703–428–6438; and by email at *Mark.Pointon@usace.army.mil.* Alternatively, contact Mr. Steven D. Riley, an Alternate Designated Federal Officer (ADFO), in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–NDC, 7701 Telegraph Road, Casey Building, Alexandria, VA 22315–3868; by telephone at 703–659–3097; and by email at *Steven.D.Riley@usace.army.mil.*

**SUPPLEMENTARY INFORMATION:** The committee meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

*Purpose of the Meeting:* The Board is chartered to provide independent advice and recommendations to the Secretary of the Army on construction and rehabilitation project investments on the commercial navigation features of the inland waterways system of the United States. At this meeting, the Board will receive briefings and presentations regarding the investments, projects and status of the inland waterways system of the United States and conduct discussions and deliberations on those matters. The Board is interested in written and verbal comments from the public relevant to these purposes.

*Agenda:* At this meeting the agenda will include the status of FY 2021 funding for inland and coastal Navigation; status of the Inland Waterways Trust Fund (IWTF), Board annual report for 2020, and the inland waterways Capital Investment Strategy activities; updates of future IWTF projects currently in Preconstruction, Engineering and Design (PED) phase for Three Rivers, Arkansas, Mississippi River-Illinois Waterway Navigation and Environmental Sustainability Program (NESP) and Upper Ohio River Navigation; status of the ongoing construction activities for the Monongahela River Locks and Dams 2, 3, and 4 Project, the Chickamauga Lock Project and the Kentucky Lock Project; and updates for Inner Harbor Navigation Canal (IHNC) Lock and Bayou Sorrel Lock.

*Availability of Materials for the Meeting.* A copy of the agenda or any updates to the agenda for the February 9, 2021 virtual meeting will be available. The final version will be available at the virtual meeting. All materials will be posted to the website after the meeting.

*Public Accessibility to the Meeting:* Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this virtual meeting is open to the public. Registration of members of the public who wish to participate in the virtual meeting will begin at 8:15 a.m. on the day of the meeting. Participation is on a first-to-arrive basis. Any interested person may participate in the meeting, file written comments or statements with the committee, or make verbal comments during the virtual public meeting, at the times, and in the manner, permitted by the committee, as set forth below.

*Special Accommodations:* Individuals requiring any special accommodations related to the virtual public meeting or seeking additional information about the procedures, should contact Mr. Pointon, the committee DFO, or Mr. Riley, an ADFO, at the email addresses or telephone numbers listed in the **FOR FURTHER INFORMATION CONTACT** section, at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

*Written Comments or Statements:* Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the Board about its mission and/or the topics to be addressed in this virtual public meeting. Written comments or statements should be submitted to Mr. Pointon, the committee DFO, or Mr. Riley, a committee ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section in the following formats: Adobe Acrobat or Microsoft Word. The comment or statement must include the author's name, title, affiliation, address, and daytime telephone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the committee DFO or ADFO at least five (5) business days prior to the meeting so that they may be made available to the Board for its consideration prior to the meeting. Written comments or statements received after this date may not be provided to the Board until its next meeting. Please note that because the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection.

*Verbal Comments:* Members of the public will be permitted to make verbal comments during the virtual public meeting only at the time and in the manner allowed herein. If a member of the public is interested in making a verbal comment at the open virtual meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three business (3) days in advance to the committee DFO or ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FURTHER INFORMATION CONTACT** section. The committee DFO and ADFO will log each request to make a comment, in the order received, and determine whether the subject matter of each comment is relevant to the Board's mission and/or the topics to be addressed in this public meeting. A 15-minute period near the end of the meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described above, will be allotted no more than three (3) minutes during this period, and will be invited to speak in the order in which their requests were received by the DFO and ADFO.

**Thomas P. Smith,**

*Chief, Operations and Regulatory Division, Directorate of Civil Works, U.S. Army Corps of Engineers.*

[FR Doc. 2021–00736 Filed 1–13–21; 8:45 am]

**BILLING CODE 3720–58–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2021–SCC–0006]**

## Agency Information Collection Activities; Comment Request; Higher Education Emergency Relief Fund (HEERF) Improper Payments Information Form

**AGENCY:** Department of Education (ED), Office of Postsecondary Education (OPE).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is requesting the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

**DATES:** The Department is requesting emergency processing and OMB approval for this information collection by January 13, 2021; and therefore, the regular clearance process is hereby being initiated to provide the public with the opportunity to comment under the full comment period. Interested persons are invited to submit comments on or before March 15, 2021.

**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2021–SCC–0006. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov*. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–4537.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Karen Epps, 202–453–6337.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork

Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* Higher Education Emergency Relief Fund (HEERF) Improper Payments Information Form.

*OMB Control Number:* 1840–NEW.

*Type of Review:* A new information collection.

*Respondents/Affected Public:* Private Sector; State, Local, and Tribal Governments.*Total Estimated Number of Annual Responses:* 5,138.

*Total Estimated Number of Annual Burden Hours:* 5,138.

*Abstract:* Under the CARES Act's Higher Education Emergency Relief Fund (HEERF), the Department has made over 12,000 awards to institutions of higher education (IHEs) to support emergency financial aid to students and institutional costs associated with significant changes to the delivery of instruction due to the coronavirus. This form will be used by institutions that have improperly drawn down funds from their award accounts to provide the Department with information regarding funds being returned to correct these improper payments.

*Additional Information:* An emergency clearance approval for the use of the system is described below due to the following conditions: Under the current unprecedented national health emergency, Congress and the President have come together to offer relief to those individuals and industries affected by the COVID–19 virus under the Coronavirus Aid, Relief, and Economic Security Act or the CARES Act. Under the CARES Act's Higher Education Emergency Relief Fund (HEERF), the U.S. Department of Education (the Department) has made over 12,000 awards to institutions of higher education (IHEs) to support emergency financial aid to students and institutional costs associated with significant changes to the delivery of instruction due to the coronavirus. In the course of monitoring these grant awards, the Department has determined that over 700 IHEs have improperly drawn down funds from their award accounts, totaling over $202 million in funds that must now be returned. Furthermore, during the time that these funds have been drawn down, grantees are earning additional interest in excess of the $500 annual cap prescribed by 2 CFR 200.305(b) of the Uniform Guidance. The Department is concerned that this excess interest, without an expeditious inventory and response by our grantees, may be difficult to account. Therefore, in order to process the return of these funds more efficiently and prevent any further earnings beyond the interest cap, we are requesting emergency approval of a short form that will allow the grantee to provide the Department with information regarding the funds being returned.

Dated: January 8, 2021.

**Kate Mullan,**

*PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.*

[FR Doc. 2021–00571 Filed 1–13–21; 8:45 am]

**BILLING CODE 4000–01–P**

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## DEPARTMENT OF EDUCATION

### Applications for New Awards; Fulbright-Hays Group Projects Abroad Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department of Education is issuing a notice inviting applications for fiscal year (FY) 2021 for the Fulbright-Hays Group Projects Abroad (GPA) Program, Assistance Listing Numbers 84.021A and 84.021B. This notice relates to the approved information collection under OMB control number 1840–0792.

**DATES:**

*Applications Available:* January 14, 2021.

*Deadline for Transmittal of Applications:* March 15, 2021.

*Pre-Application Webinar information:* The Department will hold a pre-application meeting via webinar for prospective applicants. Detailed information regarding this webinar will be provided on the Group Projects Abroad website at *www2.ed.gov/programs/iegpsgpa/index.html.* Additionally, for prospective applicants unfamiliar with grantmaking at the Department, please consult our funding basics resources at *https://www2.ed.gov/documents/funding-101/funding-101-basics.pdf.*

**ADDRESSES:** For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

**FOR FURTHER INFORMATION CONTACT:** Cory Neal, U.S. Department of Education, 400 Maryland Avenue SW, room 258–12, Washington, DC 20202. Telephone: (202) 453–6137. Email: *GPA@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Full Text of Announcement

### I. Funding Opportunity Description

*Purpose of Program:* The purpose of the Fulbright-Hays GPA Program is to promote, improve, and develop the study of modern foreign languages and area studies in the United States. The program provides opportunities for faculty, teachers, and undergraduate and graduate students to conduct individual and group projects overseas. Projects may include either (1) short-term seminars, curriculum development, group research or study, or (2) long-term advanced intensive language programs.

This competition invites applicants to submit an application to request support for either a Fulbright-Hays GPA short-term project (GPA short-term projects 84.021A) or a Fulbright-Hays GPA long-term project (GPA long-term projects 84.021B). Applicants must clearly indicate on the SF 424, the Application for Federal Assistance cover sheet, whether they are applying for a GPA short-term project (84.021A) or a GPA long-term project (84.021B). Additional submission requirements are included in the application package.

There are three types of GPA short-term projects: (1) Short-term seminar projects of four to six weeks in length designed to help participants integrate international studies into an institution's or school system's general curriculum by focusing on a particular aspect of area study, such as the culture of an area or country of study (34 CFR 664.11); (2) curriculum development projects of four to eight weeks in length that provide participants the opportunity to acquire resource materials for curriculum development in modern foreign language and area studies for use and dissemination in the United States (34 CFR 664.12); and (3) group research or study projects of three to twelve months in duration designed to give participants the opportunity to undertake research or study in a foreign country (34 CFR 664.13).

GPA long-term projects are advanced overseas intensive language projects designed by the applicant that may be carried out during a full year, an academic year, a semester, a trimester, a quarter, or a summer. GPA long-term projects provide participants an opportunity for intensive advanced language training overseas and for using the language while experiencing the culture in the foreign country. Participants should have successfully completed at least two academic years of training in the language to be studied to be eligible to participate in a GPA intensive advanced language training program. In addition, the language to be studied must be indigenous to the host country and maximum use must be made of local institutions and personnel (34 CFR 664.14).

*Priorities:* This notice contains one absolute priority and four competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the absolute priority is from the regulations for this program (34 CFR 664.32). Competitive Preference Priorities 1 and 2 are from the notice of final priorities and definitions published in the **Federal Register** on June 16, 2016 (81 FR 39196) (the 2016 NFP). Competitive Preference Priority 3 is from the regulations for this program (34 CFR 664.32), and Competitive Preference Priority 4 is from the notice of final priorities published in the **Federal Register** on September 24, 2010 (75 FR 59050) (the 2010 NFP).

*Absolute Priority:* For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

*Specific Geographic Regions of the World.*

A group project that focuses on one or more of the following geographic regions of the world: Africa, East Asia, South Asia, Southeast Asia and the Pacific, the Western Hemisphere (Central and South America, Mexico, and the Caribbean), Eastern and Central Europe and Eurasia, and the Near East.

*Competitive Preference Priorities:* For FY 2021, there are four competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award three additional points to an application that meets Competitive Preference Priority 1; two additional points to an application that meets Competitive Preference Priority 2; two additional points for short-term projects or four additional points for long-term projects to an application that meets Competitive Preference Priority 3; and two additional points to an application that meets Competitive Preference Priority 4. Applicants for GPA short-term projects may address Competitive Preference Priorities 1, 3, and 4. Applicants for GPA long-term projects may address Competitive Preference Priorities 2 and 3. In the application narrative, an applicant must indicate the priority or priorities being addressed and provide a substantive description of how the proposed activities support the applicant's selected priority or priorities and provide documentation supporting its claims.

These priorities are:

*Competitive Preference Priority 1—Applications for GPA Short-term Projects from Selected Institutions and Organizations* (3 Points).

Applications for GPA short-term projects from the following types of institutions and organizations:

- Minority-Serving Institutions (MSIs) (as defined in this notice).
- Community colleges (as defined in this notice).
- New applicants (as defined in this notice).
- State educational agencies (as defined in this notice).

*Competitive Preference Priority 2—Applications for GPA Long-term Projects from MSIs* (2 Points).

Applications for GPA long-term advanced overseas intensive language training projects from MSIs.

*Competitive Preference Priority 3—Substantive Training and Thematic Focus on Less Commonly Taught Languages* (2 Points for short-term projects or 4 Points for long-term projects).

Applications that propose GPA short-term projects (2 points) or GPA long-term projects (4 points) that provide substantive training and thematic focus on any modern foreign language except French, German, or Spanish.

*Competitive Preference Priority 4—Inclusion of K–12 Educators* (2 Points).

Applications that propose short-term projects abroad that develop and improve foreign language studies, area studies, or both at elementary and secondary schools by including K–12 teachers or K–12 administrators as at least 50 percent of the project participants.

*Definitions:*

The following definitions are from the 2016 NFP to provide clarity for applicants addressing the competitive preference priorities.

*Community college* means an institution that meets the definition in section 312(f) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1058(f)); or an institution of higher education (IHE) (as defined in section 101 of the HEA (20 U.S.C. 1001)) that awards degrees and certificates, more than 50 percent of which are not bachelor's degrees (or an equivalent).

*Minority-serving institution (MSI)* means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the HEA.

*New applicant* means any applicant that has not received a discretionary grant from the Department of Education under the Fulbright-Hays Act prior to the deadline date for applications under this program.

*State educational agency* means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

*Program Authority:* 22 U.S.C. 2452(b)(6).

**Note:** Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, and 86. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 664. (e) The 2010 NFP. (f) The 2016 NFP.

**Note:** The regulations in 34 CFR part 86 apply to IHEs only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* The Administration's budget request for FY 2021 does not include funds for this program. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year, if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2022 from the list of unfunded applications from this competition.

*Estimated Available Funds:* $3,532,000.

*Estimated Range of Awards:*

GPA short-term projects: $50,000–$100,000.

GPA long-term projects: $50,000–$250,000.

*Estimated Average Size of Awards:*

GPA short-term projects: $80,059.

GPA long-term projects: $185,025.

*Maximum Award:* We will not make a GPA short-term award exceeding $100,000 for a single project period of 18 months. We will not make a GPA long-term project award exceeding $250,000 for a single budget period of 24 months.

*Estimated Number of Awards:* 25.

GPA short-term projects: 10.

GPA long-term projects: 15.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:*

GPA short-term projects: Up to 18 months.

GPA long-term projects: Up to 24 months.

## III. Eligibility Information

1. *Eligible Applicants:* (1) IHEs, (2) State educational agencies, (3) private nonprofit educational organizations, and (4) consortia of these entities.

*Eligible Participants:* Citizens, nationals, or permanent residents of the United States, who are (1) faculty members who teach modern foreign languages or area studies at an IHE, (2) teachers in elementary or secondary schools, (3) experienced education administrators responsible for planning, conducting, or supervising programs in modern foreign language or area studies at the elementary, secondary, or postsecondary levels, or (4) graduate students, or juniors or seniors in an IHE, who plan teaching careers in modern foreign languages or area studies.

**Note:** If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

## IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

3. *Funding Restrictions:* We specify unallowable costs in 34 CFR 664.33. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 40 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet or budget section, including the narrative budget justification; the assurance and certifications; or the one-page abstract, the resumes, the biography, or letters of support. However, the recommended page limit does apply to all of the application narrative.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 664.31 and are as follows:

(a) *Plan of operation.* (20 points)

(1) The Secretary reviews each application for information to determine the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the project;

(ii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective; and

(v) A clear description of how the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition.

(b) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information to determine the quality of key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (b)(2)(i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training in fields related to the objectives of the project as well as other information that the applicant provides.

(c) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(d) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project.

(2) The Secretary looks for information that shows that the methods of evaluation are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(e) *Adequacy of resources.* (5 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows that the facilities, equipment, and supplies that the applicant plans to use are adequate.

(f) *Specific Program Criteria.* (35 points)

(1) In addition to the general selection criteria contained in this section, the Secretary reviews each application for information that shows that the project meets the specific program criteria.

(2) The Secretary looks for information that shows—

(i) The potential impact of the project on the development of the study of modern foreign languages and area studies in American education. (15 points)

(ii) The project's relevance to the applicant's educational goals and its relationship to its program development in modern foreign languages and area studies. (10 points)

(iii) The extent to which direct experience abroad is necessary to achieve the project's objectives and the effectiveness with which relevant host country resources will be utilized. (10 points)

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For FY 2021, proposed GPA short-term projects will be reviewed by peer review panels with expertise on the world area focus of the application. All proposed GPA long-term projects will be reviewed by one peer review panel. The International and Foreign Language Education office will prepare separate rank order slates for GPA short-term projects and GPA long-term projects recommended for new awards in FY 2021. Each slate will include the peer reviewers' scores for all applications evaluated, from the highest score to the lowest score.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Promoting the freedom of speech and religious liberty in alignment with *Promoting Free Speech and Religious Liberty* (E.O. 13798) and *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* (E.O. 13864) (2 CFR 200.300, 200.303, 200.339, and 200.341);

(d) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(e) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* For the purposes of the Government Performance and Results Act of 1993 and Department reporting under 34 CFR 75.110, the following measure will be used by the Department to evaluate the success of the GPA short-term program: The percentage of GPA short-term project participants who disseminated information about or materials from their group project abroad through more than one outreach activity within six months of returning to their home institution. The following measure will be used by the Department to evaluate the success of the GPA long-term program: The percentage of GPA long-term project participants who increased their reading, writing, and/or listening/speaking foreign language scores by one proficiency level. The efficiency of the GPA long-term program will be measured by considering the cost per GPA participant who increased his/her foreign language score in reading, writing, and/or listening/speaking by at least one proficiency level.

The information provided by grantees in their performance reports submitted via the International Resource Information System (IRIS) will be the source of data for this measure. Reporting screens for institutions can be viewed at: *http://iris.ed.gov/iris/pdfs/gpa_director.pdf* and *http://iris.ed.gov/iris/pdfs/gpa_participant.pdf.*

## VII. Other Information

*Accessible Format:* On request to the program contact person listed under **FOR FURTHER INFORMATION CONACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Christopher J. McCaghren,**

*Acting Assistant Secretary for Postsecondary Education.*

[FR Doc. 2021–00757 Filed 1–13–21; 8:45 am]

**BILLING CODE 4000–01–P**

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## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. NJ21–9–000]**

## City of Pasadena, California; Notice of Filing

Take notice that on December 23, 2020, the City of Pasadena, California submitted its tariff filing: Annual revision to its Transmission Revenue Balancing Account Adjustment to be effective 1/1/2021.[1]

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.

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

[1] Pasadena is a municipal electric utility that is not subject to the jurisdiction of the Commission under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e (2018). Pasadena became a Participating TO in the CAISO as of January 1, 2005. Without waiving any rights relating to its jurisdictional status, Pasadena submits this filing to the Commission, as it previously submitted its Transmission Revenue Requirement (TRR) and TO Tariff in Docket Nos. EL05–18–000, EL09–67–000, ER11–4375–000, ER17–392–000, and ER19–1136–000, for the purpose of permitting the Commission to review the justness and reasonableness of the CAISO's Tariff charges, which include the TRR of Pasadena as well as those of other non-jurisdictional and jurisdictional Participating TOs.

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 19, 2021.

Dated: January 8, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00686 Filed 1–13–21; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC21–40–000.
*Applicants:* Energia Sierra Juarez U.S., LLC, Energia Sierra Juarez U.S. Transmission, LLC.
*Description:* Application for Authorization Under Section 203 of the Federal Power Act of Energia Sierra Juarez U.S., LLC, et. al.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5071.
*Comments Due:* 5 p.m. ET 1/29/21.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER16–1404–007.
*Applicants:* New York Independent System Operator, Inc.
*Description:* Compliance filing: NYISO compliance errata to 12/22/20 SSE under BSM rules filing to be effective 2/20/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5085.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER20–479–001; ER20–481–001; ER20–482–001; ER20–484–001; ER20–1650–002.
*Applicants:* Little Bear Solar 1, LLC, Little Bear Solar 3, LLC, Little Bear Solar 4, LLC, Little Bear Solar 5, LLC, Little Bear Master Tenant, LLC.
*Description:* Notice of Change in Status of Little Bear Solar 1, LLC, et al.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5172.
*Comments Due:* 5 p.m. ET 1/28/21.

*Docket Numbers:* ER20–1912–002.
*Applicants:* Blooming Grove Wind Energy Center LLC.
*Description:* Notice of Change in Status of Blooming Grove Wind Energy Center LLC.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5180.
*Comments Due:* 5 p.m. ET 1/28/21.

*Docket Numbers:* ER20–2288–001.
*Applicants:* Tatanka Ridge Wind, LLC.
*Description:* Notice of Change in Status of Tatanka Ridge Wind, LLC.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5069.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER20–2445–001.
*Applicants:* Prineville Solar Energy LLC.
*Description:* Notice of Change in Status of Prineville Solar Energy LLC.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5179.
*Comments Due:* 5 p.m. ET 1/28/21.

*Docket Numbers:* ER21–13–001.
*Applicants:* NECEC Transmission LLC.
*Description:* Compliance filing: Notice of Effective Date and Consummation (National Grid) to be effective N/A.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5178.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–14–001.
*Applicants:* NECEC Transmission LLC.
*Description:* Compliance filing: Notice of Effective Date and Consummation (Unitil) to be effective N/A.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5179.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–15–001.
*Applicants:* NECEC Transmission LLC.
*Description:* Compliance filing: Notice of Effective Date and Consummation (HQUS Eversource) to be effective N/A.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5195.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–17–001.
*Applicants:* NECEC Transmission LLC.
*Description:* Compliance filing: Notice of Effective Date and Consummation (HQUS National Grid) to be effective N/A.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5182.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–18–001.
*Applicants:* NECEC Transmission LLC.
*Description:* Compliance filing: Notice of Effective Date and Consummation (HQUS Unitil) to be effective N/A.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5183.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–19–001.
*Applicants:* NECEC Transmission LLC.
*Description:* Compliance filing: Notice of Effective Date and Consummation (HQUS Additional) to be effective N/A.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5184.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–445–000.
*Applicants:* Hill Top Energy Center LLC.
*Description:* Supplement to November 20, 2020 Market Based Rate Application of Hill Top Energy Center LLC.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5182.
*Comments Due:* 5 p.m. ET 1/19/21.

*Docket Numbers:* ER21–681–001.
*Applicants:* Midcontinent Independent System Operator, Inc., American Transmission Company LLC.
*Description:* Tariff Amendment: 2021–01–08_SA 3592 ATC-Wood County Solar Substitute E&P (J986) to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5074.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–830–000.
*Applicants:* Weaver Wind Maine Master Tenant, LLC.
*Description:* § 205(d) Rate Filing: Notice of Non-Material Change in Status and Revised MBR Tariff to be effective 1/8/2021.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5046.
*Comments Due:* 5 p.m. ET 1/28/21.

*Docket Numbers:* ER21–831–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Original ISA, Service Agreement No. 5865; Queue No. AC1–142A to be effective 12/8/2020.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5049.
*Comments Due:* 5 p.m. ET 1/28/21.

*Docket Numbers:* ER21–832–000.
*Applicants:* Tri-State Generation and Transmission Association, Inc.

*Description:* § 205(d) Rate Filing: Amendment to Service Agreement No. 864 to be effective 1/5/2021.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5052.
*Comments Due:* 5 p.m. ET 1/28/21.

*Docket Numbers:* ER21–833–000.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2021–01–08_Schedule 31 Annual Update Filing to be effective 4/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5020.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–834–000.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2021–01–08_SA 3599 MidAmerican-Heartland Divide FSA (J583 Interconnection Sub) to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5026.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–835–000.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2021–01–08_SA 3600 MidAmerican-Heartland Divide FSA (J583 Hills-J530 POI) to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5031.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–836–000.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2021–01–08_SA 3601 MidAmerican-Heartland Divide FSA (J583 Bondurant Montezuma) to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5033.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–837–000.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2021–01–08_SA 3602 MidAmerican-Heartland Divide FSA (J583 Grimes) to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5034.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–838–000.
*Applicants:* Alabama Power Company.
*Description:* Tariff Cancellation: Bull Branch Solar LGIA Termination Filing to be effective 1/8/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5079.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–839–000.
*Applicants:* Alabama Power Company.
*Description:* Tariff Cancellation: Russell County Solar LGIA Termination Filing to be effective 1/8/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5080.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–840–000.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2021–01–08_SA 3176 NSP–NSP 2nd Rev GIA (J460) to be effective 12/18/2020.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5089.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–841–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Revisions to Sch. 12-Appx A: Dec 2020 RTEP, 30-Day Comment Period Requested to be effective 4/8/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5101.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–842–000.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2021–01–08_SA 3234 Termination of Otter Tail Power-Dakota Range III FCA (J488) to be effective 1/9/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5117.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–843–000.
*Applicants:* California Independent System Operator Corporation.
*Description:* § 205(d) Rate Filing: 2021–01–08 Hybrid Resources Phase 2 to be effective 3/12/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5118.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–844–000.
*Applicants:* PacifiCorp.
*Description:* § 205(d) Rate Filing: Exelon NITSA (OR DA) SA 943 Rev 2 to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5119.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–845–000.
*Applicants:* ISO New England Inc., Eversource Energy Service Company.
*Description:* Notice of Termination of the Standard Large Generator Interconnection Agreement of ISO New England Inc.
*Filed Date:* 1/7/21.
*Accession Number:* 20210107–5189.
*Comments Due:* 5 p.m. ET 1/28/21.

*Docket Numbers:* ER21–846–000.
*Applicants:* Duke Energy Carolinas, LLC.
*Description:* § 205(d) Rate Filing: Revisions to Rate Schedule No. 332 to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5123.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–847–000.
*Applicants:* PacifiCorp.
*Description:* § 205(d) Rate Filing: Calpine NITSA Rev 14 to be effective 1/1/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5126.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–848–000.
*Applicants:* Battle Mountain SP, LLC.
*Description:* Baseline eTariff Filing: FERC Electric MBR Tariff to be effective 3/9/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5127.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–849–000.
*Applicants:* FPL Energy Oliver Wind I, LLC.
*Description:* Tariff Cancellation: FPL Energy Oliver Wind I, LLC to be effective 1/9/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5144.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–850–000.
*Applicants:* FPL Energy Oliver Wind II, LLC.
*Description:* Tariff Cancellation: FPL Energy Oliver Wind II, LLC Cancellation of MBR Tariff to be effective 1/9/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5145.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–851–000.
*Applicants:* Hawkeye Power Partners, LLC.
*Description:* Tariff Cancellation: Hawkeye Power Partners, LLC Cancellation of MBR Tariff to be effective 1/9/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5149.
*Comments Due:* 5 p.m. ET 1/29/21.

*Docket Numbers:* ER21–852–000.
*Applicants:* Duke Energy Florida, LLC.
*Description:* Tariff Cancellation: Notice of Termination of E&P Agreement RS No. 297 (Archer) to be effective 3/10/2021.
*Filed Date:* 1/8/21.
*Accession Number:* 20210108–5172.
*Comments Due:* 5 p.m. ET 1/29/21.

Take notice that the Commission received the following electric reliability filings:

*Docket Numbers:* RD21–3–000.
*Applicants:* North American Electric Reliability Corporation.
*Description:* Petition of the North American Electric Reliability Corporation for approval of errata to Reliability Standard FAC–001–3.

*Filed Date:* 1/7/21.

*Accession Number:* 20210107–5185.

*Comments Due:* 5 p.m. ET 2/8/21.

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: January 8, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00684 Filed 1–13–21; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. NJ21–8–000]**

### City of Azusa, California; Notice of Petition for Declaratory Order

Take notice that on December 23, 2020, pursuant to Rules 205 and 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.205, 385.207, and consistent with the provisions of the Transmission Owner (TO) Tariff, the City of Azusa, California (Azusa), submitted a petition for a declaratory order requesting that the Commission (1) accepting Azusa's annual revisions to its Transmission Revenue Balancing Account Adjustment (TRBAA); (2) approving Azusa's annual update to the costs of its Existing Transmission Contract (ETC) with Southern California Edison Company for purposes of recovery of such costs through the ETC Pass-Through Clause contained in Azusa's TO Tariff; (3) accepting revisions to Appendix I to Azusa's TO Tariff to reflect Azusa's revised TRBAA, ETC costs, and updated Base and High Voltage Transmission Revenue Requirements (TRR);[1] (4) to the extent necessary, waiving the sixty-day notice requirement provided for in the Commission's regulations at 18 CFR 35.3(a); (5) waiving the filing fee associated with this Petition that is provided for by Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207; and (6) granting any other relief or waivers necessary or appropriate for approval and implementation of the revisions to Azusa's Base TRR (including the updated ETC cost components), TRBAA, High Voltage TRR, and modifications to Azusa's TO Tariff effective as of January 1, 2021,[2] as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

*Comment Date:* 5:00 p.m. Eastern Time on January 19, 2021.

Dated: January 8, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00682 Filed 1–13–21; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Number:* PR21–14–000.

*Applicants:* Permian Highway Pipeline LLC.

*Description:* Tariff filing per 284.123(b),(e)/: Petition for NGPA Section 311 Rate Approval to be effective 12/8/2020 under PR21–14.

*Filed Date:* 1/7/2021.

*Accession Number:* 202101075015.

*Comments/Protests Due:* 5 p.m. ET 1/28/2021.

*Docket Numbers:* RP21–376–000.

*Applicants:* Transcontinental Gas Pipe Line Company, LLC.

*Description:* Compliance filing Rate Schedule S–2 Flow Through Refund Report TETCO OFO.

*Filed Date:* 1/7/21.

*Accession Number:* 20210107–5004.

*Comments Due:* 5 p.m. ET 1/19/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211

[1] Azusa's High Voltage Base TRR reflects two separately-stated ETC cost components, including an annually-updated forecast of Azusa's ETC costs for the upcoming calendar year and an annually updated true-up of Azusa's ETC costs for a prior twelve-month period. The High Voltage TRR consists of the High Voltage Base TRR plus the High Voltage TRBAA, which can be either positive or negative.

[2] Azusa is a municipal electric utility that is not subject to the jurisdiction of the Commission under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e (2018). Azusa became a Participating Transmission Owner (''Participating TO'') in the California Independent System Operator Corporation (''CAISO'') as of January 1, 2003. Without waiving any rights relating to its jurisdictional status, Azusa submits this filing to the Commission, as it previously submitted its TO Tariff in Docket Nos. EL03–14–000 and ER12–489–000, for the purpose of permitting the Commission to review the justness and reasonableness of the CAISO's tariff charges, which include Azusa's TRR as well as the TRRs of other non-jurisdictional and jurisdictional Participating TOs.

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 date(s). 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: January 8, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00687 Filed 1–13–21; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 190–105]**

### Moon Lake Electric Association, Inc.; Notice of Effectiveness of Withdrawal of License Application

On January 31, 2017, Moon Lake Electric Association, Inc. (Moon Lake) filed an application for a new license for the 1.2-megawatt Uintah Hydroelectric Project No. 190. On December 23, 2020, Moon Lake filed a notice of withdrawal of its application. Moon Lake states that the anticipated cost of operating the project under the new license will render the project uneconomic.

No motion in opposition to the notice of withdrawal has been filed, and the Commission has taken no action to disallow the withdrawal. Pursuant to Rule 216(b) of the Commission's Rules of Practice and Procedure,[1] the withdrawal of the application became effective on January 8, 2021, and this proceeding is hereby terminated. Commission staff are concurrently issuing a letter to Moon Lake requiring it to file an application to surrender the project.

Dated: January 8, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00680 Filed 1–13–21; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 385.216(b) (2020).

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. AD21–8–000]**

### Technical Conference on Reassessment of the Electric Quarterly Report Requirements; Notice of Technical Conference

Take notice that on February 24, 2021, the Federal Energy Regulatory Commission (Commission) will convene a staff-led technical conference via webcast as part of a reassessment of the Electric Quarterly Report (EQR) requirements. A supplemental notice will be issued prior to the conference with further details regarding the agenda, meeting registration information, and electronic log-in information.

The purpose of this technical conference is to provide a forum for Commission staff, filers, and data users to discuss potential changes to the current EQR data fields. This technical conference is intended to be the first in a series of conferences related to a reassessment of the EQR requirements.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about the EQR technical conference, please contact Jeff Sanders of the Commission's Office of Enforcement at (202) 502–6455, or send an email to *EQR@ferc.gov.* Additional information will also be provided on the EQR web page.

Dated: January 8, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00685 Filed 1–13–21; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 3428–187]**

### Brown Bear II Hydro, Inc.; Notice of Intent To File License Application, Filing of Pre-Application Document, Commencement of Pre-Filing Process, and Scoping; Waiving Parts of the Pre-Filing Process; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for New License and Commencing Pre-filing Process.

b. *Submitted By:* Brown Bear II Hydro, Inc.

c. Name of Project: Worumbo Hydroelectric Project.

d. *Location:* On the Androscoggin River, in Androscoggin County, Maine.

e. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

f. Licensee Contact: Michael Scarzello, Regulatory Director, Eagle Creek Renewable Energy, LLC, 116 N State Street, P.O. Box 167, Neshkoro, WI 54960–0167.

g. *FERC Contact:* Ryan Hansen at (202) 502–8074 or email at *ryan.hansen@ferc.gov.*

h. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item m below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See 94 FERC 61,076 (2001).

i. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

j. With this notice, we are designating Brown Bear II Hydro, Inc. as the Commission's non-federal representatives for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section

106 of the National Historic Preservation Act.

k. Brown Bear II Hydro, Inc. filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

l. 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 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 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 FERC at *FERCONlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TYY, (202) 502–8659.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

m. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph f. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission.

The Commission strongly encourages electronic filing. Please file all documents using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

*All filings with the Commission must bear the appropriate heading:* Comments on Pre-Application Document, Study Requests, Comments on Scoping Document 1, Request for Cooperating Agency Status, or Communications to and from Commission Staff. Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by March 23, 2021.

n. *Scoping Process:* The Commission's scoping process will help determine the required level of analysis and satisfy the NEPA scoping requirements, irrespective of whether the Commission prepares an environmental assessment or Environmental Impact Statement.

Due to restrictions on mass gatherings related to COVID–19, we are waiving section 5.8(b)(viii) of the Commission's regulations and do not intend to conduct a public scoping meeting and site visit in this case. Instead, we are soliciting written comments, recommendations, and information, on SD1. Any individual or entity interested in submitting scoping comments must do so by the date specified in item m. SD1, which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's official mailing list. Copies of SD1 may be viewed on the web at *http://www.ferc.gov,* using the ''eLibrary'' link. Follow the directions for accessing information in paragraph l. Based on all written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

We may conduct a site visit, if needed, later in the process, such as in conjunction with the study plan meeting required by section 5.11(e) of the Commission's regulations which is required to occur by June 6, 2021. Further revisions to the schedule may be made as appropriate.

Dated: January 8, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00681 Filed 1–13–21; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–10016–72-Region 6]**

## Comprehensive Environmental Response, Compensation, and Liability Act; Proposed Administrative Settlement Agreement for Recovery of Response Costs; ''Delta Shipyard'' Superfund Site in Houma, Terrebonne Parish, LA

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed settlement; request for public comment.

**SUMMARY:** In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), notice is hereby given that a proposed administrative settlement agreement for recovery of response costs (''Proposed Agreement'') associated with the ''Delta Shipyard'' Superfund Site in Houma, Terrebonne Parish, Louisiana (''Site'') was executed by the Environmental Protection Agency (''EPA'') and is now subject to public comment, after which EPA may modify or withdraw its consent if comments received disclose facts or considerations that indicate that the Proposed Agreement is inappropriate, improper, or inadequate.

**DATES:** Comments must be received on or before February 16, 2021.

**ADDRESSES:** As a result of impacts related to the COVID–19 pandemic, requests for documents and submission of comments must be via electronic mail except as provided below. The Proposed Agreement and additional background information relating to the Proposed Agreement are available for public inspection upon request by contacting EPA Assistant Regional Counsel Amy Salinas at *salinas.amy@epa.gov.* Comments must be submitted via electronic mail to this same email address and should reference the ''Delta Shipyard'' Superfund Site, Proposed Settlement Agreement'' and ''EPA CERCLA Docket No. 06–03–19.'' Persons without access to electronic mail may call Ms. Salinas at (215) 665–8063 to make alternative arrangements.

**FOR FURTHER INFORMATION CONTACT:** Amy Salinas at EPA by phone (214) 665–8063 or email at: *salinas.amy@epa.gov.*

**SUPPLEMENTARY INFORMATION:** The Proposed Agreement would resolve potential EPA claims under Section 107(a) of CERCLA, against Dean Services West, LLC (''Settling Party'') for EPA response costs at the Delta Shipyard Superfund Site located in the

Southeastern section of Houma, Louisiana. The settlement amount of $350,000.00 is a reduced amount based on an Ability to Pay Analysis.

For thirty (30) days following the date of publication of this notice, EPA will receive electronic comments relating to the Proposed Agreement. EPA's response to any comments received will be available for public inspection by request. Please see the **ADDRESSES** section of this notice for special instructions in effect due to impacts related to the COVID–19 pandemic.

Dated: December 14, 2020.

**Kenley McQueen,**

*Regional Administrator, Region 6.*

[FR Doc. 2021–00751 Filed 1–13–21; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[WC Docket No. 17–97; DA 21–12; FRS 17371]**

## Pleading Cycle Established for Petitions for Reconsideration of Portions of the Call Authentication Trust Anchor Second Report and Order

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice; request for comments.

**SUMMARY:** In this document, the Wireline Competition Bureau establishes a pleading cycle for Petitions for Reconsideration of portions of the Call Authentication Trust Anchor Second Report and Order.

**DATES:** Oppositions due January 29, 2021 and replies due February 8, 2021.

**ADDRESSES:** All pleadings are to reference WC Docket No. 17–97. Oppositions and replies may be filed using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies.

- *Electronic Filers:* Oppositions and replies may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

**FOR FURTHER INFORMATION CONTACT:** For further information, please contact Mason Shefa, Competition Policy Division, Wireline Competition Bureau, at (202) 418–2962, *mason.shefa@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** On September 29, 2020, the Commission adopted the *Call Authentication Trust Anchor Second Report and Order.* The *Second Report and Order* set forth rules to make clear the obligations and deadlines for voice service providers regarding caller ID authentication and completed implementation of the caller ID authentication provisions of the TRACED Act.

On December 17, 2020, CTIA and Voice on the Net (VON) Coalition each filed petitions for reconsideration of portions of the *Second Report and Order* (together Petitions for Reconsideration). CTIA requests that the Commission eliminate the prohibition in section 64.6305(c) on voice service providers accepting calls from foreign voice service providers that use U.S. North American Numbering Plan resources and are not listed in the Robocall Mitigation Database. VON makes the same request as CTIA and further requests elimination of the requirement in section 64.6305(b)(4) that voice service provider certifications provide the name, telephone number, physical address, and email address of a central point of contact within the company responsible for addressing robocall mitigation-related issues.

Pursuant to the Commission's rules, oppositions to the Petitions for Reconsideration must be filed no later than January 29, 2021, and replies to oppositions must be filed no later than February 8, 2021. Oppositions and replies may be filed using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Oppositions and replies may be filed electronically using the internet by accessing the ECFS: *https://www.fcc.gov/ecfs.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
  - Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See* FCC Announces Closure of FCC Headquarters Open Windo and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*
- *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).
- *Ex Parte Rules.* This proceeding shall continue to be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by

rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

**Daniel Kahn,**

*Associate Chief, Wireline Competition Bureau.*

[FR Doc. 2021–00578 Filed 1–13–21; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than January 29, 2021.

*A. Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *John Morrow, Albion, Nebraska;* to join the Sullivan family group, a group acting in concert, to retain voting shares of Cedar Rapids State Company, and thereby indirectly retain voting shares of Cedar Rapids State Bank, both of Cedar Rapids, Nebraska.

Board of Governors of the Federal Reserve System, January 11, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021–00759 Filed 1–13–21; 8:45 am]

**BILLING CODE 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 16, 2021.

*A. Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *SBWY Financial Corporation, Evanston, Wyoming;* to become a bank holding company by acquiring State Bank, Green River, Wyoming.

Board of Governors of the Federal Reserve System, January 11, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021–00758 Filed 1–13–21; 8:45 am]

**BILLING CODE 6210–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–21–0950]**

### Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled The National Health and Nutrition Examination Survey (NHANES) to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on July 20, 2020 to obtain comments from the public and affected agencies. CDC received two non-substantive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

**Proposed Project**

The National Health and Nutrition Examination Survey (NHANES), (OMB Control No. 0920–0950, Exp. 11/30/2021)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes the Secretary of Health and Human Services (DHHS), acting through NCHS, to collect statistics on the extent and nature of illness and disability; environmental, social, and other health hazards; and determinants of health of the population of the United States (U.S.). The National Health and Nutrition Examination Surveys (NHANES) have been conducted periodically between 1970 and 1994 and continuously since 1999 by the National Center for Health Statistics (NCHS), CDC. Due to the Coronavirus (COVID–19) pandemic, NHANES 2019–20 paused data collection operations, making this the first time since 1999 that NHANES did not operate on a continuous basis.

NHANES programs produce descriptive statistics, which measure the health and nutrition status of the general population. With physical examinations, laboratory tests, and interviews, NHANES studies the relationship between diet, nutrition, and health in a representative sample of the U.S. NHANES monitors the prevalence of chronic conditions and risk factors and produces national reference data on height, weight, and nutrient levels in the blood. Results from the 2021–22 NHANES will be used to assess current health measures in the U.S. population.

The program is making changes to NHANES content and procedures for 2021–22. The proposed changes include modifications to sample design, questionnaires, exam components, laboratory content, outreach materials, changes in select interview and exam modes, and changes to operational procedures. NHANES proposes these changes in response to COVID–19 and to address issues such as low response rates. The program consulted with collaborators, stakeholders, and the NCHS Board of Scientific Counselors (BSC). Due to these changes, largely driven by the pandemic, NHANES 2021–22 may not be comparable with previous or future NHANES cycles.

NCHS collects personally identifiable information (PII). Participant level data items include basic demographic information, name, address, social security number, Medicare number, and participant health information to allow for linkages to other data sources such as the National Death Index and data from the Centers for Medicare and Medicaid Services (CMS).

A variety of agencies sponsor data collection components on NHANES. To keep burden low and respond to changing public health needs, NCHS cycles in and out various components. In 2021–22, NHANES plans to continue electronic consent procedures and implement multi-mode eligibility screening. Our yearly goal for interview, exam, and post exam components is 5,000 participants. To achieve the goal of 5,000 participants interviewed and examined, we need to screen approximately 7,000 individuals annually, a number lower than the approximately 15,000 screened in previous NHANES because NHANES 2021–22 will not oversample based on race, Hispanic origin, or income. In addition, there will be approximately 600 volunteers as part of a dress rehearsal that takes place in two locations (300 volunteers per location.)

In NHANES 2021–22, the interviews that would historically occur via in-person interviews (*i.e.,* screening, family, and sampled participant) will be conducted primarily over the phone. A significant reduction in interview content will occur in 2021–22 so the length of the interviews is feasible for the designed interview modes with reasonable burden to the respondents. Changes will also be made to focus on retaining questions directly related to the interpretation of examination or lab data collected in the survey and relevant to assess the effect of the pandemic. The program plans to add questions related to COVID–19 to the survey to complement NHANES laboratory measures. The program will drop select questions related to examination and laboratory content cycled out of the survey in 2021–22.

Most sections of the NHANES interviews provide self-reported information for use in combination with specific examination or laboratory content, as independent prevalence estimates, or as covariates in statistical analysis (*e.g.,* socio-demographic characteristics). Some examples include alcohol, drug and tobacco use, sexual behavior, prescription and aspirin use, and indicators of oral, bone, reproductive, and mental health. Several interview components support the nutrition-monitoring objective of NHANES, including questions about food security, nutrition program participation, and dietary supplement use.

In 2021–22, NHANES will initiate screening for COVID–19 prior to participants entering the Mobile Examination Center (MEC). Participants will be reminded via text or telephone call not to report for their examination appointment if they have been exposed or have tested positive. When participants arrive for the examination appointment, they will answer questions to determine if they have been potentially exposed, they will have their temperature checked and finally will have a COVID antibody test, prior to being allowed in the MEC.

The NHANES examinations that will remain unchanged include anthropometry (all ages), blood pressure (8+), and liver elastography (40).

The program is modifying select examination components in 2021–22. These changes include dropping the DXA spine and femur scans while continuing DXA whole body scans (ages 8–69), dropping all visual assessment subcomponents of the standing balance examination, and modifying the phlebotomy component.

Examination components cycled out in 2021–22 include: Oral Health, Audiometry and Words-in Noise (4 audiometry questions are retained in the Household Interview), and Cognitive Functioning assessment. NHANES does not plan to conduct a Blood Pressure Methodology Study.

In previous NHANES cycles, while at the examination center, participants were administered a Day 1 dietary recall interview via in-person interview, and additional interview questions were asked (six and older) both in-person and through Audio Computer-Assisted Self-Interview (ACASI). A second 24-hour dietary recall (all ages) was also scheduled to be conducted by phone 3–10 days later. In NHANES 2021–22, both the Day 1 dietary recall and the second 24-hour dietary recall will be completed as telephone interviews. The interview questions will be completed in the examination center primarily via ACASI.

The biospecimens collected for laboratory testing include urine and blood. Serum, plasma, and urine specimens are stored for future testing, including genetic studies, if the participant consents. Consent to store DNA will continue in NHANES.

In 2021–22, we plan to add the following laboratory tests: Serum Terpenes: α-Pinene, β-Pinene, β-Myrcene, Δ-3-Carene, Limonene, β-Caryophyllene, α-Humulene; Magnesium; HPV, serum; Alpha-1-acid-glycoprotein (AGP); Vitamin D; Vitamin A; Vitamin C; Acrylonitrile; Trans-fatty Acids; Blood butyrylcholinesterase activity, blood butyrylcholinesterase concentration, and red blood cell acetylcholinesterase activity; Enterovirus D68; and COVID–19 serology.

In 2021–22, the following laboratory tests will be modified: Hepatitis D (new testing method, reportable findings); Sex steroid hormone panel (now starting at 3+); Urine VOC metabolites (adding as additional 7); trans, trans-Muconic acid; N-Acetyl-S-phenyl-L-cysteine; N–2-Furoylglycine; 2,5-Furandicarboxylic acid; 5-Hydroxymethyl-2-furancarboxylic acid; 5-Hydroxymethyl-2-furoylglycine; and 5-Hydroxy-N-methyl-2-pyrrolidone.

The laboratory tests cycling out for 2021–22 include: HPV swabs (male and female); HPV oral rinse; Home water sample collection to test for fluoride; Salt home collection for iodine assessment; Chromium/Cobalt; Tuberculosis (TB); and Urine flow rate.

NHANES plans to conduct a dress rehearsal prior to fielding the survey as usual. This will be conducted in two locations, among a sample of approximately 300 volunteers per location (approximately 600 total). The program is taking this step to assure it maintains the consistent quality associated with data collection, given the necessary pause in field operations in 2020. The data collected during dress rehearsal will be used for quality control and training purposes. Dress rehearsal data will not be part of the 2021–22 public release.

NHANES plans to conduct developmental projects during NHANES 2021–22 with a focus on planning for NHANES 2023 and beyond. These may include activities such as tests of new equipment, crossover studies between current and proposed methods, test of different study modes, settings, or technology, outreach materials, incentive strategies, sample storage and processing, or sample designs.

Burden for individuals varies based on their level of participation. For example, infants and children tend to have shorter interviews and exams than adults because young people may have fewer health conditions or medications to report, certain exams are only conducted on individuals 18 and older, etc. In addition, adults often serve as proxy respondents for young people in their families.

Participation in NHANES is voluntary and confidential. There is no cost to respondents other than their time. CDC requests a three-year approval, with 65,630 annualized hours of burden.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|---|
| Individuals in households | Screener | 8,300 | 1 | 10/60 |
| Individuals in households | Household Interview | 5,600 | 1 | 1 |
| Individuals in households | MEC Interview & Examination | 5,600 | 1 | 2.5 |
| Individuals in households | Day 1 and Day 2 Telephone Dietary Recall & Dietary Supplements. | 5,600 | 1 | 1.3 |
| Individuals in households | Flexible Consumer Behavior Survey Phone Follow-Up. | 5,600 | 1 | 20/60 |
| Individuals in households | Developmental Projects & Special Studies | 3,500 | 1 | 3 |
| *Individuals in households* | *24-hour wearable device projects* | *1,000* | *1* | *25* |

**Jeffrey M. Zirger,**

*Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.*

[FR Doc. 2021–00691 Filed 1–13–21; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Disease Control and Prevention

## Healthcare Infection Control Practices Advisory Committee (HICPAC)

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Healthcare Infection Control Practices Advisory Committee (HICPAC). This meeting is open to the public, limited only by audio phone lines available. The public is also welcome to listen to the meeting by dialing 1–877–924–1748, passcode: 3380216. A total of 200 lines will be available. Registration is required. To register for this call, please go to *www.cdc.gov/hicpac.*

**DATES:** The meeting will be held on March 4, 2021, from 9 a.m. to 3 p.m., EST.

**ADDRESSES:** The teleconference access is 1–877–924–1748, and the passcode is 3380216.

**FOR FURTHER INFORMATION CONTACT:** Koo-Whang Chung, M.P.H., HICPAC, Division of Healthcare Quality Promotion, NCEZID, CDC, 1600 Clifton Road NE, Mailstop H16–3, Atlanta, Georgia 30329–4027, Telephone (404) 498–0730; Email: *HICPAC@cdc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose:* The Committee is charged with providing advice and guidance to the Director, Division of Healthcare Quality Promotion (DHQP), the Director, National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), the Director, CDC, the Secretary, Health and Human Services regarding (1) the practice of healthcare infection prevention and control; (2) strategies for surveillance, prevention, and control of infections, antimicrobial resistance, and related events in settings where healthcare is provided; and (3) periodic updating of CDC guidelines and other policy statements regarding prevention of healthcare-associated infections and healthcare-related conditions.

*Matters to be Considered:* The agenda will include the following updates: The Healthcare Personnel Guideline Workgroup; the Long-term Care/Post-acute Care Workgroup; the Neonatal Intensive Care Unit Workgroup; and updates from DHQP including DHQP's engagement on Coronavirus disease response. Agenda items are subject to change as priorities dictate.

*Procedures for Public Comment:* Time will be available for public comment. Members of the public who wish to provide public comments should plan to attend the public comment session at the start time listed. Please note that the public comment period may end before the time indicated, following the last call for comments.

*Procedures for Written Comment:* The public may submit written comments in advance of the meeting. Comments should be submitted in writing by email to the contact person listed above. The deadline for receipt of written public comment is February 25, 2021. All requests must contain the name, address, and organizational affiliation of the speaker, as well as the topic being addressed. Written comments should not exceed one single-spaced typed page in length. Written comments received in advance of the meeting will be included in the official record of the meeting.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Kalwant Smagh,**

*Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2021–00603 Filed 1–13–21; 8:45 am]

**BILLING CODE 4163–18–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–21–1278]**

### Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled *Online Training for Law Enforcement to Reduce Risks Associated with Shift Work and Long Work Hours* to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on October 1, 2020 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

**Proposed Project**

Online training for law enforcement to reduce risks associated with shift work and long work hours—Reinstatement without Change—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Police often work during the evening, at night, and sometimes irregular and long hours. Shift work and long work hours are linked to many health and safety risks due to disturbances to sleep and circadian rhythms. These work schedules also lead to difficulties with personal relationships due to having less time with family and friends, poor mood from sleep deprivation, and problems balancing work and personal responsibilities. These work schedules and inadequate sleep likely contribute to health problems seen in police: Shorter life spans, high occupational injury rates, and burden of chronic illnesses. One strategy to reduce these risks is training programs to inform employers and law enforcement officers about the risks and strategies to reduce their risks.

An Reinstatement is being requested due to delays recruiting participants and initiating data. The delays resulted from the COVID–19 pandemic and the civil unrest after George Floyd's death on May 25 2020. Law enforcement leaders requested that the data collection be delayed until the end of June 2020. As a result, NIOSH is requesting a one-year extension of the data collection end date to May 31, 2021. This pilot study is part of a project awarded National Occupational Research Agenda (NORA) funding. The National Institute for Occupational Safety and Health is authorized to carry out this data collection through Occupational Safety and Health Act of 1970.

The purpose of this project is to develop a training program to relay the risks linked to shift work and long work hours and give workplace strategies for employers and personal strategies for the officers to reduce the risks. Once finalized, the training will be available on the NIOSH website. The training will be pilot tested with 30 recent graduates of a police academy and 30 experienced officers. The study will recruit 60 law enforcement officers during a 30-minute phone call. All respondents will work full-time on fixed night shifts. The pilot test will use a pre-test–post-test design to examine sleep (both duration and quality), worktime sleepiness, and knowledge retained. Pre-test measures will be collected two weeks before the training. Post-test measures will be collected the week of the training (week three of the study), one week after the training (week four) and at eight and nine weeks after the training (weeks 11 and 12 of the study). Additional post-test measures will include feedback about the training and if specific behaviors changed.

Before starting the pretest, the respondent will sign an informed consent form. The pilot pre-test will start with the respondent filling out a 10 minute online survey that includes four short surveys: (1) Demographic information and work experience; (2) the Epworth Sleepiness Scale; (3) the Pittsburgh Sleep Quality Index; and (4) a knowledge test. The respondent will be fitted with a wrist actigraph, which will record activity and estimate the times of sleep. The respondents will keep an online sleep activity diary and wear the actigraph continuously during weeks one to four of the study. The online sleep activity diary takes approximately two minutes a day to complete. The sleep diary and actigraph are being used together to obtain a more accurate timing of respondent's sleep and activity.

During the third week of the study, the respondent will take the 2.5 hour online training program. Immediately after completing the training, the respondent will take the post-test knowledge test and will provide feedback about the training including barriers to using the training information and what influential people in their life would want them to do with the training information. At the end of week four, the respondent will return the actigraph. No data collection will occur during weeks five to 10 of the study.

The second post-test period will be weeks 11 and 12 of the study to gather longer-term outcomes. At the beginning of week 11, the respondents will be fitted with an actigraph. The respondent will wear the actigraph and complete the sleep activity diary for the next 14 days. At the end of week 12 of the study, the respondent will complete the Epworth Sleepiness Scale, Pittsburgh Sleep Quality Index, and Changes in Behaviors After Training. The combined response time is five minutes.

The burden table lists three 10-minute meetings during the post-test period when they will return the actigraph at the end of week four, be fitted with an actigraph at the beginning of week 11 and return it at the end of week 12. The respondents will complete the sleep activity diary for 42 days total (two minutes each day). The total burden hours for the diary is 84.

Study staff will use the findings from the pilot test to make improvements to the training program. The research team will reinforce or expand training content that showed less than desired results on the pilot test. Potential impacts of this project include improvements in management practices such as the design of work schedules and improvements in officers' personal behaviors for coping with the demands of shift work and long work hours. The total estimated annualized burden hours is 334. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|---|
| Law enforcement officers | phone call for recruitment & informed consent. | 60 | 1 | 30/60 |
| Law enforcement officers | Initial meeting | 60 | 1 | 15/60 |
| Law enforcement officers | Knowledge survey | 60 | 2 | 5/60 |
| Law enforcement officers | Epworth Sleepiness Scale | 60 | 2 | 1/60 |
| Law enforcement officers | Pittsburgh Sleep Quality Index | 60 | 2 | 2/60 |
| Law enforcement officers | Demographics and work experience | 60 | 1 | 2/60 |
| Law enforcement officers | Sleep diary | 60 | 42 | 2/60 |
| Law enforcement officers | Online training | 60 | 1 | 150/60 |
| Law enforcement officers | Feedback about Training, Barriers, and Influential People. | 60 | 1 | 5/60 |
| Law enforcement officers | Changes in Behaviors after Training | 60 | 1 | 2/60 |
| Law enforcement officers | Actigraph fitting and return | 60 | 3 | 10/60 |

**Jeffrey M. Zirger,**

*Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.*

[FR Doc. 2021–00690 Filed 1–13–21; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### 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, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)*—Notice of Funding Opportunity (NOFO) DP21–003, Reducing Inequities in Cancer Outcomes through Community-Based Interventions on Social Determinants of Health.

*Date:* April 6, 2021–April 8, 2021.

*Time:* 10:00 a.m.–6:00 p.m., EDT.

*Place:* Teleconference.

*Agenda:* To review and evaluate grant applications.

**FOR FURTHER INFORMATION CONTACT:** Jaya Raman Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway, Mailstop F80, Atlanta, Georgia 30341, Telephone: (770) 488–6511, *JRaman@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Kalwant Smagh,**

*Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2021–00572 Filed 1–13–21; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–43 and CMS–381]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments on the collection(s) of information must be received by the OMB desk officer by *February 16, 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.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html*.
2. Call the Reports Clearance Office at (410) 786–1326.

**FOR FURTHER INFORMATION CONTACT:** William Parham at (410) 786–4669.

**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. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Application for Health Insurance Benefits Under Medicare for Individual with Chronic Renal Disease and Supporting Regulations in 42 CFR; *Use:* Individuals with End-Stage Renal Disease (ESRD) have the opportunity to apply for Medicare benefits and obtain premium-free Part A if they meet certain criteria outlined in statute. Sections 226A of the Act authorizes entitlement for Medicare Hospital Insurance (Part A) if the individual with ESRD files an application for benefits and meets the requisite contributions through one's own employment or the employment of a related individual to meet the statutory definition of a ''currently insured'' individual outlined in section 214 of the Act. Further, for individuals who meet the requirements for premium-free Part A entitlement, Medicare coverage starts based on the dates in which the individual started dialysis treatment or had a kidney transplant. These statutory provisions are codified at 42 CFR 406.7(c)(3) and 407.13.

The CMS–43 form is used (in conjunction with the CMS–2728, OMB control number 0938–0046) to establish entitlement to Medicare Part A and enrollment in Medicare Part B for individuals with ESRD. Form CMS–43 is only used for initial applications for Medicare by individuals diagnosed with ESRD. Form CMS–2728 provides the medical documentation that the individual has ESRD, and it accompanies Form CMS–43.

Form CMS–43 is completed by the person applying for Medicare or by an SSA representative using information provided by the Medicare enrollee during an in-person interview. The majority of the forms are completed by an SSA representative on behalf of the individual applying for Medicare benefits. *Form Number:* CMS–43 (OMB control number: 0938–0080); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 20,382; *Total Annual Responses:* 20,382; *Total Annual Hours:* 8,560. (For policy questions regarding this collection contact Carla Patterson at 410–786–1000.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Identification of Extension Units of Medicare Approved Outpatient Physical Therapy/Outpatient Speech Pathology (OPT/OSP) Providers and Supporting Regulations; *Use:* Form CMS–381 was developed to ensure that each OPT/OSP extension location at which OPT/OSP providers furnish services, must be reported by the providers to the State Survey Agencies (SAs). Form CMS–381 is completed when: (1) New OPT/OSP providers enter the Medicare program; (2) when existing OPT/OPS providers delete or add a service, or close or add an extension location; or, (3) when existing OPT/OSP providers are recertified by the State Survey Agency every 6 years. *Form Number:* CMS–381 (OMB control number: 0938–0273); *Frequency:* Occasionally; *Affected Public:* Private Sector; Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 2,083; *Total Annual*

*Responses:* 443; *Total Annual Hours:* 111. (For policy questions regarding this collection contact Caroline Gallaher at 410–786–8705.)

Dated: January 11, 2021.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff,Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2021–00762 Filed 1–13–21; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifiers CMS–10147]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments must be received by March 15, 2021.

**ADDRESSES:** When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26, –05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Call the Reports Clearance Office at (410) 786–1326.

**FOR FURTHER INFORMATION CONTACT:** William N. Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:**

### Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10147—Medicare Prescription Drug Coverage and Your Rights

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

### Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicare Prescription Drug Coverage and Your Rights; *Use:* Section 423.562(a)(3) and an associated regulatory provision at § 423.128(b)(7)(iii) require that Part D plan sponsors' network pharmacies provide Part D enrollees with a printed copy of our standardized pharmacy notice ''Medicare Prescription Drug Coverage and Your Rights'' (hereafter, ''notice'') if an enrollee's prescription cannot be filled.

The purpose of this notice is to provide enrollees with information about how to contact their Part D plans to request a coverage determination, including a request for an exception to the Part D plan's formulary. The notice reminds enrollees about certain rights and protections related to their Medicare prescription drug benefits, including the right to receive a written explanation from the drug plan about why a prescription drug is not covered. Through delivery of this standardized notice, a Part D plan sponsor's network pharmacies are in the best position to inform enrollees at point of sale about how to contact their Part D plan if the prescription cannot be filled. *Form Number:* CMS–10147, OMB 0938–0975; *Frequency:* Annually; *Affected Public:* Private Sector, Business or other for-profits; *Number of Respondents:* 70,000; *Number of Responses:* 49,681,292; *Total Annual Hours:* 827,690. (For questions regarding this collection, contact Trevor Rose at (410) 786 7768.)

Dated: January 8, 2021.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2021–00587 Filed 1–13–21; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Meeting of the Advisory Committee on Minority Health

**AGENCY:** Office of Minority Health, Office of the Secretary, Department of Health and Human Services.

**ACTION:** Notice of meeting.

**SUMMARY:** As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services (HHS or Department) is hereby giving notice that the Advisory Committee on Minority Health (ACMH) will hold a meeting. This meeting will be open to the public. Preregistration is required for the public to attend the meeting, provide comments, and/or distribute printed material(s) to ACMH members. Information about the meeting will be posted on the HHS Office of Minority Health (OMH) website:

*www.minorityhealth.hhs.gov.* Information about ACMH activities can be found on the OMH website under the heading *About OMH, Committees and Workgroups.*

**DATES:** The ACMH meeting will be held on Friday, January 29, 2021, from 1:30 p.m. to 2:00 p.m. ET. If the Committee completes its work before 2:00 p.m., the meeting will end early.

**ADDRESSES:** The meeting will be held virtually and will be accessible by webcast.

**FOR FURTHER INFORMATION CONTACT:** Samuel Wu, Designated Federal Officer, Advisory Committee on Minority Health, Office of Minority Health, Department of Health and Human Services, Tower Building, 1101 Wootton Parkway, Suite 100, Rockville, Maryland 20852. Phone: 240–453–6173; email: *OMH-ACMH@hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with Public Law 105–392, the ACMH was established to provide advice to the Deputy Assistant Secretary for Minority Health on improving the health of each racial and ethnic minority group and on the development of goals and specific program activities of the OMH.

The purpose of the January 2021 ACMH meeting is to finalize recommendations for improving access to and utilization of clinical preventive services among racial and ethnic minority populations. The recommendations will be given to the Deputy Assistant Secretary for Minority Health to inform efforts for removing barriers to achieving health equity.

The meeting is open to the public. Any individual who wishes to attend the meeting must register by sending an email to *OMH-ACMH@hhs.gov* by 5:00 p.m. ET on January 28, 2021. Each registrant should provide name, affiliation, phone number, and email address. Registrants will receive webcast access information via email. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact *OMH-ACMH@hhs.gov* and reference this meeting. Requests for special accommodations should be made at least ten (10) business days prior to the meeting.

Members of the public will have an opportunity to provide comments at the meeting. Public comments will be limited to two minutes per speaker during the time allotted. Individuals who would like to submit written statements should email *OMH-ACMH@hhs.gov* at least five (5) business days prior to the meeting.

Any members of the public who wish to distribute electronic or printed material(s) related to this meeting's topic to ACMH members should email the Designated Federal Officer at *OMH-ACMH@hhs.gov.* The material should be received by the Designated Federal Officer at least five (5) business days prior to the meeting.

Dated: January 11, 2021.

**Samuel Wu,**

*Designated Federal Officer, Advisory Committee on Minority Health.*

[FR Doc. 2021–00660 Filed 1–13–21; 8:45 am]

BILLING CODE 4150–29–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Interventions to Prevent Electronic Nicotine Delivery Systems (ENDS) Use Among Adolescents (R01—Clinical Trial Optional).

*Date:* March 10, 2021.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Yvonne Owens Ferguson, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 402–7371, *yvonne.ferguson@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00576 Filed 1–13–21; 8:45 am]

BILLING CODE 4140–01–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Proposed Collection; 60-Day Comment Request Data and Specimen Hub (DASH) (Eunice Kennedy Shriver National Institute of Child Health and Human Development)

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Notice.

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**SUMMARY:** In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD), the National Institutes of Health will publish periodic summaries of propose projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

**DATES:** Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

**FOR FURTHER INFORMATION CONTACT:** To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Regina Bures, Ph.D., Eunice Kennedy Shriver National Institute of Child Health and Human Development (NICHD), National Institutes of Health, 6710B Rockledge Drive, Room 2160, Bethesda, MD 20817, or call non-toll-free number (301) 496–9485 or Email your request, including your address to: *NICHD.DASH@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

**SUPPLEMENTARY INFORMATION:** Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*Proposed Collection Title:* Data and Specimen Hub (DASH)-0925–0744 expiration date 01/31/2022, REVISION, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD), National Institutes of Health (NIH).

*Need and Use of Information Collection:* This is a request to revise the previously approved submission (OMB number: 0925–0744) to add the collection of additional information from Users who will submit information to NICHD Data and Specimen Hub (DASH) about studies, and data collections stored in publicly accessible external archives—a process hereinafter referred to as 'cataloging' in DASH.

DASH has been established by NICHD as a data sharing mechanism for biomedical research investigators. It serves as a centralized resource for investigators to share and access de-identified study data from studies funded by NICHD. DASH also serves as a portal for requesting biospecimens from selected DASH studies.

NICHD also supports other public archives, data collections, and resources, such as Data Sharing for Demographic Research (DSDR), NICHD/DIPHR Biospecimen Repository Access and Data Sharing (BRADS), the Down Syndrome Registry (DS-Connect), Zebrafish Information Network (ZFIN), etc. In addition to these NICHD-funded public archives, many collaborative studies funded through NICHD are dispersed across other National Institutes of Health (NIH) designated archives, including the National Heart, Lung, and Blood Institute (NHLBI) Biologic Specimen and Data Repository Information Coordinating Center (BioLINCC), and other NIH-wide repositories, such as the Database of Genotypes and Phenotypes (dbGaP).

In an effort to link these data resources and increase the visibility of NICHD-funded studies and data collections, DASH will enable Users to catalog studies and data collections stored in other external archives to facilitate their discovery through DASH. Users submitting studies or data collections for cataloging in DASH will provide descriptive information about the study required to populate the Study Overview Page in DASH. This cataloging process closely mirrors the existing study data submission process in DASH; however, no study documentation or data will be uploaded to DASH. Requesters will be directed to the external archive via a URL link to obtain access to the data stored in the external archives and resources.

The potential for public benefit to be achieved through sharing study data and/or biospecimen inventories through DASH for secondary analysis is significant. Additionally, the ability to centralize information regarding where to find, and how to access, studies, and data collections funded by NICHD stored across various public archives (*i.e.,* cataloged studies and data collections) further helps to promote information discovery and reuse of data. NICHD DASH supports NICHD's mission to ensure that every person is born healthy and wanted; that women suffer no harmful effects from reproductive processes; that all children have the chance to achieve their full potential for healthy and productive lives, free from disease or disability; and to ensure the health, productivity, independence, and well-being of all people through optimal rehabilitation. Study data and biospecimen sharing and reuse will promote testing of new hypotheses from data and biospecimens already collected, facilitate trans-disciplinary collaboration, accelerate scientific findings and enable NICHD to maximize the return on its investments in research.

Anyone can access NICHD DASH to browse and view descriptive information about the studies and data collections without creating an account. Users who wish to submit studies or request data stored in DASH, and/or request biospecimens (stored in NICHD contracted Biorepository) must register for an account; Users who wish to submit a study catalog and/or data collection catalog must also register for an account.

Information will be collected from those wishing to create an account, sufficient to identify them as unique Users. Those submitting or requesting data and/or biospecimens will be required to provide additional supporting information to ensure proper use and security of NICHD DASH study data and biospecimens. The information collected is limited to the essential data required to ensure the management of Users in NICHD DASH is efficient and the sharing of data and biospecimens among investigators is effective. The primary uses of the information collected from Uses by NICHD will be to:

- Communicate with the Users regarding data submission, study catalog submission, data collection catalog submission, data requests and biospecimen requests;
- Monitor data submissions, study catalog submission, data collection catalog submission, data requests and biospecimen requests;
- Notify interested Users of updates to data and biospecimen inventories stored in NICHD DASH; and
- Help NICHD understand the use of NICHD DASH study data and biospecimen inventories by the research community.

All the data collected from use of NICHD DASH except for information provided in the annual progress reports are for the purposes of internal administrative management of NICHD DASH. Information gathered through the annual progress reports may be used in publications describing performance of the DASH system.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 211.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of form | Number of respondents | Frequency of response per respondent | Average time per response (in hours) | Total annual burden hour |
|---|---|---|---|---|
| User Registration | 200 | 1 | 5/60 | 17 |
| Data and Biospecimen Inventory Submissions | 36 | 1 | 2 | 72 |
| Study Catalog Submission | 10 | 1 | 30/60 | 5 |
| Data Collection Catalog Submission | 6 | 1 | 15/60 | 2 |
| Data Request | 60 | 1 | 1 | 60 |

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

| Type of form | Number of respondents | Frequency of response per respondent | Average time per response (in hours) | Total annual burden hour |
|---|---|---|---|---|
| Biospecimen Request | 36 | 1 | 1 | 36 |
| Data Use Annual Progress Report | 60 | 1 | 10/60 | 10 |
| Biospecimen Use Annual Progress Report | 36 | 1 | 10/60 | 6 |
| Institutional Certification Template | 36 | 1 | 5/60 | 3 |
| Total | 200 | 200 | ........................ | 211 |

Dated: January 5, 2021.

**Jennifer M. Guimond,**

*Project Clearance Liaison, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health.*

[FR Doc. 2021–00636 Filed 1–13–21; 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 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 100.

*Date:* February 2, 2021.

*Time:* 11:00 a.m. to 4:00 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 3G62A, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* Lynn Rust, 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 3G62A, Rockville, MD 20852, (240) 669–5069, *lrust@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: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00577 Filed 1–13–21; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Exploring Epigenomic or Non-Coding RNA Regulation in the Development, Maintenance, or Treatment of Chronic Pain (R61/R33 Clinical Trial Optional).

*Date:* February 22, 2021.

*Time:* 2:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health National Institute on Drug Abuse 301 North Stonestreet Avenue Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Soyoun Cho, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 594–9460, *Soyoun.cho@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00575 Filed 1–13–21; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Nursing Research; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Nursing Research Special Emphasis Panel; Modular Budget Research Project Grant for NIH Nurse Scientist Scholars.

*Date:* February 5, 2021.

*Time:* 10:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ming Yan, MD, Ph.D., Scientific Review Officer, Immunology (IMM), DPPS, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 4205, Bethesda, MD 20892, (301) 594–0343, *yanming@mail.nih.gov.*

*Name of Committee:* National Institute of Nursing Research Special Emphasis Panel; Fellowship and Career Development.

*Date:* February 19, 2021.

*Time:* 10:00 a.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ming Yan, MD, Ph.D., Scientific Review Officer, Immunology (IMM), DPPS, Center for Scientific Review, National Institute of Nursing Research, National Institutes of Health, 6701 Rockledge Drive, RM 4205 Bethesda, MD 20892, (301) 594–0343, *yanming@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: January 8, 2021.

**Tyeshia Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00651 Filed 1–13–21; 8:45 am]

BILLING CODE 4140–01–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

*Date:* April 11–13, 2021.

*Time:* 3:00 p.m. to 12:00 p.m.

*Agenda:* To review and evaluate personnel qualifications and performance, and competence of individual investigators.

*Place:* Porter Neuroscience Research Center, Building 35A, 35 Convent Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Lorna W. Role, Ph.D., Scientific Director, Division of Intramural Research, National Institute of Neurological Disorders and Stroke, 35A Convent Drive, MSC 3716, Bethesda, MD 20892, *lorna.role@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00653 Filed 1–13–21; 8:45 am]

BILLING CODE 4140–01–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Prospective Grant of an Exclusive Patent License: Development and Commercialization of CD33-Specific Chimeric Antigen Receptor (CAR) Therapies for CD33-Expressing Malignancies Using Natural Killer Cells (NK Cells) Transduced With Retroviral or Lentiviral Vectors

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Notice.

**SUMMARY:** The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this Notice to Senti Bio (''Senti''), located in South San Francisco, CA.

**DATES:** Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before January 29, 2021 will be considered.

**ADDRESSES:** Requests for copies of the patent applications, inquiries, and comments relating to the contemplated Exclusive Patent License should be directed to: Jim Knabb, Senior Technology Transfer Manager, NCI Technology Transfer Center at Email: *jim.knabb@nih.gov.*

**SUPPLEMENTARY INFORMATION:**

**Intellectual Property**

*E–097–2018–0: Anti-CD33 Chimeric Antigen Receptors for Treatment of Human Acute Myeloid Leukemia*

1. US Provisional Patent Application 62/643,015, filed March 14, 2018 (E–097–2018–0–US–01);
2. International Patent Application PCT/US2019/022,309, filed March 14, 2019 (E–097–2018–0–PCT–02)
3. United Arab Emirates Application No: P6001291/2020, filed September 13, 2020 (E–097–2018–0–AE–03)
4. Australia Application No: 2019235926, filed September 2, 2020 (E–097–2018–0–AU–04)
5. Canada Application No: 3,093,567, filed September 9, 2020 (E–097–2018–0–CA–05)
6. China Application No: 201980018105.0, filed September 9, 2020 (E–097–2018–0–CN–06)
7. Eurasia Application No: 202092044, filed September 25, 2020 (E–097–2018–0–EA–07)
8. European Patent Application No: 19714007.2, filed October 14, 2020 (E–097–2018–0–EP–08)
9. Israel Application No: 277078, filed September 1, 2020 (E–097–2018–0–IL–09)
10. India Application No: 202047039152, filed September 10, 2020 (E–097–2018–0–IN–10)
11. South Korea Application No: 2020–7029302, filed October 13, 2020 (E–097–2018–0–KR–11)
12. Mexico Application No: MX/a/2020/009472, filed September 10, 2020 (E–097–2018–0–MX–12)
13. New Zealand Application No: 767782, filed September 13, 2020 (E–097–2018–0–NZ–13)
14. Saudi Arabia Application No: 520420134, filed September 13, 2020 (E–097–2018–0–SA–14)
15. Singapore Application No: 11202008796V, filed September 9, 2020, (E–097–2018–0–SG–15)
16. United States of America Application No: 16/980,205, filed September 11, 2020 (E–097–2018–0–US–16)
17. South Africa Application No: 2020/05571, filed September 8, 2020 (E–097–2018–0–ZA–17)

The patent rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide, and the fields of use may be limited to the following:

An exclusive license to:

1. The development of a CD33-specific logic-gated CAR-based

immunotherapy using autologous human T cells transduced with lentiviral vectors, wherein the viral transduction leads to the expression of a CAR that targets CD33 (comprised of the CD33-binding domain referenced as Hu195 or hP67.6 in the invention as well as an intracellular signaling domain), for the prophylaxis or treatment of CD33-expressing cancers. For clarity, ''CD33-specific logic-gated CAR-based immunotherapy'' means therapies where the CAR-expressing T cells recognize CD33 and are engineered to respond to one or more additional antigens (but not necessarily all of the antigens).

2. The development of a CD33-specific logic-gated CAR-based immunotherapy using allogeneic human NK cells transduced with retroviral vectors, including but not limited to lentiviral vectors, wherein the viral transduction leads to the expression of a CAR that targets CD33 (comprised of the CD33-binding domain referenced as Hu195 or hP67.6 in the invention as well as an intracellular signaling domain), for the prophylaxis or treatment of CD33-expressing cancers. For clarity, ''CD33-specific logic-gated CAR-based immunotherapy'' means therapies where the CAR-expressing NK cells recognize CD33 and are engineered to respond to one or more additional antigens (but not necessarily all of the antigens).

These technologies disclose therapies to treat AML by utilizing CARs that recognize AML cells through a binder for CD33. The CD33 binders are known as Hu195 or hP67.6. CD33 is a well validated immunotherapeutic target that is expressed on the surface of malignant cells, most notably on the surface of acute myelogenous leukemia (AML) blasts.

This Notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published Notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information from these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: January 7, 2021.

**Richard U. Rodriguez,**

*Associate Director, Technology Transfer Center, National Cancer Institute.*

[FR Doc. 2021–00637 Filed 1–13–21; 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; HHS–NIH–CDC–SBIR PHS 2021–1 Phase I: Production of Adjuvants Mimics (Topic 093) (For SBIRs Phase I)

*Date:* February 1, 2021.

*Time:* 11:00 a.m. to 1:30 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 3F52, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* Maggie A. Morris Fears, 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 3F52, Rockville, MD 20852, 301–761–5444, *maggie.morrisfears@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS–NIH–CDC–SBIR PHS 2021–1 Phase I: Adjuvant Discovery for Vaccines and for Autoimmune and Allergic Disease (Topic 092) (For SBIRs Phase I).

*Date:* February 1, 2021.

*Time:* 1:30 p.m. to 2:30 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 3F52, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* Maggie A. Morris Fears, 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 3F52, Rockville, MD 20852, 301–761–5444, *maggie.morrisfears@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS–NIH–CDC–SBIR PHS 2021–1 Phase II: Adjuvant Discovery for Vaccines and for Autoimmune and Allergic Disease (Topic 092) (For SBIRs Phase II).

*Date:* February 1, 2021.

*Time:* 2:30 p.m. to 4:00 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 3F52, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* Maggie A. Morris Fears, 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 3F52, Rockville, MD 20852, 301–761–5444, *maggie.morrisfears@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00573 Filed 1–13–21; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Neurological Disorders and Stroke Special Emphasis Panel; BRAIN Review (U01 and R01).

*Date:* February 12, 2021.

*Time:* 8:00 a.m. to 7:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Mir Ahamed Hossain, Ph.D., Scientific Review Officer, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Rockville, MD 20852, (301) 496–9223, *mirahamed.hossain@nih.gov.*

*Name of Committee:* Neurological Sciences Training Initial Review Group; NST–2 Subcommittee NINDS Post-Doc Fellowship Review.

*Date:* February 17–19, 2021.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Deanna Lynn Adkins, Ph.D., Scientific Review Officer, Scientific Review Branch, Neuroscience Center, Rockville, MD 20852, 301–496–9223, *deanna.adkins@nih.gov.*

*Name of Committee:* National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders B.

*Date:* February 25, 2021.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Joel A. Saydoff, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH NSC, 6001 Executive Blvd., Room 3205, MSC 9529, Rockville, MD 20852, (301) 496–9223, *joel.saydoff@nih.gov.*

*Name of Committee:* National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Exploratory Udall Centers P20 Review.

*Date:* February 25, 2021.

*Time:* 10:00 a.m. to 6:30 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Marilyn Moore-Hoon, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, National Institute of Neurological Disorders and Stroke, Rockville, MD 20852, 301 827–9087, *mooremar@mail.nih.gov.*

*Name of Committee:* National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Advancing Careers of Diverse Research.

*Date:* February 25–26, 2021.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Deanna Lynn Adkins, Ph.D., Scientific Review Officer, Scientific Review Branch, Neuroscience Center, Rockville, MD 20852, 301–496–9223, *deanna.adkins@nih.gov.*

*Name of Committee:* National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Udall Centers P50 Review.

*Date:* March 1–2, 2021.

*Time:* 10:00 a.m. to 6:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Marilyn Moore-Hoon, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, National Institute of Neurological Disorders and Stroke, Rockville, MD 20852, 301 827–9087, *mooremar@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00650 Filed 1–13–21; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Nonhuman Primate Reagent Resource (U24 Clinical Trial Not Allowed).

*Date:* February 8, 2021.

*Time:* 2:30 p.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* Tara Capece, 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 3G41, Rockville, MD 20852, 240–191–4281, *capecet2@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: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00649 Filed 1–13–21; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; PrEP for HIV Prevention among Substance Using Populations (R01—Clinical Trial Optional).

*Date:* February 11, 2021.

*Time:* 12:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Trinh T. Tran, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–5843, *trinh.tran@nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; BRAIN Initiative: Tools for Germline Gene Editing in Marmosets (U01—Clinical Trial Not Allowed).

*Date:* February 17, 2021.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–5819, *gm145a@nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Exploiting Genome or Epigenome Editing to Functionally Validate Genes or Variants Involved in Substance Use Disorders (R21/R33 Clinical Trial Not Allowed).

*Date:* February 18, 2021.

*Time:* 12:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ipolia R. Ramadan, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–4471, *ramadanir@mail.nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; NIDA Centers Review.

*Date:* February 26—March 1, 2021.

*Time:* 10:00 a.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ipolia R Ramadan, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC, 6021 Bethesda, MD 20892, (301) 827–4471, *ramadanir@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: January 8, 2021.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00574 Filed 1–13–21; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[OMB Control Number 1615–0124]**

### Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Consideration of Deferred Action for Childhood Arrivals

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting 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. The purpose of this notice is to allow an additional 30 days for public comments.

**DATES:** Comments are encouraged and will be accepted until February 16, 2021.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2012–0012. All submissions received must include the OMB Control Number 1615–0124 in the body of the letter, the agency name and Docket ID USCIS–2012–0012.

**FOR FURTHER INFORMATION CONTACT:** USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

**SUPPLEMENTARY INFORMATION:**

### Comments

The original information collection notice for an extension without change was previously published in the **Federal Register** on July 20, 2020, at 85 FR 43866, allowing for a 60-day public comment period. USCIS did receive 26 comments in connection with the 60-day notice. USCIS subsequently published a second notice in the **Federal Register** on November 13, 2020 at 85 FR 72682 for a revision to the collection of information. USCIS published a notice of withdrawal in the **Federal Register** for the revision action on December 31, 2020 at 85 FR 86946, which incorrectly listed the original notice publication as 85 FR 46882.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2012–0012 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 submission of responses.

**Overview of This Information Collection**

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Consideration of Deferred Action for Childhood Arrivals.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–821D; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households.* The information collected on this form is used by USCIS to determine eligibility of certain individuals who were brought to the United States as children and meet the following guidelines to be considered for deferred action for childhood arrivals.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–821D Initial Requests is 40,819 and the estimated hour burden per response is 3 hours; and the estimated total number of respondents for the information collection I–821D Renewal Requests is 418,775 and the estimated hour burden per response is 3 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,378,782 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $50,553,340.

Dated: January 8, 2020.

**Samantha L Deshommes,**

*Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2021–00641 Filed 1–13–21; 8:45 am]

BILLING CODE 9111–97–P

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## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[OMB Control Number 1615–0051]**

### Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Monthly Report on Naturalization Papers

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

**DATES:** Comments are encouraged and will be accepted for 60 days until March 15, 2021.

**ADDRESSES:** All submissions received must include the OMB Control Number 1615–0051 in the body of the letter, the agency name and Docket ID USCIS–2005–0032. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2005–0032. USCIS is limiting communications for this Notice as a result of USCIS' COVID–19 response actions.

**FOR FURTHER INFORMATION CONTACT:** USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

**SUPPLEMENTARY INFORMATION:**

**Comments**

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2005–0032 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 submission of responses.

**Overview of This Information Collection**

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Monthly Report on Naturalization Papers.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* N–4; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Federal Government; or State, local or Tribal Government. This form is used by the clerk of courts that administer the oath of allegiance for naturalization to notify the USCIS of all persons to whom the oath was administered. The information is used by the USCIS to update its alien files and records to indicate that the aliens are now citizens; develop an audit trail on the certificates of naturalization; and determine the payments to be made to the courts for reimbursement of their expenses in connection with the naturalization process.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–4 is 160 and the estimated hour burden per response is 0.5 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 960 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $7,200.

Dated: January 8, 2021.

**Samantha L Deshommes,**

*Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2021–00638 Filed 1–13–21; 8:45 am]

**BILLING CODE 9111–97–P**

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## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[OMB Control Number 1615–0144]**

### Agency Information Collection Activities; Revision of a Currently Approved Collection: H–1B Registration Tool

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting 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. The purpose of this notice is to allow an additional 30 days for public comments.

**DATES:** Comments are encouraged and will be accepted until February 16, 2021.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2008–0014. All submissions received must include the OMB Control Number 1615–0144 in the body of the letter, the agency name and Docket ID USCIS–2008–0014.

**FOR FURTHER INFORMATION CONTACT:** USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

**SUPPLEMENTARY INFORMATION:**

#### Comments

The information collection notice was previously published in the **Federal Register** on October 22, 2020, at 85 FR 67366, allowing for a 60-day public comment period. USCIS did receive two comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2008–0014 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 submission of responses.

#### Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* H–1B Registration Tool.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* OMB–64; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. USCIS uses the data collected through the H–1B Registration Tool to select a sufficient number of registrations projected to meet the applicable H–1B cap allocations and to notify registrants whether their registration was selected.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–1B Registration Tool is

275,000 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 137,500 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0. There are no costs for submitting this collection of information, it is online and only a registration.

Dated: January 8, 2021.

**Samantha L Deshommes,**

*Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2021–00646 Filed 1–13–21; 8:45 am]

BILLING CODE 9111–97–P

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[OMB Control Number 1615–0140]**

### Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Citizenship and Integration Direct Services Grant Program

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting 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. The purpose of this notice is to allow an additional 30 days for public comments.

**DATES:** Comments are encouraged and will be accepted until February 16, 2021.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2016–0002. All submissions received must include the OMB Control Number 1615–0140 in the body of the letter, the agency name and Docket ID USCIS–2016–0002.

**FOR FURTHER INFORMATION CONTACT:** USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

**SUPPLEMENTARY INFORMATION:**

### Comments

The information collection notice was previously published in the **Federal Register** on May 19, 2020, at 85 FR 29957, allowing for a 60-day public comment period. USCIS received one comment in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2016–0002 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Citizenship and Integration Direct Service Grant Program.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* G–1482; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Not-for-profit institutions. The USCIS Office of Citizenship (OoC) will use the information collected during the grant application period to determine the number of, and amounts for, approved grant applications. In recent years USCIS has been authorized to expend funds that are collected for adjudication and naturalization services and deposited into the Immigration Examination Fee Account for the Citizenship and Integration Grant Program (CIGP). The USCIS Office of Citizenship will use the data being collected from grant recipients after funding awards have been made to conduct an ongoing evaluation of citizenship education and naturalization outcomes for program participants.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection G–1482 is 300 who respond 1 time and the estimated hour burden per response is 40 hours. The estimated total number of respondents for the information collection Grant Post-Award Evaluation is 85 who respond 13 times a year and the estimated hour burden per response is 28 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual

hour burden associated with this collection is 42,940 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $15,000.

Dated: January 8, 2021.

**Samantha L Deshommes,**

*Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2021–00640 Filed 1–13–21; 8:45 am]

**BILLING CODE 9111–97–P**

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## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[OMB Control Number 1615–0003]**

## Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application to Extend/Change Nonimmigrant Status

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting 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. The purpose of this notice is to allow an additional 30 days for public comments.

**DATES:** Comments are encouraged and will be accepted until February 16, 2021.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2007–0038 All submissions received must include the OMB Control Number 1615–0003 in the body of the letter, the agency name and Docket ID USCIS–2007–0038.

**FOR FURTHER INFORMATION CONTACT:** USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

**SUPPLEMENTARY INFORMATION:**

### Comments

The information collection notice was originally published in the **Federal Register** as a revision on May 19, 2020, at 85 FR 29958, allowing for a 60-day public comment period. USCIS did receive one comment in connection with the 60-day notice. USCIS will be submitting the information collection as an extension, without change, of the currently approved collection and will not be making any changes at this time.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2007–0038 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection

(2) *Title of the Form/Collection:* Application to Extend/Change Nonimmigrant Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–539 and I–539A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. This form will be used for nonimmigrants to apply for an extension of stay, for a change to another nonimmigrant classification, or for obtaining V nonimmigrant classification.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–539 (paper) is 174,289 and the estimated hour burden per response is 2.38 hours, the estimated total number of respondents for the information collection I–539 (electronic) is 74,696 and the estimated hour burden per response is 1.083 hours; and the estimated total number of respondents for the information collection I–539A is 54,375 and the estimated hour burden per response is 0.5 hours; biometrics processing is 373,477 total respondents requiring an estimated 1.17 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 959,860 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $56,121,219.

Dated: January 8, 2021.

**Samantha L Deshommes,**

*Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2021–00643 Filed 1–13–21; 8:45 am]

**BILLING CODE 9111–97–P**

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## DEPARTMENT OF HOMELAND SECURITY

## U.S. Citizenship and Immigration Services

**[OMB Control Number 1615–0133]**

## Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Request for Reduced Fee

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting 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. The purpose of this notice is to allow an additional 30 days for public comments.

**DATES:** Comments are encouraged and will be accepted until February 16, 2021.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2018–0002. All submissions received must include the OMB Control Number 1615–0133 the body of the letter, the agency name and Docket ID USCIS–2018–0002.

**FOR FURTHER INFORMATION CONTACT:** USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

**SUPPLEMENTARY INFORMATION:**

### Background

On November 14, 2019, DHS published the proposed rule, ''U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,'' in the **Federal Register** proposing to adjust certain immigration and naturalization benefit request fees charged by U.S. Citizenship and Immigration Services (USCIS). *See* 84 FR 62280. That rule proposed to eliminate this information collection. On August 3, 2020, DHS published the final rule making the changes effective on October 2, 2020. 85 FR 46788 (Aug. 3, 2020) (final rule). Form I–942 was eliminated in the final rule.

On September 29, 2020, the United States District Court for the Northern District of California granted a motion for a preliminary injunction and a stay of the effective date of the final rule in its entirety. *Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). On October 8, 2020, the United States District Court for the District of Columbia also granted a motion for a preliminary injunction of the final rule. *See Northwest Immigrant Rights Project, et al.,* v. *United States Citizenship and Immigration Services, et al.* (No. 19–3283 (RDM) (D.D.C., Oct. 8, 2020). Therefore, DHS is enjoined from implementing or enforcing the final rule in its entirety pending final adjudication of the two cases.

USCIS is publishing this notice in accordance with the Paperwork Reduction Act as required to extend the approval to use Form I–942 while the final rule is enjoined.

### Comments

The information collection notice was previously published in the **Federal Register** on October 30, 2020, at 85 FR 68909, allowing for a 60-day public comment period. USCIS did receive two comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2018–0002 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Request for Reduced Fee.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–942; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the data collected on this form to verify that the applicant is eligible for a reduced fee for the immigration benefit being requested.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–942 is 4,491 and the estimated hour burden per response is 0.75 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 3,368 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $19,087.

Dated: January 8, 2021.

**Samantha L Deshommes,**

*Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2021–00644 Filed 1–13–21; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[OMB Control Number 1615–0104]**

### Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Petition for U Nonimmigrant Status

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting 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. The purpose of this notice is to allow an additional 30 days for public comments.

**DATES:** Comments are encouraged and will be accepted until February 16, 2021.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2010–0004. All submissions received must include the OMB Control Number 1615–0104 in the body of the letter, the agency name and Docket ID USCIS–2010–0004.

**FOR FURTHER INFORMATION CONTACT:** USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 271–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

**SUPPLEMENTARY INFORMATION:**

#### Comments

The information collection notice was previously published in the **Federal Register** on September 18, 2020, at 85 FR 58381, allowing for a 60-day public comment period. USCIS did receive one comment in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2010–0004 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 submission of responses.

#### Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for U Nonimmigrant Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–918; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; Federal Government; or State, local or Tribal Government. This petition permits victims of certain qualifying criminal activity and their immediate family members to apply for temporary nonimmigrant classification. This nonimmigrant classification provides temporary immigration benefits, potentially leading to permanent resident status, to certain victims of criminal activity who: suffered substantial mental or physical abuse as a result of having been a victim of criminal activity; have information regarding the criminal activity; and assist government officials in investigating and prosecuting such criminal activity.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–918 is 29,400 and the estimated hour burden per response is 5 hours. The estimated total number of respondents for the information collection I–918A is 17,900 and the estimated hour burden per response is 1.5 hour. The estimated total number of respondents for the information collection I–918B is 29,400 and the estimated hour burden per response is 1 hour. The estimated total number of respondents for the information collection of Biometrics is 47,300 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 258,591 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $201,025.

Dated: January 8, 2021.

**Samantha L Deshommes,**

*Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2021–00642 Filed 1–13–21; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–6238–D–02]**

## Order of Succession for Government National Mortgage Association (Ginnie Mae)

**AGENCY:** Office of the President of the Government National Mortgage Association, HUD.

**ACTION:** Notice of order of succession.

**SUMMARY:** In this Notice, the Secretary of Housing and Urban Development designates the Order of Succession for the Government National Mortgage Association (Ginnie Mae). This Order of Succession supersedes all prior Orders of Succession for Ginnie Mae, including the Order of Succession published in the **Federal Register** on January 18, 2018.

**DATES:** Applicability Date: January 11, 2021.

**FOR FURTHER INFORMATION CONTACT:** Senior Vice President and Chief Risk Officer, Office of Enterprise Risk, Government National Mortgage Association, Department of Housing and Urban Development, Capitol View, 425 3rd Street, SW, Washington, DC 20024; telephone number (202) 475–4918. (This is not a toll-free number). Persons with hearing- or speech-impairments may access this number though TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** The Secretary of Housing and Urban Development hereby issues this Order of Succession pursuant to the bylaws of Ginnie Mae which authorize the Secretary of Housing and Urban Development or the Ginnie Mae President to designate the sequence in which other officers of Ginnie Mae shall act. The officers designated below shall perform the duties and exercise the power and authority of the Ginnie Mae President, when the Ginnie Mae President is absent or unable to act, or when there is a vacancy in the Office of the President of Ginnie Mae. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d) and the bylaws of the Government National Mortgage Association, as published at *www.ginniemae.gov.* Accordingly, the Secretary of Housing and Urban Development designates the following Order of Succession:

### Section A. Order of Succession

Subject to the provisions of the Federal Vacancies Reform Act of 1998 and the bylaws of Ginnie Mae, during any period when, by reason of absence, disability, or vacancy in office, the Ginnie Mae President is not available to exercise the powers or perform the duties of the Ginnie Mae President, the following officials within Ginnie Mae are hereby designated to exercise the powers and perform the duties of the Office. No individual who is serving in an office listed below in an acting capacity shall act as the Ginnie Mae President pursuant to this Order of Succession.

(1) Principal Executive Vice President;
(2) Executive Vice President and Chief Operating Officer;
(3) Executive Vice President of Policy;
(4) Senior Vice President, Strategic Planning and Policy, Office of the President
(5) Senior Vice President and Chief Risk Officer, Office of Enterprise Risk;
(6) Senior Vice President, Office of Issuer and Portfolio Management;
(7) Senior Vice President, Office of Capital Markets;
(8) Senior Vice President, Office of Securities Operations;
(9) Senior Vice President and Chief Financial Officer, Office of Chief Financial Officer;
(10) Senior Vice President, Office of Enterprise Data and Technology Solutions;
(11) Senior Vice President, Office of Management Operations; and
(12) Director of Program Administration, Office of Securities Operations.

These officials shall perform the functions and duties of the Office in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede his/hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

### Section B. Authority Superseded

This Order of Succession supersedes the prior Orders of Succession for the Ginnie Mae President, including the Order of Succession published in the **Federal Register** on January 18, 2018 at 83 FR 2661.

**Authority:** Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)); Bylaws of the Government National Mortgage Association, posted at *www.ginniemae.gov.*

**Benjamin S. Carson, Sr.,**

*Secretary.*

[FR Doc. 2021–00693 Filed 1–13–21; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7042–N–01]**

## 60-Day Notice of Proposed Information Collection: Office of Lead Hazard Control and Healthy Homes Grant Programs Assessment of the HUD Grants To Promote Coordination between Grantees of HUD's Lead Hazard Control Program and DOE's Weatherization Assistance Program

**AGENCY:** Office of Lead Hazard Control and Healthy Homes, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

**DATES:** *Comments Due Date: March 15, 2021.*

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–5535 (this is not a toll-free number) or email at *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

**FOR FURTHER INFORMATION CONTACT:** Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410; email Anna P. Guido at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Guido.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

## A. Overview of Information Collection

*Title of Information Collection:* Assessment of the HUD Grants to Promote Coordination between Grantees of HUD's Lead Hazard Control Program and DOE's Weatherization Assistance Program.

*OMB Approval Number:* 2539-Pending.

*Type of Request:* New request.

*Form Number:* None.

*Description of the need for the information and proposed use:* Congress requested HUD to do the following: (1) Demonstrate whether the coordination of Healthy Homes remediation activities with weatherization activities achieves cost savings and better outcomes in improving the safety and quality of homes, and (2) collect information on the benefits of coordinating with DOE, evaluate if improved health outcomes are achieved, and provide information on the replicability and sustainability of these models. This information collection request is to collect information on the potential benefits of coordinated service delivery by HUD's Lead Hazard Control Program and DOE's Weatherization Assistance Program grantees and subgrantees.

*Respondents:* Lead Hazard Control (LHC) Grantees; Weatherization Assistance Program (WAP) Grantees; and residential property owners or residents (renters).

*Total Burden Estimate:* The table below reflects our estimate of the burden on the LHC and WAP grantees, and the residents that will be recruited.

| Information collection | Number of respondents | Frequency of response | Responses per annum | Burden hour per response | Annual Burden hours | Hourly cost per response | Annual cost |
|---|---|---|---|---|---|---|---|
| Grantees | 18 | 4 | 4 | 2 | 144 | $17.48 | $ 2,517 |
| Residents | 150 | 4 | 4 | 0.5 | 300 | $7.50 | $ 2,250 |
| Total | 168 | 4 | 4 | | | | $ 4,767 |

## B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses

HUD encourages interested parties to submit comments in response to these questions.

## C. Authority:

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

The Senior Advisor to the Director for the Office of Lead Hazard Control and Healthy Homes, Warren Friedman, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Nacheshia Foxx, who is the Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

**Nacheshia Foxx,**

*Federal Register Liaison for the Department of Housing and Urban Development.*

[FR Doc. 2021–00673 Filed 1–13–21; 8:45 am]

BILLING CODE 4210–67–P

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–6238–D–01]**

## Consolidated Delegation of Authority for the Government National Mortgage Association (Ginnie Mae)

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Notice of Delegation of Authority.

**SUMMARY:** This notice is issued to consolidate the authorities delegated from the Secretary to the President, Principal Executive Vice President, Executive Vice President and Chief Operating Officer, and Executive Vice President of Policy of the Government National Mortgage Association (Ginnie Mae).

**DATES:** Applicability Date: January 11, 2021.

**FOR FURTHER INFORMATION CONTACT:** Senior Vice President and Chief Risk Officer, Office of Enterprise Risk, Government National Mortgage Association, Department of Housing and Urban Development; Capitol View, 425 3rd Street, SW, 4th Floor; Washington, DC 20024; telephone number 202–475–4918 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the Federal Relay Service at 1–800–877–8339 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:** Ginnie Mae is a wholly owned U.S. Government corporation within the Department of Housing and Urban Development. Ginnie Mae's organic statute vests all the powers and duties of Ginnie Mae in the Secretary of HUD (12 U.S.C. 1723).

In Ginnie Mae's bylaws, the Secretary has delegated all the powers and duties of Ginnie Mae that were vested in the Secretary to Ginnie Mae. In previous **Federal Register** notices, the Secretary has delegated authority over Ginnie Mae to the Ginnie Mae President. Specifically, the Secretary has delegated: (1) All the Secretary's authority with respect to managing Ginnie Mae and Ginnie Mae's programs pursuant to title III of the National Housing Act (12 U.S.C. 1723 and 68 FR 41840); (2) Authority to waive regulations issued by the U.S. Department of Housing and Urban Development (73 FR 76674); (3) Authority to impose suspensions and debarments, with the concurrence of the General Counsel or his or her designee (54 FR 4913 and 63 FR 57133); and (4) The power to affix HUD's seal and authenticate documents (68 FR 41840).

This notice consolidates the functions that the Secretary has delegated to the

Ginnie Mae President, while also delegating certain concurrent authority to Ginnie Mae's Principal Executive Vice President, Executive Vice President and Chief Operating Officer, and Executive Vice President of Policy. While the Secretary has delegated authority to these individuals, the Secretary retains authority under 12 U.S.C. 1723.

**Section A. Consolidation of Authority Delegated**

The Secretary hereby concurrently delegates authority to the President, the Principal Executive Vice President, Executive Vice President and Chief Operating Officer, and Executive Vice President of Policy of Ginnie Mae the following:

1. All powers and duties of Ginnie Mae, which are by law vested in the Secretary, except as otherwise provided in the Ginnie Mae bylaws (12 U.S.C. 1723; 24 CFR part 310, section 1.02; Bylaws of the Government National Mortgage Association, posted at *www.ginniemae.gov*);
2. All authority of the Secretary with respect to the management of Ginnie Mae and Ginnie Mae programs pursuant to title III of the National Housing Act (12 U.S.C. 1723; 68 FR 41840);
3. The power to impose suspensions and debarments, with the concurrence of the General Counsel (Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d); 54 FR 4913; 63 FR 57133); and
4. The authority to authenticate documents and affix the seal of HUD to documents (68 FR 41840).

The Secretary hereby delegates authority to the President of Ginnie Mae the power to waive HUD regulations (Section 7(q), Department of Housing and Urban Development Act, 42 U.S.C. 3535(q); 73 FR 76674).

**Section B. Authority to Redelegate**

The Ginnie Mae President, Ginnie Mae Principal Executive Vice President, Ginnie Mae Executive Vice President and Chief Operating Officer, and Ginnie Mae Executive Vice President of Policy may redelegate the authorities delegated by the Secretary, except for the authority to waive HUD regulations. The authority to waive HUD regulations is reserved for the Ginnie Mae President, pursuant to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), and may not be redelegated. However, if the Ginnie Mae President is absent from office then Ginnie Mae's Principal Executive Vice President, Executive Vice President and Chief Operating Officer, Executive Vice President of Policy, or other persons authorized to act in the President's absence may exercise the waiver authority of the President consistent with HUD's policies and procedures (73 FR 76674 and 66 FR 13944).

**Section C. Authority Superseded**

This delegation of authority supersedes all previous delegations of authority and redelegations of authority for Ginnie Mae, including the delegation of authority published in the **Federal Register** on January 18, 2018 (83 FR 2660). The Secretary may revoke the authority authorized herein, in whole or part, at any time.

**Section D. Actions Ratified**

The Secretary hereby ratifies all actions previously taken by the Ginnie Mae President, Ginnie Mae Principal Executive Vice President, Ginnie Mae Executive Vice President and Chief Operating Officer, and Ginnie Mae Executive Vice President of Policy that are consistent with the delegations of authority provided in this notice.

**Authority:** Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)); 24 CFR part 310; Bylaws of the Government National Mortgage Association, posted at *www.ginniemae.gov.*

**Benjamin S. Carson, Sr.,**

*Secretary.*

[FR Doc. 2021–00692 Filed 1–13–21; 8:45 am]

BILLING CODE 4210–67–P

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7024–N–60]**

## 30-Day Notice of Proposed Information Collection: Grant Drawdown Payment Request/Line of Credit Control System (LOCCS)/eLOCCS OMB Control No.: 2577–0166

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

**DATES:** *Comments Due Date:* February 16, 2021.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. 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/Start* Printed Page 15501PRAMain. 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:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 23, 2020 at 85 FR 59817.

**A. Overview of Information Collection**

*Title of Information Collection:* Grant Drawdown Payment Request/LOCCS/VRS Voice Activated.

*OMB Approval Number:* 2577–0166.

*Type of Request:* Extension of a currently approved collection.

*Form Numbers:* 50080–CFP; 50080–OFND; 50080–SC; 50080–PHTA; 50080–URP; 50080–FSS; 50080–IHBG; 50080–TIHD.

*Description of the need for the information and proposed use:* On April 17, 2017, the Grant Drawdown Payment Request/Voice Response System (VRS) was converted to a Business Partner Registration and Secure Systems for both the user and the user's Approving Official. The Secure Systems supports many HUD applications, one of which is Line of Credit Control System (eLOCCS) . The eLOCCS is implementing a Single Sign-On solution under Secure Systems, where Grant recipients will be recognized and authenticated based on a Secure System ID and will no longer separately Sign-in to eLOCCS. Grant recipients use LOCCS system to request funds from HUD by signing into Secure Systems, as they normally do, and select the Line of Credit Control System (eLOCCS) link. Some Grantees (*all new or reinstated users who need to access eLOCCS*) will need to complete the LOCCS HUD–27054E form, have it notarized, send the original HUD–27054E LOCCS Access Authorization Form (with the original signature and notary seal) via U.S. Mail to the Program Office for review. The LOCCS system will automatically generate an Access Authorization email letting the user know that HUD–27054E has been processed, enabling grantees to access their eLOCCS account. The information collected on the payment voucher will also be used as an internal control measure to ensure the lawful and appropriate disbursement of Federal funds as well as provide a service to program recipients.

Below is a link where the HUD–27054E LOCCS Authorized Form can be accessed: *http://portal.hud.gov/hudportal/documents/huddoc?id=27054E.pdf.*

*Respondents:* PHAs, state or local government. Tribes and tribally designated housing entities.

| Information collection | Number of respondents | Frequency of responses | Responses per annum | Burden hour per response | Annual burden hours | Hourly cost per response * | Annual cost |
|---|---|---|---|---|---|---|---|
| Capital Fund 50080–CFP | 3,100 | 12 | 37,200 | .2.25 | 9,300 | .224.08 | 233,944.00 |
| Operating Fund 50080–OFND | 3,100 | 12 | 37,200 | .2.25 | 9,300 | .224.08 | 233,944.00 |
| Resident Opportunities and Supportive Services (ROSS) SC 50080–SC | 330 | 12 | 3,960 | .25 | 990 | .224.08 | 23,839.20 |
| Public Housing Technical Assistance 50080–PHTA | 12 | 12 | 144 | .25 | 36 | .224.08 | 866.88 |
| Hope VI 50080–URP | 50 | 12 | 600 | .50 | 300 | .224.08 | 7,224.00 |
| Family Self-Sufficiency 50080–FSS | 700 | 12 | 8,400 | .25 | 2,100 | .224.08 | 50,568.00 |
| Indian Housing Block Grant 50080–IHBG | 361 | 12 | 4,332 | .25 | 1,083 | .224.08 | 26,078.64 |
| Traditional Indian Housing Development 50080–TIHD | 32 | 12 | 384 | .25 | 96 | .224.08 | 2,190.72 |
| Totals | 7,685 | 12 | 92,220 | Varies | 23,205 | 24.08 | $558,776.40 |

**B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

**C. Authority:**

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

**Colette Pollard,**

*Department reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. 2021–00670 Filed 1–13–21; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

**[20XD4523WS. DS62400000. DWSN00000.000000. DP62402; OMB Control Number 1084–0034]**

### Agency Information Collection Activities; Documenting, Managing and Preserving Department of the Interior Museum Collections Housed in Non-Federal Repositories

**AGENCY:** Office of Acquisition and Property Management, Interior.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, we, the Office of Acquisition and Property Management, Office of the Secretary, Department of the Interior are proposing to renew an information collection.

**DATES:** Interested persons are invited to submit comments on or before March 15, 2021.

**ADDRESSES:** Send your comments on this information collection request (ICR) by mail to Emily Palus, Office of Acquisition and Property Management, U.S. Department of the Interior, 1849 C Street NW, MS 4262–MIB, Washington, DC 20240; or by email to *Emily_Palus@ios.doi.gov.* Please reference OMB Control Number 1084–0034 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Emily Palus by email at *Emily_Palus@ios.doi.gov,* or by telephone at 202–513–7563.

**SUPPLEMENTARY INFORMATION:** In accordance with the PRA and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Abstract:* The Department of the Interior (DOI) manages an estimated 73 million museum objects and over 86 million linear feet of archives in trust for the American public. This diverse collection consists of archaeological artifacts, archives, biological specimens, ethnographic objects, fine arts, geological specimens, historic objects, and paleontological specimens that are owned and managed by the Department's bureaus and offices (bureaus). This information collection request is directed to non-Federal repositories that house DOI museum collections. The information that DOI obtains, on a voluntary basis, concerns DOI museum collections held in non-Federal repositories. Receipt of this information supports the Department's management of its museum collections for public benefit, including preservation, protection, access, and use, as well as where applicable, compliance with the Native American Graves Protection and Repatriation Act (NAGPRA).

The information that DOI seeks consists of the following:

A. Accession Records and associated files regarding acquisition;

B. Catalog Records and associated files describing the objects and their use;

C. Facility Checklist for Spaces Housing DOI Museum Property (Checklist), which addresses the environmental, security and other management controls in place to document and safeguard the collections;

D. Inventory of Museum Collections (Inventory) documenting presence and condition of objects and records; and

E. Input on Collections from Lands Administered by the U.S. Department of the Interior that are Located in Non-Federal Facilities (Input Form) to query a limited range information about the repository; the scope and types of DOI collections in repositories, with which bureaus and offices those collections are associated and the nature of any agreements; the status of documentation and NAGPRA compliance, and availability for research and use.

Although the majority of DOI's documented collections are housed in bureau facilities across the nation, at least ten percent (an estimated more than 25 million objects) are located in approximately 970 non-Federal repositories, primarily state, tribal, and local museums and university departments. Most of the DOI museum artifacts, specimens, and archives housed in non-Federal repositories resulted from projects on Federal lands, and include collections from the disciplines of archaeology, biology, geology, and paleontology, as well as associated project documentation.

DOI museum objects cared for in non-Federal repositories are those artifacts, specimens, and archives that are established as Federal property under Federal law. Common law also confers rights to landowners, including the Federal government, such as ownership of property, resources, and other tangible assets existing on or originating from those lands, unless those rights were previously relinquished, sold, awarded, or otherwise reassigned. Also, permits and other agreements for the collection of artifacts and specimens from public lands managed at the time by the Department may further affirm Federal ownership. In order to maintain accountability of and facilitate access to DOI museum objects, the objects must be documented in the Interior Collection Management System (ICMS), its successor, the Museum Collection Management System (MCMS) or in another collection management database from which the necessary data can be imported into ICMS or MCMS.

Federal regulations and DOI policy requires that all permitees conducting authorized scientific research and authorized individuals performing compliance activities on DOI-managed lands must ensure that any retained museum specimens or objects collected during a project are: (1) Accessioned and cataloged in ICMS/MCMS, according to DOI standards; and (2) housed in an appropriate museum repository that meets DOI museum standards. These requirements ensure the collections' long-term preservation, protection, and accessibility for access and use.

*Title of Collection:* Documenting, Managing and Preserving Department of the Interior Museum Collections Housed in Non-Federal Repositories.

*OMB Control Number:* 1084–0034.

*Form Number:* None.

*Type of Review:* Extension of a currently approved collection.

*Respondents/Affected Public:* Museums; academic, cultural, and research institutions; and, state or local agencies and institutions.

*Total Estimated Number of Annual Respondents:* 900.

*Total Estimated Number of Annual Responses:* 900.

*Estimated Completion Time per Response:* Varies from 1 hour to 12 hours, depending on activity.

*Total Estimated Number of Annual Burden Hours:* 3,600 hours.

*Respondent's Obligation:* Voluntary.

*Frequency of Collection:* Maximum of once per year per collection instrument, and likely less frequently.

*Total Estimated Annual Nonhour Burden Cost:* None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**Megan Olsen,**

*Director, Office of Acquisition and Property Management.*

[FR Doc. 2021–00639 Filed 1–13–21; 8:45 am]

**BILLING CODE 4334–63–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[212.LLWO230000. L11700000.PH0000.LXSGPL000000]**

### Notice of Availability of the Record of Decision for Greater Sage-Grouse Management, Nevada and Northeastern California

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the management of Greater Sage-Grouse habitat in Nevada and Northeastern California. The BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse Conservation in Nevada and Northeastern California.

**ADDRESSES:** Copies of the ROD are available for public inspection at the Nevada Bureau of Land Management

State Office at 1340 Financial Boulevard, Reno, Nevada 89502–7147 or the California Bureau of Land Management State Office at 2800 Cottage Way, Sacramento, California 95825. Interested persons may also review the ROD on the internet at: *https://eplanning.blm.gov/eplanning-ui/project/103343/510.*

**FOR FURTHER INFORMATION CONTACT:** Arlene Kosic, California Sage-Grouse Implementation Lead, at 530–279–2726; California Bureau of Land Management Applegate Field Office, 602 Cressler Street, Cedarville, California 96104; *akosic@blm.gov;* or Colleen Dulin, Acting Nevada Sage-Grouse Implementation Lead, at 775–430–3621; 1340 Financial Boulevard Reno, Nevada 89502–7147; *cdulin@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Ms. Kosic or Ms. Dulin during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM issued this ROD to document the agency's determination regarding the analysis contained in the final supplemental Environmental Impact Statement (EIS) (85 FR 74381). With the issuance of this ROD, the BLM has now completed several planning and NEPA processes for Greater Sage-Grouse management in Nevada and Northeastern California over roughly the last decade, which include the processes that culminated in the 2015 ROD and the Approved Resource Management Plan Amendment (the 2015 planning process), the 2019 ROD and Approved Resource Management Plan Amendment (the 2019 planning process), and this 2020 ROD (the 2020 supplemental EIS process). Together, these processes represent a thorough analysis of Greater Sage-Grouse management, substantial public engagement, and important coordination with state wildlife agencies, other federal agencies, and many others in the range of the species have been collaborating to conserve Greater Sage-Grouse and its habitats.

The BLM prepared the final supplemental EIS in order to review its previous NEPA analysis, clarify and augment it where necessary, and provide the public with additional opportunities to review and comment. It also helped the BLM determine whether its 2015 and 2019 land use planning and NEPA processes sufficiently addressed Greater Sage-Grouse habitat conservation or whether the BLM should initiate a new land use planning process to consider additional alternatives or new information.

The final supplemental EIS addressed four specific issues: the range of alternatives, need to take a hard look at environmental impacts, cumulative effects analysis, and the BLM's approach to compensatory mitigation. Rationale to support BLM's determination, with respect to each of these topical areas, is summarized below and described further in the ROD:

(1) *Range of Alternatives:* Throughout the decade-long planning and NEPA processes, the BLM has analyzed in detail 143 alternatives across the range of Greater Sage-Grouse. Additionally, the BLM has continued to review new science as it is published, which affirms that the BLM has considered a full range of plan-level conservation measures in the alternatives already analyzed.

(2) *Hard Look:* The BLM has continued to take a hard look at environmental impacts every step of the way in planning for Greater Sage-Grouse habitat conservation. In the 2015 planning process, the 2019 planning process, and in the 2020 supplemental EIS process, the BLM incorporated detailed analysis of environmental impacts into our decision-making processes and disclosed these expected impacts to the public. As scientific information has continued to evolve, the BLM has closely reviewed and considered any changes from such science to expected environmental impacts, both at the land use plan scale and in site-specific analyses. To address public comments raised during the supplemental EIS process, the BLM convened a team of biologists and land use planners to evaluate scientific literature provided to the agency. The BLM found that the most up-to-date Greater Sage-Grouse science and other information has incrementally increased, and built upon, the knowledgebase of Greater Sage-Grouse management evaluated by the BLM most recently in its 2019 land use plan amendments, but does not change the scope or direction of the BLM's management; however, new science does suggest adaptations to management may be warranted at site-specific scales.

(3) *Cumulative Effects Analysis:* The BLM considered cumulative impacts on a rangewide basis, organizing that analysis at the geographic scale of each Western Association of Fish and Wildlife Agencies (WAFWA) management zone, in order to consider impacts at biologically meaningful scales. In the 2019 planning process, the BLM incorporated by reference cumulative effects analysis conducted in the 2015 planning process and other environmental impact statements. Since the nature and context of the cumulative effects scenario has not appreciably changed since 2015, and the 2015 analysis covered the entire range of the Greater Sage-Grouse, the BLM's consideration of cumulative effects in the 2015 planning process adequately addresses most, if not all, of the planning decisions made through the 2019 planning process.

While the 2019 planning process largely incorporated by reference the analysis from the 2015 planning process, and updated it where needed to account for current conditions, the 2020 supplemental EIS process elaborated on this information in greater detail and updated the analysis to ensure that the BLM appropriately evaluated cumulative effects at biologically meaningful scales.

(4) *BLM's Approach to Compensatory Mitigation:* In the 2019 planning process, the BLM requested public comments on a number of issues, including the BLM's approach to compensatory mitigation. As part of the 2015 Approved Resource Management Plan Amendments, the BLM selected a net conservation gain standard in its approach to compensatory mitigation, which the 2019 land use plan amendments modified to align with the BLM's 2018 policy on compensatory mitigation. Through the 2020 supplemental EIS process, the BLM requested further comments about the BLM's approach to compensatory mitigation. After reviewing the comments that the BLM received about compensatory mitigation, the BLM determined that its environmental analysis supporting the 2019 land use plan amendments was sound. The public has now had substantial opportunities to consider and comment on the BLM's approach to compensatory mitigation at the land use planning level, including the approach taken in the 2019 land use plan amendments.

Based on the final supplemental EIS, the BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse Conservation in Nevada and Northeastern California.

(Authority: 40 CFR 1505.2; 40 CFR 1506.6; References to the CEQ regulations are to the regulations in effect prior to September 14, 2020. The revised CEQ regulations effective September 14, 2020, are not cited because this supplemental EIS process began prior to that date.)

**Jon K. Raby,**

*BLM Nevada State Director.*

**Karen E. Mouritsen,**

*BLM California State Director.*

[FR Doc. 2021–00663 Filed 1–13–21; 8:45 am]

**BILLING CODE 4310–DQ–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[212.LLWO230000. L11700000.PH0000.LXSGPL000000]**

### Notice of Availability of the Record of Decision for Greater Sage-Grouse Management, Colorado

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the management of Greater Sage-Grouse habitat in Colorado. The BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Colorado.

**ADDRESSES:** Copies of the ROD are available for public inspection at the Colorado Bureau of Land Management State Office at 2850 Youngfield Street, Lakewood, Colorado 80215. Interested persons may also review the ROD on the internet at: *https://eplanning.blm.gov/eplanning-ui/project/105596/510.*

**FOR FURTHER INFORMATION CONTACT:** Leah Waldner, Colorado Sage-Grouse Coordinator, at 970–244–3045; Colorado Grand Junction Field Office, 2815 H Rd., Grand Junction, CO 81506; *lwaldner@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Ms. Waldner during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM issued this ROD to document the agency's determination regarding the analysis contained in the final supplemental Environmental Impact Statement (EIS) (85 FR 74378). With the issuance of this ROD, the BLM has now completed several planning and NEPA processes for Greater Sage-Grouse management in Colorado over roughly the last decade, which include the processes that culminated in the 2015 ROD and the Approved Resource Management Plan Amendment (the 2015 planning process), the 2019 ROD and Approved Resource Management Plan Amendment (the 2019 planning process), and this 2020 ROD (the 2020 supplemental EIS process). Together, these processes represent a thorough analysis of Greater Sage-Grouse management, substantial public engagement, and important coordination with state wildlife agencies, other federal agencies, and many others in the range of the species have been collaborating to conserve Greater Sage-Grouse and its habitats.

The BLM prepared the final supplemental EIS in order to review its previous NEPA analysis, clarify and augment it where necessary, and provide the public with additional opportunities to review and comment. It also helped the BLM determine whether its 2015 and 2019 land use planning and NEPA processes sufficiently addressed Greater Sage-Grouse habitat conservation or whether the BLM should initiate a new land use planning process to consider additional alternatives or new information.

The final supplemental EIS addressed four specific issues: The range of alternatives, need to take a hard look at environmental impacts, cumulative effects analysis, and the BLM's approach to compensatory mitigation. Rationale to support BLM's determination, with respect to each of these topical areas, is summarized below and described further in the ROD:

(1) *Range of Alternatives:* Throughout the decade-long planning and NEPA processes, the BLM has analyzed in detail 143 alternatives across the range of Greater Sage-Grouse. Additionally, the BLM has continued to review new science as it is published, which affirms that the BLM has considered a full range of plan-level conservation measures in the alternatives already analyzed.

(2) *Hard Look:* The BLM has continued to take a hard look at environmental impacts every step of the way in planning for Greater Sage-Grouse habitat conservation. In the 2015 planning process, the 2019 planning process, and in the 2020 supplemental EIS process, the BLM incorporated detailed analysis of environmental impacts into our decision-making processes and disclosed these expected impacts to the public. As scientific information has continued to evolve, the BLM has closely reviewed and considered any changes from such science to expected environmental impacts, both at the land use plan scale and in site-specific analyses. To address public comments raised during the supplemental EIS process, the BLM convened a team of biologists and land use planners to evaluate scientific literature provided to the agency. The BLM found that the most up-to-date Greater Sage-Grouse science and other information has incrementally increased, and built upon, the knowledgebase of Greater Sage-Grouse management evaluated by the BLM most recently in its 2019 land use plan amendments, but does not change the scope or direction of the BLM's management; however, new science does suggest adaptations to management may be warranted at site-specific scales.

(3) *Cumulative Effects Analysis:* The BLM considered cumulative impacts on a rangewide basis, organizing that analysis at the geographic scale of each Western Association of Fish and Wildlife Agencies (WAFWA) management zone, in order to consider impacts at biologically meaningful scales. In the 2019 planning process, the BLM incorporated by reference cumulative effects analysis conducted in the 2015 planning process and other environmental impact statements. Since the nature and context of the cumulative effects scenario has not appreciably changed since 2015, and the 2015 analysis covered the entire range of the Greater Sage-Grouse, the BLM's consideration of cumulative effects in the 2015 planning process adequately addresses most, if not all, of the planning decisions made through the 2019 planning process.

While the 2019 planning process largely incorporated by reference the analysis from the 2015 planning process, and updated it where needed to account for current conditions, the 2020 supplemental EIS process elaborated on this information in greater detail and updated the analysis to ensure that the BLM appropriately evaluated cumulative effects at biologically meaningful scales.

(4) *BLM's Approach to Compensatory Mitigation:* In the 2019 planning process, the BLM requested public comments on a number of issues, including the BLM's approach to compensatory mitigation. As part of the 2015 Approved Resource Management Plan Amendments, the BLM selected a net conservation gain standard in its approach to compensatory mitigation, which the 2019 land use plan amendments modified to align with the BLM's 2018 policy on compensatory mitigation. Through the 2020 supplemental EIS process, the BLM requested further comments about the BLM's approach to compensatory mitigation. After reviewing the comments that the BLM received about compensatory mitigation, the BLM determined that its environmental analysis supporting the 2019 land use plan amendments was sound. The public has now had substantial opportunities to consider and comment on the BLM's approach to compensatory mitigation at the land use planning level, including the approach taken in the 2019 land use plan amendments.

Based on the final supplemental EIS, the BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Colorado.

(Authority: 40 CFR 1505.2; 40 CFR 1506.6; References to the CEQ regulations are to the regulations in effect prior to September 14, 2020. The revised CEQ regulations effective September 14, 2020, are not cited because this supplemental EIS process began prior to that date.)

**Jamie E. Connell,**

*BLM Colorado State Director.*

[FR Doc. 2021–00661 Filed 1–13–21; 8:45 am]

**BILLING CODE 4310–DQ–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[212.LLWO230000. L11700000.PH0000.LXSGPL000000]**

### Notice of Availability of the Record of Decision for Greater Sage-Grouse Management, Idaho

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the management of Greater Sage-Grouse habitat in Idaho. The BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Idaho.

**ADDRESSES:** Copies of the ROD are available for public inspection at the Idaho Bureau of Land Management State Office, 1387 S Vinnell Way, Boise, Idaho 83709. Interested persons may also review the ROD on the internet at: *https://eplanning.blm.gov/eplanning-ui/project/103344/510.*

**FOR FURTHER INFORMATION CONTACT:** Pamela Murdock, Planning and Environmental Coordinator, at 208–373–4050; Idaho Bureau of Land Management State Office, 1387 S Vinnell Way, Boise, Idaho 83709; *pmurdock@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Ms. Murdock during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM issued this ROD to document the agency's determination regarding the analysis contained in the final supplemental Environmental Impact Statement (EIS) (85 FR 74380). With the issuance of this ROD, the BLM has now completed several planning and NEPA processes for Greater Sage-Grouse management in Idaho over roughly the last decade, which include the processes that culminated in the 2015 ROD and the Approved Resource Management Plan Amendment (the 2015 planning process), the 2019 ROD and Approved Resource Management Plan Amendment (the 2019 planning process), and this 2020 ROD (the 2020 supplemental EIS process). Together, these processes represent a thorough analysis of Greater Sage-Grouse management, substantial public engagement, and important coordination with state wildlife agencies, other federal agencies, and many others in the range of the species have been collaborating to conserve Greater Sage-Grouse and its habitats.

The BLM prepared the final supplemental EIS in order to review its previous NEPA analysis, clarify and augment it where necessary, and provide the public with additional opportunities to review and comment. It also helped the BLM determine whether its 2015 and 2019 land use planning and NEPA processes sufficiently addressed Greater Sage-Grouse habitat conservation or whether the BLM should initiate a new land use planning process to consider additional alternatives or new information.

The final supplemental EIS addressed four specific issues: The range of alternatives, need to take a hard look at environmental impacts, cumulative effects analysis, and the BLM's approach to compensatory mitigation. Rationale to support BLM's determination, with respect to each of these topical areas, is summarized below and described further in the ROD:

(1) *Range of Alternatives:* Throughout the decade-long planning and NEPA processes, the BLM has analyzed in detail 143 alternatives across the range of Greater Sage-Grouse. Additionally, the BLM has continued to review new science as it is published, which affirms that the BLM has considered a full range of plan-level conservation measures in the alternatives already analyzed.

(2) *Hard Look:* The BLM has continued to take a hard look at environmental impacts every step of the way in planning for Greater Sage-Grouse habitat conservation. In the 2015 planning process, the 2019 planning process, and in the 2020 supplemental EIS process, the BLM incorporated detailed analysis of environmental impacts into our decision-making processes and disclosed these expected impacts to the public. As scientific information has continued to evolve, the BLM has closely reviewed and considered any changes from such science to expected environmental impacts, both at the land use plan scale

and in site-specific analyses. To address public comments raised during the supplemental EIS process, the BLM convened a team of biologists and land use planners to evaluate scientific literature provided to the agency. The BLM found that the most up-to-date Greater Sage-Grouse science and other information has incrementally increased, and built upon, the knowledgebase of Greater Sage-Grouse management evaluated by the BLM most recently in its 2019 land use plan amendments, but does not change the scope or direction of the BLM's management; however, new science does suggest adaptations to management may be warranted at site-specific scales.

(3) *Cumulative Effects Analysis:* The BLM considered cumulative impacts on a rangewide basis, organizing that analysis at the geographic scale of each Western Association of Fish and Wildlife Agencies (WAFWA) management zone, in order to consider impacts at biologically meaningful scales. In the 2019 planning process, the BLM incorporated by reference cumulative effects analysis conducted in the 2015 planning process and other environmental impact statements. Since the nature and context of the cumulative effects scenario has not appreciably changed since 2015, and the 2015 analysis covered the entire range of the Greater Sage-Grouse, the BLM's consideration of cumulative effects in the 2015 planning process adequately addresses most, if not all, of the planning decisions made through the 2019 planning process.

While the 2019 planning process largely incorporated by reference the analysis from the 2015 planning process, and updated it where needed to account for current conditions, the 2020 supplemental EIS process elaborated on this information in greater detail and updated the analysis to ensure that the BLM appropriately evaluated cumulative effects at biologically meaningful scales.

(4) *BLM's Approach to Compensatory Mitigation:* In the 2019 planning process, the BLM requested public comments on a number of issues, including the BLM's approach to compensatory mitigation. As part of the 2015 Approved Resource Management Plan Amendments, the BLM selected a net conservation gain standard in its approach to compensatory mitigation, which the 2019 land use plan amendments modified to align with the BLM's 2018 policy on compensatory mitigation. Through the 2020 supplemental EIS process, the BLM requested further comments about the BLM's approach to compensatory mitigation. After reviewing the comments that the BLM received about compensatory mitigation, the BLM determined that its environmental analysis supporting the 2019 land use plan amendments was sound. The public has now had substantial opportunities to consider and comment on the BLM's approach to compensatory mitigation at the land use planning level, including the approach taken in the 2019 land use plan amendments.

Based on the final supplemental EIS, the BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Idaho.

(Authority: 40 CFR 1505.2; 40 CFR 1506.6; References to the CEQ regulations are to the regulations in effect prior to September 14, 2020. The revised CEQ regulations effective September 14, 2020, are not cited because this supplemental EIS process began prior to that date.)

**John F. Ruhs,**

*BLM Idaho State Director.*

[FR Doc. 2021–00662 Filed 1–13–21; 8:45 am]

**BILLING CODE 4310–DQ–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[(LLCA930000.L13400000.DS0000.21X) MO#450014117]**

### Notice of Availability of the Draft Desert Plan Amendment and Draft Environmental Impact Statement, California

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) has prepared a Draft Land Use Plan Amendment (LUPA) and Draft Environmental Impact Statement (EIS), for an amendment to the California Desert Conservation Area (CDCA) Plan and the Bakersfield and Bishop Resource Management Plans (RMPs). The Desert Plan Amendment Draft LUPA/EIS includes consideration of changes to the management or modification to the boundaries of 129 Areas of Critical Environmental Concern (ACECs). By this notice, the BLM is announcing the availability of the Draft LUPA/EIS. In order to comply with Federal regulations, the BLM is also announcing a comment period on proposed changes to the ACECs within the planning area.

**DATES:** To ensure that comments will be considered, the BLM must receive written comments on the Draft LUPA/EIS within 90 days following the date the Environmental Protection Agency publishes its notice of the Draft LUPA/EIS in the **Federal Register**. The BLM will announce future meetings and any other public participation activities at least 15 days in advance through public notices, news releases, and/or mailings.

**ADDRESSES:** The Desert Plan Amendment Draft LUPA/EIS are available on the BLM ePlanning project website at *https://go.usa.gov/x7hdj.* Click the ''Documents'' link on the left side of the screen to find the electronic version of these materials. Hard copies of the Desert Plan Amendment Draft LUPA and Draft EIS are also available for public inspection at the following BLM locations:

California State Office, 2800 Cottage Way, Suite W–1623, Sacramento, CA 95825;
California Desert District Office, 22835 Calle San Juan De Los Lagos, Moreno Valley, CA 92553;
Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311;
El Centro Field Office, 1661 S. 4th Street, El Centro, CA 92243;
Needles Field Office, 1303 S. Highway 95, Needles, CA 92363;
Ridgecrest Field Office, 300 S. Richmond Road, Ridgecrest, CA 93555;
Bakersfield Field Office, 3801 Pegasus Drive, Bakersfield, CA 93308; and
Bishop Field Office, 351 Pacu Lane, Suite 100, Bishop, CA 93514.

You may submit written comments related to the Desert Plan Amendment by either of the following methods:

- *Website: https://go.usa.gov/x7hdj.*
- *Mail:* Bureau of Land Management, California State Office, Attn: Desert Plan Amendment, 2800 Cottage Way, Suite W–1623, Sacramento, CA 95825.

**FOR FURTHER INFORMATION CONTACT:** Jeremiah Karuzas, Renewable Energy Program Manager, telephone: 916–978–4644, email: *jkaruzas@blm.gov;* address Bureau of Land Management, 2800 Cottage Way, W–1623, Sacramento, CA 95825. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay

Service (FRS) at 1–800–877–8339 to contact Mr. Karuzas during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** In September 2016, the BLM issued a Record of Decision (ROD) for the Desert Renewable Energy Conservation Plan (DRECP) LUPA, which amended the CDCA Plan, the Bishop RMP, and the Bakersfield RMP in the Mojave and Colorado/Sonoran Desert regions of southern California. The 2016 ROD was intended to address the streamlining of renewable energy development, conservation of desert resources, and to support multiple use and recreation on the nearly 11 million acres of BLM-managed public land in the planning area. In response to challenges that arose with the implementation of the 2016 DRECP LUPA, as well as in response to Executive Order 13783, Promoting Energy Independence and Economic Growth, and Executive Order 13821 on Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, the BLM published a Notice of Intent in the **Federal Register** on February 2, 2018 (83 FR 4921) initiating a 45-day public comment period. The BLM sought comments on:

• The potential impacts that land use designations contained in the amended Land Use Plans will have on commercial-scale renewable energy projects, including wind, solar and geothermal energy;

• ACECs that were designated, including where private lands lie within the external boundaries of such designations, as well as comments on increasing opportunities for increased renewable energy development, recreational and off-highway vehicle access, mining access, and grazing; and

• The impact that land-use designations, land-disturbance limits (''disturbance caps''), and visual-management classifications contained in the plans may have on the deployment of future communications infrastructure.

The BLM used public scoping comments to help identify planning issues to formulate alternatives and frame the scope of analysis in the Draft LUPA/EIS. Issues considered in the Draft LUPA/EIS are management actions associated with conservation areas, biological resources (including special status species), cultural resources, renewable energy, minerals, livestock grazing, visual resources, air resources, water resources, and recreation. The LUPA also considers decisions regarding ACECs, California Desert National Conservation Lands (CDNCL), and management of lands with wilderness characteristics. The Desert Plan Amendment Draft LUPA/EIS evaluates the No Action Alternative and two action alternatives (Alternatives 1 and 2). The BLM identifies Alternative 1 as the Preferred Alternative. This alternative, however, does not represent the final agency direction. After the public comment period closes, the BLM will prepare a Proposed LUPA, which may reflect changes or adjustments based on information received during public comment on the Draft LUPA/EIS, new information, or changes in BLM policies or priorities.

The No Action Alternative would retain the decisions specified in the 2016 ROD for the DRECP LUPA, as recently modified by Public Law 116–9. Alternative 1 would reduce the number of ACECs from 129 to 97 thus reducing the acreage of the ACECs by approximately 1.8 million acres; reduce the areas identified as CDNCL by approximately 2.2 million acres; and result in an additional 450,000 acres of General Public Lands (GPL). Alternative 1 would also modify or eliminate 68 Conservation Management Actions (CMAs), which would also change the manner in which disturbance caps are implemented, including elimination of disturbance caps in CDNCL, as well as allowing renewable energy development in Special Recreation Management Areas (SRMA).

Alternative 2 would reduce the number of ACECs to 100, and reduce the acreage of the ACECs by approximately 1.5 million acres; reduce the areas identified as CDNCL by approximately 2.1 million acres; and result in an additional approximate 274,000 acres of General Public Lands (GPL). Alternative 2 would also modify or eliminate the same 68 CMAs, which would also change the manner in which disturbance caps are implemented similar to Alternative 1 but Alternative 2 would retain the one percent disturbance cap for CDNCL. Alternative 2 CMAs would be modified to only allow renewable energy development in a SRMA where there is overlap with Development Focus Areas (DFAs). All other land use allocation decisions and CMAs from the 2016 ROD would be retained in both Alternative 1 and Alternative 2.

As a result of proposed CMA changes, the resource use limitations of the 129 ACECs within the planning area will also change. Therefore, pursuant to 43 CFR 1610.7–2(b), this notice announces a concurrent public comment period on proposed management changes (including alteration or elimination of disturbance caps), and boundary modifications or elimination of the existing ACECs as identified in Table 1.

TABLE 1—ACECS PROPOSED FOR BOUNDARY MODIFICATION OR ELIMINATION

| ACEC name | No action acres | Alternative 1 acres | Alternative 2 acres |
|---|---|---|---|
| Afton Canyon | 8,800 | 8,800 | 8,800 |
| Alligator Rock | 6,800 | 6,200 | 6,200 |
| Amargosa North | 114,000 | 72,760 | 72,760 |
| Amargosa South | 148,410 | 134,410 | 134,410 |
| Amboy Crater | 640 | 640 | 640 |
| Avawatz Mountains WSA | 49,900 | 0 | 0 |
| Ayers Rock | 1,500 | 1,500 | 1,500 |
| Barstow Woolly Sunflower | 19,100 | 19,100 | 19,100 |
| Bedrock Spring | 440 | 0 | 0 |
| Bendire's Thrasher | 9,800 | 9,800 | 9,800 |
| Big Morongo Canyon | 25,000 | 24,600 | 24,600 |
| Big Rock Creek Wash | 310 | 310 | 310 |
| Bigelow Cholla | 4,200 | 4,200 | 4,200 |
| Black Mountain | 51,300 | 0 | 0 |
| Brisbane Valley Monkey Flower | 11,700 | 11,700 | 11,700 |
| Bristol | 213,600 | 116,400 | 116,400 |
| Cadiz Valley | 191,200 | 67,600 | 67,600 |

TABLE 1—ACECS PROPOSED FOR BOUNDARY MODIFICATION OR ELIMINATION—Continued

| ACEC name | No action acres | Alternative 1 acres | Alternative 2 acres |
| --- | --- | --- | --- |
| Cady Mountains WSA | 101,400 | 0 | 101,400 |
| Calico Early Man Site | 840 | 840 | 840 |
| Carbonate Endemic Plants RNA | 5,000 | 5,000 | 5,000 |
| Castle Mountain | 3,180 | 0 | 0 |
| Cerro Gordo | 10,400 | 9,700 | 9,700 |
| Cerro Gordo WSA | 630 | 0 | 0 |
| Chemehuevi | 864,200 | 578,600 | 578,600 |
| Chuckwalla | 512,300 | 319,400 | 319,400 |
| Chuckwalla to Chemehuevi tortoise linkage | 318,600 | 269,900 | 269,900 |
| Chuckwalla Valley Dune Thicket | 2,200 | 2,200 | 2,200 |
| Coachella Valley Fringe-toed Lizard | 10,300 | 10,300 | 10,300 |
| Conglomerate Mesa | 1,700 | 1,700 | 1,700 |
| Coolgardie Mesa | 9,800 | 9,800 | 9,800 |
| Corn Springs | 2,500 | 900 | 900 |
| Coyote Mountains Fossil Site | 5,900 | 5,900 | 5,900 |
| Cronese Basin | 8,500 | 0 | 0 |
| Dagget Ridge Monkey Flower | 26,100 | 26,100 | 26,100 |
| Dead Mountains | 27,200 | 0 | 0 |
| Death Valley 17 WSA | 20,600 | 0 | 0 |
| Denning Springs | 390 | 0 | 0 |
| Desert Lily Preserve | 2,100 | 2,100 | 2,100 |
| Desert Tortoise Research Natural Area | 22,200 | 22,200 | 22,200 |
| Dos Palmas | 8,600 | 8,600 | 8,600 |
| Eagles Flyway | 10,900 | 0 | 0 |
| East Mesa | 88,500 | 38,200 | 88,500 |
| El Paso to Golden | 57,800 | 57,800 | 57,800 |
| Fossil Falls | 1,700 | 1,700 | 1,700 |
| Fremont-Kramer | 236,000 | 236,000 | 236,000 |
| Granite Mountain Corridor | 39,300 | 0 | 34,500 |
| Great Falls Basin | 10,300 | 0 | 0 |
| Halloran Wash | 1,700 | 1,700 | 1,700 |
| Harper Dry Lake | 490 | 490 | 490 |
| Horse Canyon | 1,500 | 1,500 | 1,500 |
| Independence Creek WSA | 6,500 | 0 | 0 |
| Indian Pass | 1,900 | 1,900 | 1,900 |
| Ivanpah | 78,600 | 63,900 | 78,600 |
| Jawbone/Butterbredt | 145,700 | 114,900 | 114,900 |
| Juniper Flats | 2,400 | 2,400 | 2,400 |
| Kingston Range | 18,900 | 15,200 | 15,200 |
| Kingston Range WSA | 40,000 | 0 | 0 |
| Lake Cahuilla | 8,600 | 8,600 | 8,600 |
| Lake Cahuilla Shoreline | 11,900 | 11,900 | 11,900 |
| Last Chance Canyon | 5,100 | 3,500 | 3,500 |
| Manix | 2,900 | 2,900 | 2,900 |
| Manzanar | 540 | 540 | 540 |
| Marble Mountain Fossil Bed | 230 | 0 | 0 |
| McCoy Valley | 26,200 | 26,200 | 26,200 |
| McCoy Wash | 6,400 | 6,400 | 6,400 |
| Mesquite Hills/Crucero | 5,000 | 5,000 | 5,000 |
| Mesquite Lake | 6,800 | 6,800 | 6,800 |
| Middle Knob | 17,800 | 17,800 | 17,800 |
| Mohave Ground Squirrel | 165,200 | 170,800 | 170,800 |
| Mojave Fishhook Cactus | 637 | 635 | 635 |
| Mojave Fringe-toed Lizard | 22,500 | 11,500 | 11,500 |
| Mopah Spring | 1,900 | 0 | 0 |
| Mountain Pass Dinosaur Trackway | 630 | 630 | 630 |
| Mule McCoy Linkage | 51,200 | 51,200 | 51,200 |
| Mule Mountains | 4,100 | 4,100 | 4,100 |
| Northern Lucerne Wildlife Linkage | 21,900 | 21,900 | 21,900 |
| Ocotillo | 14,600 | 14,600 | 14,600 |
| Olancha Greasewood | 25,600 | 19,500 | 19,500 |
| Old Woman Springs Wildlife Linkage | 55,600 | 43,200 | 55,600 |
| Ord-Rodman | 195,300 | 140,700 | 140,700 |
| Owens Lake | 10,200 | 10,200 | 10,200 |
| Palen Dry Lake | 3,600 | 3,600 | 3,600 |
| Palen Ford | 41,400 | 25,600 | 41,400 |
| Panamint Lake | 21,700 | 0 | 0 |
| Panamints and Argus | 102,900 | 71,500 | 71,500 |
| Parish's Phacelia | 560 | 560 | 560 |
| Patton Military Camps | 16,400 | 21,100 | 21,100 |
| Picacho | 183,500 | 133,600 | 133,600 |

TABLE 1—ACECS PROPOSED FOR BOUNDARY MODIFICATION OR ELIMINATION—Continued

| ACEC name | No action acres | Alternative 1 acres | Alternative 2 acres |
|---|---|---|---|
| Pilot Knob | 860 | 860 | 860 |
| Pinto Mountains | 108,200 | 84,200 | 84,200 |
| Pipes Canyon | 8,700 | 4,600 | 4,600 |
| Pisgah | 46,600 | 46,600 | 46,600 |
| Piute-Fenner | 155,500 | 146,200 | 146,200 |
| Plank Road | 420 | 420 | 420 |
| Rainbow Basin/Owl Canyon | 4,100 | 4,100 | 4,100 |
| Red Mountain Spring | 700 | 700 | 700 |
| Rodman Mountains Cultural Area | 6,200 | 0 | 0 |
| Rose Spring | 840 | 840 | 840 |
| Saline Valley | 1,400 | 0 | 0 |
| Salt Creek Hills | 2,200 | 1,600 | 1,600 |
| Salton Sea Hazardous ACEC | 5,100 | 5,100 | 5,100 |
| San Sebastian Marsh/San Felipe Creek | 6,600 | 6,600 | 6,600 |
| Sand Canyon | 2,600 | 0 | 0 |
| Santos Manuel | 27,500 | 0 | 0 |
| Shadow Valley | 197,300 | 159,700 | 159,700 |
| Short Canyon | 750 | 0 | 0 |
| Sierra Canyons | 26,300 | 27,000 | 27,000 |
| Singer Geoglyphs | 2,000 | 2,000 | 2,000 |
| Soda Mountains Expansion | 16,700 | 0 | 0 |
| Soda Mountains WSA | 88,800 | 0 | 0 |
| Soda Mountains | 0 | 0 | 33,300 |
| Soggy Dry Lake Creosote Rings | 180 | 180 | 180 |
| Southern Inyo WSA | 2,700 | 0 | 0 |
| Steam Well | 40 | 0 | 0 |
| Superior-Cronese | 315,800 | 310,900 | 310,900 |
| Surprise Canyon | 4,600 | 0 | 0 |
| Symmes Creek WSA | 8,400 | 0 | 0 |
| Trona Pinnacles | 4,100 | 4,100 | 4,100 |
| Turtle Mountains | 50,400 | 0 | 0 |
| Upper Johnson Valley Yucca Rings | 330 | 330 | 330 |
| Upper McCoy | 37,400 | 37,400 | 37,400 |
| Warm Sulfur Springs | 350 | 350 | 350 |
| West Mesa | 82,500 | 18,700 | 82,500 |
| West Paradise | 240 | 0 | 0 |
| Western Rand Mountains | 30,400 | 30,400 | 30,400 |
| Whipple Mountains | 2,800 | 2,100 | 2,100 |
| White Mountain City | 820 | 820 | 820 |
| White Mountains WSA | 1,600 | 0 | 0 |
| Whitewater Canyon | 14,900 | 2,800 | 2,800 |
| Yuha Basin | 77,300 | 73,600 | 73,600 |

A more detailed description of all proposed ACEC modifications, including maps, is included in the Draft LUPA/EIS and Appendix B of the Draft LUPA/EIS.

The BLM will utilize and coordinate the NEPA process to help fulfill the public involvement process under the National Historic Preservation Act (54 U.S.C. 306108), as provided in 36 CFR 800.2(d)(3). The BLM will continue to consult with Indian tribes on a government-to-government basis, in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will continue to be given due consideration. Federal, State, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed action that the BLM is evaluating, are invited to participate in the comment period.

Please note that public comments and information submitted, including names, street addresses, and email addresses of persons who submit comments, will be available for public review and disclosure at the BLM California State Office (see **ADDRESSES**) during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10)

**Karen E. Mouritsen,**

*State Director, California.*

[FR Doc. 2021–00579 Filed 1–13–21; 8:45 am]

BILLING CODE 4310–40–P

## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[212.LLWO230000. L11700000.PH0000.LXSGPL000000]**

## Notice of Availability of the Record of Decision for Greater Sage-Grouse Management, Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the management of Greater Sage-Grouse habitat in Wyoming. The BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Wyoming.

**ADDRESSES:** Copies of the ROD are available for public inspection at the Wyoming Bureau of Land Management State Office at 5353 Yellowstone Road, Cheyenne, Wyoming 82009. Interested persons may also review the ROD on the internet at: *https://eplanning.blm.gov/eplanning-ui/project/103347/510.*

**FOR FURTHER INFORMATION CONTACT:** Jenny Marzluf, Wyoming Sage-Grouse Implementation Lead, at 307–775–6090; Wyoming Bureau of Land Management State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009; *jmarzluf@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Ms. Marzluf during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM issued this ROD to document the agency's determination regarding the analysis contained in the final supplemental Environmental Impact Statement (EIS) (85 FR 74380). With the issuance of this ROD, the BLM has now completed several planning and NEPA processes for Greater Sage-Grouse management in Wyoming over roughly the last decade, which include the processes that culminated in the 2015 ROD and the Approved Resource Management Plan Amendment (the 2015 planning process), the 2019 ROD and Approved Resource Management Plan Amendment (the 2019 planning process), and this 2020 ROD (the 2020 supplemental EIS process). Together, these processes represent a thorough analysis of Greater Sage-Grouse management, substantial public engagement, and important coordination with state wildlife agencies, other federal agencies, and many others in the range of the species have been collaborating to conserve Greater Sage-Grouse and its habitats.

The BLM prepared the final supplemental EIS in order to review its previous NEPA analysis, clarify and augment it where necessary, and provide the public with additional opportunities to review and comment. It also helped the BLM determine whether its 2015 and 2019 land use planning and NEPA processes sufficiently addressed Greater Sage-Grouse habitat conservation or whether the BLM should initiate a new land use planning process to consider additional alternatives or new information.

The final supplemental EIS addressed four specific issues: The range of alternatives, need to take a hard look at environmental impacts, cumulative effects analysis, and the BLM's approach to compensatory mitigation. Rationale to support BLM's determination, with respect to each of these topical areas, is summarized below and described further in the ROD:

(1) *Range of Alternatives:* Throughout the decade-long planning and NEPA processes, the BLM has analyzed in detail 143 alternatives across the range of Greater Sage-Grouse. Additionally, the BLM has continued to review new science as it is published, which affirms that the BLM has considered a full range of plan-level conservation measures in the alternatives already analyzed.

(2) *Hard Look:* The BLM has continued to take a hard look at environmental impacts every step of the way in planning for Greater Sage-Grouse habitat conservation. In the 2015 planning process, the 2019 planning process, and in the 2020 supplemental EIS process, the BLM incorporated detailed analysis of environmental impacts into our decision-making processes and disclosed these expected impacts to the public. As scientific information has continued to evolve, the BLM has closely reviewed and considered any changes from such science to expected environmental impacts, both at the land use plan scale and in site-specific analyses. To address public comments raised during the supplemental EIS process, the BLM convened a team of biologists and land use planners to evaluate scientific literature provided to the agency. The BLM found that the most up-to-date Greater Sage-Grouse science and other information has incrementally increased, and built upon, the knowledgebase of Greater Sage-Grouse management evaluated by the BLM most recently in its 2019 land use plan amendments, but does not change the scope or direction of the BLM's management; however, new science does suggest adaptations to management may be warranted at site-specific scales.

(3) *Cumulative Effects Analysis:* The BLM considered cumulative impacts on a rangewide basis, organizing that analysis at the geographic scale of each Western Association of Fish and Wildlife Agencies (WAFWA) management zone, in order to consider impacts at biologically meaningful scales. In the 2019 planning process, the BLM incorporated by reference cumulative effects analysis conducted in the 2015 planning process and other environmental impact statements. Since the nature and context of the cumulative effects scenario has not appreciably changed since 2015, and the 2015 analysis covered the entire range of the Greater Sage-Grouse, the BLM's consideration of cumulative effects in the 2015 planning process adequately addresses most, if not all, of the planning decisions made through the 2019 planning process.

While the 2019 planning process largely incorporated by reference the analysis from the 2015 planning process, and updated it where needed to account for current conditions, the 2020 supplemental EIS process elaborated on this information in greater detail and updated the analysis to ensure that the BLM appropriately evaluated cumulative effects at biologically meaningful scales.

(4) *BLM's Approach to Compensatory Mitigation:* In the 2019 planning process, the BLM requested public comments on a number of issues, including the BLM's approach to compensatory mitigation. As part of the 2015 Approved Resource Management Plan Amendments, the BLM selected a net conservation gain standard in its approach to compensatory mitigation, which the 2019 land use plan amendments modified to align with the BLM's 2018 policy on compensatory mitigation. Through the 2020 supplemental EIS process, the BLM requested further comments about the BLM's approach to compensatory mitigation. After reviewing the comments that the BLM received about compensatory mitigation, the BLM determined that its environmental analysis supporting the 2019 land use plan amendments was sound. The public has now had substantial opportunities to consider and comment on the BLM's approach to compensatory mitigation at the land use planning level, including the approach taken in the 2019 land use plan amendments.

Based on the final supplemental EIS, the BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Wyoming.

(Authority: 40 CFR 1505.2; 40 CFR 1506.6; References to the CEQ regulations are to the regulations in effect prior to September 14, 2020. The revised CEQ regulations effective September 14, 2020, are not cited because this supplemental EIS process began prior to that date.)

**Kimber Liebhauser,**

*Acting BLM Wyoming State Director.*

[FR Doc. 2021–00666 Filed 1–13–21; 8:45 am]

**BILLING CODE 4310–DQ–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[212.LLWO230000. L11700000.PH0000.LXSGPL000000]**

### Notice of Availability of the Record of Decision for Greater Sage-Grouse Management, Oregon

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the management of Greater Sage-Grouse habitat in Oregon. The BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Oregon.

**ADDRESSES:** Copies of the ROD are available for public inspection at the Oregon Bureau of Land Management State Office at 1220 SW 3rd Ave., Portland, Oregon 97204. Interested persons may also review the ROD on the internet at: *https://eplanning.blm.gov/eplanning-ui/project/103348/510.*

**FOR FURTHER INFORMATION CONTACT:** Jim Regan-Vienop, Planning and Environmental Coordinator, at 503–808–6062; 1220 SW 3rd Ave., Suite 1305, Portland, OR, 97204; *jreganvienop@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Mr. Regan-Vienop during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM issued this ROD to document the agency's determination regarding the analysis contained in the final supplemental Environmental Impact Statement (EIS) (85 FR 74381). With the issuance of this ROD, the BLM has now completed several planning and NEPA processes for Greater Sage-Grouse management in Oregon over roughly the last decade, which include the processes that culminated in the 2015 ROD and the Approved Resource Management Plan Amendment (the 2015 planning process), the 2019 ROD and Approved Resource Management Plan Amendment (the 2019 planning process), and this 2020 ROD (the 2020 supplemental EIS process). Together, these processes represent a thorough analysis of Greater Sage-Grouse management, substantial public engagement, and important coordination with state wildlife agencies, other federal agencies, and many others in the range of the species have been collaborating to conserve Greater Sage-Grouse and its habitats.

The BLM prepared the final supplemental EIS in order to review its previous NEPA analysis, clarify and augment it where necessary, and provide the public with additional opportunities to review and comment. It also helped the BLM determine whether its 2015 and 2019 land use planning and NEPA processes sufficiently addressed Greater Sage-Grouse habitat conservation or whether the BLM should initiate a new land use planning process to consider additional alternatives or new information.

The final supplemental EIS addressed four specific issues: The range of alternatives, need to take a hard look at environmental impacts, cumulative effects analysis, and the BLM's approach to compensatory mitigation. Rationale to support BLM's determination, with respect to each of these topical areas, is summarized below and described further in the ROD:

(1) Range of Alternatives: Throughout the decade-long planning and NEPA processes, the BLM has analyzed in detail 143 alternatives across the range of Greater Sage-Grouse. Additionally, the BLM has continued to review new science as it is published, which affirms that the BLM has considered a full range of plan-level conservation measures in the alternatives already analyzed.

(2) Hard Look: The BLM has continued to take a hard look at environmental impacts every step of the way in planning for Greater Sage-Grouse habitat conservation. In the 2015 planning process, the 2019 planning process, and in the 2020 supplemental EIS process, the BLM incorporated detailed analysis of environmental impacts into our decision-making processes and disclosed these expected impacts to the public. As scientific information has continued to evolve, the BLM has closely reviewed and considered any changes from such science to expected environmental impacts, both at the land use plan scale and in site-specific analyses. To address public comments raised during the supplemental EIS process, the BLM convened a team of biologists and land use planners to evaluate scientific literature provided to the agency. The BLM found that the most up-to-date Greater Sage-Grouse science and other information has incrementally increased, and built upon, the knowledgebase of Greater Sage-Grouse management evaluated by the BLM most recently in its 2019 land use plan amendments, but does not change the scope or direction of the BLM's management; however, new science does suggest adaptations to management may be warranted at site-specific scales.

(3) Cumulative Effects Analysis: The BLM considered cumulative impacts on a rangewide basis, organizing that analysis at the geographic scale of each Western Association of Fish and Wildlife Agencies (WAFWA) management zone, in order to consider impacts at biologically meaningful scales. In the 2019 planning process, the BLM incorporated by reference cumulative effects analysis conducted in the 2015 planning process and other environmental impact statements. Since the nature and context of the cumulative effects scenario has not appreciably changed since 2015, and the 2015 analysis covered the entire range of the Greater Sage-Grouse, the BLM's consideration of cumulative effects in the 2015 planning process adequately addresses most, if not all, of the

planning decisions made through the 2019 planning process.

While the 2019 planning process largely incorporated by reference the analysis from the 2015 planning process, and updated it where needed to account for current conditions, the 2020 supplemental EIS process elaborated on this information in greater detail and updated the analysis to ensure that the BLM appropriately evaluated cumulative effects at biologically meaningful scales.

(4) BLM's Approach to Compensatory Mitigation: In the 2019 planning process, the BLM requested public comments on a number of issues, including the BLM's approach to compensatory mitigation. As part of the 2015 Approved Resource Management Plan Amendments, the BLM selected a net conservation gain standard in its approach to compensatory mitigation, which the 2019 land use plan amendments modified to align with the BLM's 2018 policy on compensatory mitigation. Through the 2020 supplemental EIS process, the BLM requested further comments about the BLM's approach to compensatory mitigation. After reviewing the comments that the BLM received about compensatory mitigation, the BLM determined that its environmental analysis supporting the 2019 land use plan amendments was sound. The public has now had substantial opportunities to consider and comment on the BLM's approach to compensatory mitigation at the land use planning level, including the approach taken in the 2019 land use plan amendments.

Based on the final supplemental EIS, the BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Oregon.

(Authority: 40 CFR 1505.2; 40 CFR 1506.6; References to the CEQ regulations are to the regulations in effect prior to September 14, 2020. The revised CEQ regulations effective September 14, 2020, are not cited because this supplemental EIS process began prior to that date.)

**Barry R. Bushue,**

*BLM Oregon State Director.*

[FR Doc. 2021–00664 Filed 1–13–21; 8:45 am]

**BILLING CODE 4310–DQ– P**

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## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[212.LLWO230000.L11700000.PH0000.LXSGPL000000]**

## Notice of Availability of the Record of Decision for Greater Sage-Grouse Management, Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the management of Greater Sage-Grouse habitat in Utah. The BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Utah.

**ADDRESSES:** Copies of the ROD are available for public inspection at the Utah Bureau of Land Management State Office at 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345. Interested persons may also review the ROD on the internet at: *https://eplanning.blm.gov/eplanning-ui/project/103346/510.*

**FOR FURTHER INFORMATION CONTACT:** Christine Fletcher, Utah Sage-Grouse Implementation Lead, at 435–865–3035; Utah Bureau of Land Management State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345; *cfletcher@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Mrs. Fletcher during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM issued this ROD to document the agency's determination regarding the analysis contained in the final supplemental Environmental Impact Statement (EIS) (85 FR 74379). With the issuance of this ROD, the BLM has now completed several planning and NEPA processes for Greater Sage-Grouse management in Utah over roughly the last decade, which include the processes that culminated in the 2015 ROD and the Approved Resource Management Plan Amendment (the 2015 planning process), the 2019 ROD and Approved Resource Management Plan Amendment (the 2019 planning process), and this 2020 ROD (the 2020 supplemental EIS process). Together, these processes represent a thorough analysis of Greater Sage-Grouse management, substantial public engagement, and important coordination with state wildlife agencies, other federal agencies, and many others in the range of the species that have been collaborating to conserve Greater Sage-Grouse and its habitats.

The BLM prepared the final supplemental EIS in order to review its previous NEPA analysis, clarify and augment it where necessary, and provide the public with additional opportunities to review and comment. It also helped the BLM determine whether its 2015 and 2019 land use planning and NEPA processes sufficiently addressed Greater Sage-Grouse habitat conservation or whether the BLM should initiate a new land use planning process to consider additional alternatives or new information.

The final supplemental EIS addressed four specific issues: The range of alternatives, need to take a hard look at environmental impacts, cumulative effects analysis, and the BLM's approach to compensatory mitigation. Rationale to support BLM's determination, with respect to each of these topical areas, is summarized below and described further in the ROD:

(1) Range of Alternatives: Throughout the decade-long planning and NEPA processes, the BLM has analyzed in detail 143 alternatives across the range of Greater Sage-Grouse. Additionally, the BLM has continued to review new science as it is published, which affirms that the BLM has considered a full range of plan-level conservation measures in the alternatives already analyzed.

(2) Hard Look: The BLM has continued to take a hard look at environmental impacts every step of the way in planning for Greater Sage-Grouse habitat conservation. In the 2015 planning process, the 2019 planning process, and in the 2020 supplemental

EIS process, the BLM incorporated detailed analysis of environmental impacts into our decision-making processes and disclosed these expected impacts to the public. As scientific information has continued to evolve, the BLM has closely reviewed and considered any changes from such science to expected environmental impacts, both at the land use plan scale and in site-specific analyses. To address public comments raised during the supplemental EIS process, the BLM convened a team of biologists and land use planners to evaluate scientific literature provided to the agency. The BLM found that the most up-to-date Greater Sage-Grouse science and other information has incrementally increased, and built upon, the knowledgebase of Greater Sage-Grouse management evaluated by the BLM most recently in its 2019 land use plan amendments, but does not change the scope or direction of the BLM's management; however, new science does suggest adaptations to management may be warranted at site-specific scales.

(3) Cumulative Effects Analysis: The BLM considered cumulative impacts on a rangewide basis, organizing that analysis at the geographic scale of each Western Association of Fish and Wildlife Agencies (WAFWA) management zone, in order to consider impacts at biologically meaningful scales. In the 2019 planning process, the BLM incorporated by reference cumulative effects analysis conducted in the 2015 planning process and other environmental impact statements. Since the nature and context of the cumulative effects scenario has not appreciably changed since 2015, and the 2015 analysis covered the entire range of the Greater Sage-Grouse, the BLM's consideration of cumulative effects in the 2015 planning process adequately addresses most, if not all, of the planning decisions made through the 2019 planning process.

While the 2019 planning process largely incorporated by reference the analysis from the 2015 planning process, and updated it where needed to account for current conditions, the 2020 supplemental EIS process elaborated on this information in greater detail and updated the analysis to ensure that the BLM appropriately evaluated cumulative effects at biologically meaningful scales.

(4) BLM's Approach to Compensatory Mitigation: In the 2019 planning process, the BLM requested public comments on a number of issues, including the BLM's approach to compensatory mitigation. As part of the 2015 Approved Resource Management Plan Amendments, the BLM selected a net conservation gain standard in its approach to compensatory mitigation, which the 2019 land use plan amendments modified to align with the BLM's 2018 policy on compensatory mitigation. Through the 2020 supplemental EIS process, the BLM requested further comments about the BLM's approach to compensatory mitigation. After reviewing the comments that the BLM received about compensatory mitigation, the BLM determined that its environmental analysis supporting the 2019 land use plan amendments was sound. The public has now had substantial opportunities to consider and comment on the BLM's approach to compensatory mitigation at the land use planning level, including the approach taken in the 2019 land use plan amendments.

Based on the final supplemental EIS, the BLM has determined that its decade-long planning and NEPA processes have sufficiently addressed Greater Sage-Grouse habitat conservation and no new land use planning process to consider additional alternatives or new information is warranted. This determination is not a new planning decision. Instead, it is a determination not to amend the applicable land use plans. Thus, it is not subject to appeal or protest. The BLM's decision remains as identified in the 2019 Approved Resource Management Plan Amendment for Greater Sage-Grouse conservation in Utah.

(Authority: 40 CFR 1505.2; 40 CFR 1506.6; References to the CEQ regulations are to the regulations in effect prior to September 14, 2020. The revised CEQ regulations effective September 14, 2020, are not cited because this supplemental EIS process began prior to that date.)

**Gregory Sheehan,**

*BLM Utah State Director.*

[FR Doc. 2021–00665 Filed 1–13–21; 8:45 am]

**BILLING CODE 4310–DQ–P**

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## DEPARTMENT OF THE INTERIOR

## National Park Service

**[NPS–WASO–D–COS–POL–30716; PPWODIREP0; PPMPSAS1Y.YP0000]**

## National Park System Advisory Board; Charter Renewal

**AGENCY:** National Park Service, Interior.

**ACTION:** Charter renewal.

**SUMMARY:** The Secretary of the Interior intends to renew the National Park System Advisory Board, in accordance with section 14(b) of the Federal Advisory Committee Act. This action is necessary and in the public interest in connection with the performance of statutory duties imposed upon the Department of the Interior and the National Park Service.

**FOR FURTHER INFORMATION CONTACT:** Joshua Winchell, Staff Director and Designated Federal Officer for the National Park System Advisory Board, Office of Policy, National Park Service, 202–513–7053.

**SUPPLEMENTARY INFORMATION:** The Board is authorized by 54 U.S.C. 102303 (part of the 1935 Historic Sites, Buildings and Antiquities Act) and has been in existence almost continuously since 1935. Pursuant to 54 U.S.C. 102303, the legislative authorization for the Board expired January 1, 2010. However, due to the importance of the issues on which the Board advises, the Secretary of the Interior exercised the authority contained in 54 U.S.C. 100906 to re-establish and continue the Board as a discretionary committee from January 1, 2010, until such time as it may be legislatively reauthorized.

The advice and recommendations provided by the Board fulfill an important need within the Department of the Interior and the National Park Service, and it is necessary to re-establish the Board to ensure its work is not disrupted. The Board's members are balanced to represent a cross-section of disciplines and expertise relevant to the National Park Service mission. The renewal of the Board comports with the requirements of the Federal Advisory Committee Act, as amended.

*Certification:* I hereby certify that the renewal of the National Park System Advisory Board is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by the National Park Service Organic Act (54 U.S.C. 100101(a) *et seq.*), and other statutes relating to the administration of the National Park Service.

**Authority:** 5 U.S.C. Appendix 2

Dated: November 18, 2020.

**David L. Bernhardt,**

*Secretary of the Interior.*

[FR Doc. 2021–00750 Filed 1–13–21; 8:45 am]

**BILLING CODE 4312–52–P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**[NPS–AKRO–ANIA–DENA–CAKR–LACL–KOVA–WRST–GAAR–31255; PPAKAKROR4; PPMPRLE1Y.LS0000]**

## National Park Service Alaska Region Subsistence Resource Commission Program; Notice of Public Meetings

**AGENCY:** National Park Service, Interior.

**ACTION:** Meeting notice.

**SUMMARY:** The National Park Service (NPS) is hereby giving notice that the Aniakchak National Monument Subsistence Resource Commission (SRC), the Denali National Park SRC, the Cape Krusenstern National Monument SRC, the Lake Clark National Park SRC, the Kobuk Valley National Park SRC, the Wrangell-St. Elias National Park SRC, and the Gates of the Arctic National Park SRC will meet as indicated below.

**DATES:** The Aniakchak National Monument SRC will meet via teleconference from 1:30 p.m. to 5:00 p.m. or until business is completed on Tuesday, February 2, 2021. The alternate meeting date is Wednesday, February 3, 2021, from 1:30 p.m. to 5:00 p.m. or until business is completed. Teleconference participants must call the NPS office at (907) 246–2154 prior to the meeting to receive teleconference passcode information. For more detailed information regarding these meetings, or if you are interested in applying for SRC membership, contact Designated Federal Officer Mark Sturm, Superintendent, at (907) 246–2120, or via email at *mark_sturm@nps.gov,* or Linda Chisholm, Subsistence Coordinator, at (907) 246–2154 or via email at *linda_chisholm@nps.gov,* or Joshua Ream, Federal Advisory Committee Group Federal Officer, at (907) 644–3596 or via email at *joshua_ream@nps.gov.*

The Denali National Park SRC will meet via teleconference from 10:00 a.m. to 5:00 p.m. or until business is completed on Tuesday, February 23, 2021. The alternate meeting date is Tuesday, March 2, 2021, from 10:00 a.m. to 5:00 p.m. or until business is completed. Teleconference participants must call the NPS office at (907) 644–3604 prior to the meeting to receive teleconference passcode information. For more detailed information regarding these meetings, or if you are interested in applying for SRC membership, contact Designated Federal Officer Brooke Merrell, Superintendent, at (907) 683–9627, or via email at *brooke_merrell@nps.gov* or Amy Craver, Subsistence Coordinator, at (907) 644–3604 or via email at *amy_craver@nps.gov* or Joshua Ream, Federal Advisory Committee Group Federal Officer, at (907) 644–3596 or via email at *joshua_ream@nps.gov.*

The Cape Krusenstern National Monument SRC will meet via teleconference or possibly in person from 1:00 p.m. to 5:00 p.m. on Monday, March 1, 2021, and from 9:00 a.m. to 12:00 p.m. on Tuesday March 2, 2021. The alternate meeting dates are Tuesday, March 9, 2021, from 1:00 p.m. to 5:00 p.m., and Wednesday, March 10, 2021, from 9:00 a.m. to 12:00 p.m. at the same location. Teleconference participants must call the NPS office at (907) 442–8342 prior to the meeting to receive teleconference passcode information. For more detailed information regarding this meeting or if you are interested in applying for SRC membership, contact Designated Federal Officer Maija Lukin, Superintendent, at (907) 442–8301, or via email at *maija_lukin@nps.gov* or Hannah Atkinson, Cultural Resource Specialist, at (907) 442–8342 or via email at *hannah_atkinson@nps.gov* or Joshua Ream, Federal Advisory Committee Group Federal Officer, at (907) 644–3596 or via email at *joshua_ream@nps.gov.*

The Lake Clark National Park SRC will meet via teleconference or possibly in person from 1:00 p.m. to 4:00 p.m. or until business is completed on Wednesday, March 24, 2021. The alternate meeting date is Wednesday, April 7, 2021. Teleconference participants must call the NPS office at (907) 644–3648 prior to the meeting to receive teleconference passcode information. For more detailed information regarding this meeting or if you are interested in applying for SRC membership, contact Designated Federal Officer Susanne Green, Superintendent, at (907) 644–3627, or via email at *susanne_green@nps.gov* or Liza Rupp, Subsistence Manager, at (907) 644–3648 or via email at *elizabeth_rupp@nps.gov* or Joshua Ream, Federal Advisory Committee Group Federal Officer, at (907) 644–3596 or via email at *joshua_ream@nps.gov.*

The Kobuk Valley National Park SRC will meet via teleconference or possibly in person from 1:00 p.m. to 5:00 p.m. on Wednesday, March 3, 2021, and from 9:00 a.m. to 12:00 p.m. on Thursday, March 4, 2021. The alternate meeting dates are Thursday, March 11, 2021, from 1:00 p.m. to 5:00 p.m., and Friday, March 12, 2021, from 9:00 a.m. to 12:00 p.m. at the same location. Teleconference participants must call the NPS office at (907) 442–8342 prior to the meeting to receive teleconference passcode information. For more detailed information regarding this meeting or if you are interested in applying for SRC membership, contact Designated Federal Officer Maija Lukin, Superintendent, at (907) 442–8301, or via email at *maija_lukin@nps.gov* or Hannah Atkinson, Cultural Resource Specialist, at (907) 442–8342 or via email at *hannah_atkinson@nps.gov* or Joshua Ream, Federal Advisory Committee Group Federal Officer, at (907) 644–3596 or via email at *joshua_ream@nps.gov.*

The Wrangell-St. Elias National Park SRC will meet via teleconference and possibly in person from 9:00 a.m. to 5:00 p.m. on Thursday, February 11, 2021, and from 9:00 a.m. to 5:00 p.m. or until business is completed on Friday, February 12, 2021. If business is completed on February 11, 2021, the meeting will adjourn, and no meeting will take place on February 12, 2021. The alternate meeting dates are Monday, March 1, 2021, from 9:00 a.m. to 5:00 p.m., and Tuesday, March 2, 2021, from 9:00 a.m. to 5:00 p.m. or until business is completed at the same location. Teleconference access to the meeting may be requested by calling the NPS office at (907) 822–7236 at least two business days prior to the meeting to receive teleconference passcode information. For more detailed information regarding these meetings, or if you are interested in applying for SRC membership, contact Designated Federal Officer Ben Bobowski, Superintendent, (907) 822–5234, or via email at *ben_bobowski@nps.gov* or Barbara Cellarius, Subsistence Coordinator, at (907) 822–7236 or via email at *barbara_cellarius@nps.gov* or Joshua Ream, Federal Advisory Committee Group Federal Officer, at (907) 644–3596 or via email at *joshua_ream@nps.gov.*

The Gates of the Arctic National Park SRC will meet via teleconference from 8:30 a.m. to 5:00 p.m. or until business is completed on both Wednesday, April 7, 2021, and Thursday, April 8, 2021. The alternate meeting dates are Wednesday, April 14, 2021, from 8:30 a.m. to 5:00 p.m., and Thursday, April 15, 2021, from 8:30 a.m. to 5:00 p.m. or until business is completed. Teleconference participants must call the NPS office at (907) 455–0639 prior to the meeting to receive teleconference passcode information. For more detailed information regarding this meeting or if you are interested in applying for SRC membership, contact Designated Federal Officer Greg Dudgeon, Superintendent, at (907) 457–5752, or via email at *greg_dudgeon@nps.gov* or Marcy Okada, Subsistence Coordinator, at (907) 455–0639 or via email at *marcy_okada@nps.gov* or Joshua Ream, Federal Advisory Committee Group Federal

Officer, at (907) 644–3596 or via email at *joshua_ream@nps.gov.*

**ADDRESSES:** The Aniakchak National Monument SRC will meet via teleconference. The Denali National Park SRC will meet via teleconference. The Cape Krusenstern National Monument SRC will meet in-person in the conference room at the Northwest Arctic Heritage Center, 171 3rd Avenue, Kotzebue, AK 99752. If an in-person meeting is not feasible or advisable, the meeting will be held solely by teleconference. The Lake Clark National Park SRC will meet in-person at the Newhalen School, 900 Schoolhouse Road, Iliamna, AK 99606. If an in-person meeting is not feasible or advisable, the meeting will be held solely by teleconference. The Kobuk Valley National Park SRC will meet in-person in the conference room at the Northwest Arctic Heritage Center, 171 3rd Avenue, Kotzebue, AK 99752. If an in-person meeting is not feasible or advisable, the meeting will be held solely by teleconference. The Wrangell-St. Elias National Park SRC will meet in-person at the NPS office in the Copper Center Visitor Center Complex, Wrangell-St. Elias National Park and Preserve, Mile 106.8 Richardson Highway, Copper Center, AK 99573 and via teleconference. If an in-person meeting is not feasible or advisable, the meeting will be held solely by teleconference. The Gates of the Arctic National Park SRC will meet via teleconference.

**SUPPLEMENTARY INFORMATION:** The NPS is holding meetings pursuant to the Federal Advisory Committee Act (5 U.S.C. Appendix 1–16). The NPS SRC program is authorized under title VIII, section 808 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3118).

SRC meetings are open to the public and will have time allocated for public testimony. The public is welcome to present written or oral comments to the SRC. SRC meetings will be recorded and meeting minutes will be available upon request from the Superintendent for public inspection approximately six weeks after the meeting.

*Purpose of the Meeting:* The agenda may change to accommodate SRC business. The proposed meeting agenda for each meeting includes the following:

1. Call to Order—Confirm Quorum
2. Welcome and Introduction
3. Review and Adoption of Agenda
4. Approval of Minutes
5. Superintendent's Welcome and Review of the SRC Purpose
6. SRC Membership Status
7. SRC Chair and Members' Reports
8. Superintendent's Report
9. Old Business
10. New Business
11. Federal Subsistence Board Update
12. Alaska Boards of Fish and Game Update
13. National Park Service Staff Reports
    a. Superintendent/Ranger Reports
    b. Resource Manager's Report
    c. Subsistence Manager's Report
14. Work Session
15. Public and Other Agency Comments
16. Set Tentative Date and Location for Next SRC Meeting
17. Adjourn Meeting.

SRC meeting location and date may change based on inclement weather or exceptional circumstances, including public health advisories or mandates. If the meeting date and location are changed, the Superintendent will issue a press release and use local newspapers and/or radio stations to announce the rescheduled meeting.

*Public Disclosure of Comments:* Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority:** 5 U.S.C. Appendix 2.

**Alma Ripps,**

*Chief, Office of Policy.*

[FR Doc. 2021–00726 Filed 1–13–21; 8:45 am]

BILLING CODE 4312–52–P

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## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–CHCH–DTS 29367; PPSECHCH00; PPMPSAS1Z.Y00000]**

### Written Determination: Bicycle Use at Chickamauga and Chattanooga National Military Park

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice of Written Determination.

**SUMMARY:** The National Park Service determines that allowing bicycles on certain administrative roads and two miles of existing hiking trails within Chickamauga and Chattanooga National Military Park is consistent with the protection of the park's natural, scenic, and aesthetic values; safety considerations; and management objectives; and will not disturb wildlife or park resources.

**DATES:** Comments on this written determination must be received by 11:59 EDT on February 16, 2021.

**ADDRESSES:** You may submit comments by either of the following methods:

(1) *Electronically:* Visit *https://parkplanning.nps.gov/chch* and click on the link entitled ''Open for Comment''.

(2) *By hard copy:* Mail to Park Superintendent, Chickamauga and Chattanooga National Military Park, 3370 Lafayette Road, Fort Oglethorpe, GA 30742.

*Document Availability:* The Proposed Bicycle Use Jackson Gap and John Smartt Trails Environmental Assessment and Finding of No Significant Impact provide information and context for this written determination and are available online at *https://parkplanning.nps.gov/chch.*

**FOR FURTHER INFORMATION CONTACT:** Brad Bennett, Superintendent, Chickamauga and Chattanooga National Military Park, (706) 866–9241 x115, *brad_bennett@nps.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

In 1890, Congress established Chickamauga and Chattanooga National Military Park (the park) to preserve the sites of some of the most remarkable maneuvers and brilliant fighting of the Civil War for historical and professional military study. In addition to the primary purpose for which it was established, the NPS manages the park to allow for recreational activity, which began to increase significantly in the late 1960s and early 1970s. In the 1980s, concerned about potential impacts from the use of mountain bicycles that were becoming very popular at the time, the NPS limited bicycles to (1) park roads open for motor vehicle use by the general public; and (2) a subset of administrative roads closed to motor vehicle use by the public, but open to motor vehicle use by the NPS for administrative purposes. This management framework continues today. Bicycles are allowed on park roads and on the following administrative roads:

- Dalton Ford Road
- Thedford Ford Road
- Vittetoe Road
- Mullis-Vittetoe Road
- the roads located within the South Post area
- the roads known as the Upper Truck Trail and the Lower Truck Trail.

In 2015, the NPS completed the Lookout Mountain Battlefield General Management Plan Amendment (GMPA). The GMPA establishes long-term goals for preserving the park's natural and cultural resources and improving interpretive, educational, and recreational opportunities for visitors. During the scoping period for the GMPA, the NPS received a request to open approximately two miles of the Jackson Gap Trail and the upper portion of the John Smartt Trail to bicycle use. Public comments received during the GMPA supported bicycle use on these two trails. In order to evaluate the potential impacts from the use of bicycles on these trails, the NPS issued the Proposed Bicycle Use Jackson Gap and John Smartt Trails Environmental Assessment (EA) in May 2019. The EA considered two alternatives: (1) A no action alternative that would continue to allow only hiking on these trails; and (2) the NPS preferred alternative that would also allow bicycling on the portions of these trails identified in the EA. The EA was open for public review and comment for 30 days. On September 13, 2019, the Regional Director for DOI Unified Region 2 South Atlantic–Gulf signed a Finding of No Significant Impact that identified the preferred alternative in the EA as the selected alternative.

Prior to designating the trails for bicycle use, NPS regulations at 36 CFR 4.30(d)(3) require the Superintendent to determine that the addition of bicycles is consistent with the protection of the park's natural, scenic and aesthetic values, safety considerations, and management objectives, and will not disturb wildlife or park resources. The regulations require that this written determination be published in the **Federal Register** for a 30-day public comment period. After the 30-day public review period concludes, the Regional Director will evaluate whether to approve the written determination. If the Regional Director approves the written determination, the Superintendent may designate the trails for bicycle use and will provide notice of such designation to the public under 36 CFR 1.7.

During the preparation of this written determination for the Jackson Gap and John Smartt Trails, the NPS recognized an opportunity to evaluate bicycle use on the administrative roads where bicycles are already allowed. NPS regulations require the Superintendent to determine that bicycle use on administrative roads is consistent with the protection of the park's natural, scenic, and aesthetic values; safety considerations; and management objectives; and will not disturb wildlife or park resources. 36 CFR 4.30(b). This is the same written determination that must be made before allowing bicycles on the Jackson Gap Trail and John Smartt Trails. For this reason, this written determination applies to two separate management actions: (1) Continuing to allow bicycles on the administrative roads identified above; and (2) allowing bicycles for the first time on the approximately two miles of the Jackson Gap Trail and the upper portion of the John Smartt Trail that are identified in the EA.

**Written Determination**

*Park Significance, Purpose, and Values*

As stated above, Congress established the park in 1890 for its historic significance. Consisting of more than 9,000 acres, the park is the largest federally protected Civil War battlefield in the United States. The park encompasses multiple administrative units along the Tennessee-Georgia border and contains nearly 1,500 commemorative features such as monuments, markers, and tablets. The park is located in Catoosa, Dade, and Walker Counties in Georgia, and Hamilton County in Tennessee.

A formal statement of the purpose and significance of the park is set forth in the park's 2016 Foundation Document. The purpose of the park is to preserve, protect, and interpret the nationally significant resources associated with the Civil War Campaign for Chattanooga and the 12,000 years of American Indian presence on Moccasin Bend. The fundamental historic and cultural resources and values that contribute to this purpose include battlefields and related sites, commemorative features, archeological resources, strategic and important views, and the contemplative experience.

In addition to these resources and values, the park includes one of the few large open spaces within and near the Chattanooga metropolitan area. The paved tour roads and hiking trails in the park provide outstanding opportunities for recreation and alternative ways to experience park landscapes. Use of the park for fitness activities like walking, running, and bicycling creates a unique opportunity to engage community members and foster the relevancy of the park with local stakeholders. The flora and fauna protected within the park provide the public with opportunities to view wildlife and enjoy natural beauty and scenic views. Recreation at the park provides an opportunity for current and future generations of visitors to experience and appreciate the park in different ways, while at the same time respecting and commemorating the solemnity of the battlefields.

*Management Objectives*

Continuing to allow bicycles on the subset of administrative roads where they are already allowed and adding bicycles to the two miles of existing hiking trails is consistent with the GMPA and the Foundation Document, which emphasize improvements to the visitor experience through the expansion of appropriate recreational activities, including bicycling, while protecting and preserving the park's natural and cultural resources.

Bicycling on the administrative roads has occurred for more than 100 years and is an established form of visiting and experiencing the park. Continuing to allow bicycles on the administrative roads would maintain an important recreational opportunity for park visitors. Many visitors access and travel through the park on bicycles. Bicycles provide visitors with a different experience than other forms of recreation and transportation, such as driving, horseback riding, or hiking. The administrative roads provide approximately 15.82 miles of bicycling access in the park. Bicycling on administrative roads provides more solitude than bicycling on park roads by removing bicyclists from public motor vehicle traffic. This allows for a more contemplative experience for those who seek to interact with and learn about the history of the park in that type of environment.

Adding bicycles to the hiking trails on Lookout Mountain is consistent with the GMPA and the Foundation Document, which emphasize improvements to the visitor experience through the expansion of appropriate recreational activities, including bicycling. These management actions are also consistent with Secretary of the Interior Order 3366, ''Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior,'' which directs the NPS to expand access to outdoor recreational opportunities on NPS-managed lands and waters.

Currently, bicycle traffic in Lookout Mountain Battlefield is limited to the Upper Truck Trail and Lower Truck Trail, administrative roads that connect the park to the regional bicycle trail system on the Tennessee side. Bicyclists can access the Upper Truck Trail from the Guild Trail, which is part of the regional bicycle trail system owned by the Lookout Mountain Conservancy. In the opposite direction, the Upper Truck Trail connects to the Jackson Gap and John Smartt trails in the park. These trails connect to the regional bicycle trail system in Georgia. Under current rules, when bicyclists reach the end of the Upper Truck Trail, in order to continue riding they must turn around and exit the park on the Tennessee side from where they entered. Otherwise, bicyclists must carry their bikes up hiking trails to exit the park on the Georgia side. Under these circumstances, hikers are the only user group that has continuous access through the park from the regional trail systems in Georgia and Tennessee. If bicycles were allowed on the two miles of the Jackson Gap Trail and the upper portion of the John Smartt Trail identified in the EA, then bicyclists could ride the entire 21 miles, through the park, in either direction between Cloudland Canyon State Park in Georgia and Chattanooga in Tennessee.

*Wildlife*

The NPS strives to maintain all components and processes of naturally evolving ecosystems, including the natural abundance, diversity, and ecological integrity of wildlife. Allowing bicycles on the Jackson Gap and upper John Smartt Trails would increase the overall human traffic on those trails by a small amount. The NPS expects most of the bicycle traffic to be slow due to steep grades. Bicycling on the Jackson Gap and John Smartt trails would occur in areas that already receive frequent human visitation. Typically, wildlife avoid these areas during the daylight to avoid humans. Nonetheless, bicycle use in these locations could create the potential for collisions with wildlife, especially along curves of the trails where forward visibility is diminished. It is unlikely that large species, such as deer, would be impacted. Smaller species, however, such as snakes or lizards, could be injured or killed by bicycle tires. These risks would likely have minimal adverse effects due to the expected low incidence rate of collisions on the Jackson Gap and upper John Smartt Trails. Effects upon wildlife from adding bicycles to the hiking trails were dismissed from further analysis in the EA because the NPS concluded they would be negligible and not likely result in unacceptable impacts.

The Endangered Species Act (ESA) requires examination of impacts to federally listed threatened, endangered, and candidate species. Section 7 of the ESA requires Federal agencies to consult with the U.S. Fish and Wildlife Service to ensure that any action authorized, funded, or carried out by the agency does not jeopardize the continued existence of listed species or critical habitats. NPS Management Policies 2006 require the NPS to examine the impacts to Federal candidate species, as well as state listed threatened, endangered, candidate, rare, declining, and sensitive species. Park records and field surveys did not identify the potential for individual species, or habitat for any of the known special status species, within the vicinity of the hiking trails where bicycles would be allowed nor in proximity to the administrative roads where bicycles are presently allowed. The U.S. Fish and Wildlife Service was consulted and determined the proposed action is not expected to significantly impact fish and wildlife resources under the jurisdiction of the U.S Fish and Wildlife Service. For these reasons, impacts to special status species from adding bicycles to the hiking trails were dismissed from detailed analysis in the EA.

Bicycle use on the administrative roads is considerably less than the volume of bicycles using the park roads. Over the past 34 years, relatively few wildlife-bicycle encounters have been observed on administrative roads and even fewer accidents have been reported by the public as a result of those encounters.

*Cultural Resources*

The NPS preserves and maintains 755 documented historic structures within the park. Most of these are monuments and markers that commemorate the troops that fought across the park landscapes during the two Civil War battles. The NPS expects that allowing bicycles on the hiking trails would result in a relatively small increase (approximately 200 bicyclists per year) to the total number of recreational visitors on the trails. The NPS does not expect this level of increased use would have a measurable impact to cultural resources within this area.

None of the park's documented commemorative features are located along the Jackson Gap Trail or the upper John Smartt Trail. These trails were likely constructed by the Civilian Conservation Corps under the Emergency Conservation Works Administration from either Camp Adolph Ochs or Camp Demaray, both located on Lookout Mountain. They have several dry laid retaining walls and wet weather drainage crossings that are constructed of native stone. These early 20th century stone walls and drainage features, the only extant cultural resources on the trails, have required minor and infrequent maintenance by the NPS. NPS staff within the Resource Management Division would increase the frequency of monitoring the retaining walls and drainages to ensure these resources are protected.

Staff from the NPS Southeast Archeological Center (SEAC) conducted shovel test surveys and a metal detector survey within the area potentially affected by bicycles on the hiking trails. Archeologists tested six sections of the trails, including areas proposed for widening a switchback and locations identified for sign and fence installation. The SEAC determined there was no potential for significant archeological resources to be harmed.

The NPS would implement management strategies to minimize impacts to resources on the trails, including: (1) Issuing citations for off-trail use; (2) increasing monitoring, education, and enforcement of regulations; (3) re-evaluating trail design; and (4) requesting assistance from trail advocates to establish a defined trail edge by barricading short cuts.

Over the last 34 years, the NPS has not recorded any adverse effects to historic structures or archeological resources caused by bicycle use on the administrative roads. For this reason, the NPS does not expect that the continued use of bicycles on the administrative roads would adversely affect the park's cultural resources.

*Natural, Scenic and Aesthetic Values*

The 30-mile network of trails within Lookout Mountain Battlefield and more than 80 miles of trail throughout the park provide ample opportunities for hikers to view wildlife and enjoy natural beauty and scenic views. The proposed actions would extend similar opportunities to bicyclists on approximately two miles of the Jackson Gap Trail and the upper portion of the John Smartt Trail and maintain similar opportunities for bicyclists on the administrative roads. Allowing bicycles on the hiking trails would allow more regional trail users to experience the scenic vistas and natural features in the park.

New signs on the hiking trails would be small scale, low stature, natural metal, and post-mounted with incised letters. Scale and placement would minimally affect the natural landscape. Installation would occur in disturbed locations within the trail beds. Kiosks at trailheads and other locations would be based on standard NPS designs that are appropriate for the selected locations. Aside from signage, bicycle use on the trails would not require the addition of any human-made features and would have no other visual impacts on natural landscape. Trail width and trail tread would remain the same as they currently are on both trails: Single-track trail with a width ranging from 2–4 feet with natural trail tread. Allowing bicycle use on these trails would not negatively impact opportunities for other visitors to experience scenic and aesthetic values on these trails.

Existing signs along the administrative roads provide route information and safety messages about bicycling. The continued use of bicycles on the administrative roads would not require the addition of new human-made features that would impact the natural landscape at the Chickamauga Battlefield.

*Safety Considerations*

The NPS will install new signs on the trails that convey safety messages about bicycling. Due to steep grades, the hiking trails would receive a ''Black Diamond'' designation according to the criteria that has been developed by the International Mountain Biking Association (IMBA). Signs and educational materials would be posted at the Jackson Gap trailhead, at the intersection of the John Smartt Trail and Upper Truck Trail, near switchbacks, and in other strategic locations to convey important safety and regulatory information. Signs and educational materials would provide guidance on trail etiquette to mitigate the potential for user conflict and to help establish user norms. Signs would provide route names, trail direction and appropriate practices for yielding to others.

The Jackson Gap and John Smartt Trails are well-constructed hiking trails within a natural zone of the park. They have existed for many decades in good condition without a high frequency of maintenance. Trail crews would continue to assess the Jackson Gap and John Smartt Trail during annual condition assessments, on regular patrols, and as reports are received concerning fallen trees or other hazards. Crews would continue to clean all drainages and culverts, remove loose rocks and debris, and prune vegetation as necessary. Trail rovers would conduct monthly monitoring to assist in identifying any additional maintenance needs. Volunteers will patrol these trails to provide safety information.

Since the implementation of the current incident reporting system, there have been no reports of bicycle accidents on park administrative roads. As stated above, the administrative roads have signs conveying wayfinding information and safety messages.

*Electric Bicycles*

The NPS will evaluate the environmental impacts of allowing electric bicycles (e-bikes) on the administrative roads and hiking trails under the National Environmental Policy Act (NEPA) after the conclusion of the written determination process. E-bikes will only be considered in locations where traditional bicycles are already allowed. E-bikes will not be allowed anywhere in the park until compliance with the NEPA is completed and the Superintendent designates those locations for e-bike use in accordance with 36 CFR 1.7.

*Determination*

Based upon the foregoing, the NPS determines that (1) continuing to allow bicycle use on the administrative roads identified above; and (2) allowing bicycle use on the two miles of the Jackson Gap Trail and the upper section of the John Smartt Trail (identified in the EA) are consistent with the protection of the park's natural, scenic and aesthetic values; safety considerations; and management objectives; and will not disturb wildlife or park resources.

**Jon Bennett,**

*Superintendent.*

[FR Doc. 2021–00595 Filed 1–13–21; 8:45 am]

BILLING CODE 4312–52–P

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–657 and 731–TA–1537 (Final)]**

### Chassis From China; Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–657 and 731–TA–1537 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of chassis from China, provided for in subheadings 8716.39.00 and 8716.90.50 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized. The determination with respect to imports of chassis alleged to be sold at less-than-fair-value is pending.

**DATE:** December 28, 2020.

**FOR FURTHER INFORMATION CONTACT:** Ahdia Bavari ((202) 205–3191), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Scope.*—For purposes of these investigations, Commerce has defined the subject merchandise as ''chassis and subassemblies thereof, whether finished or unfinished, whether assembled or unassembled, whether coated or uncoated, regardless of the number of axles, for carriage of containers, or other payloads (including self-supporting payloads) for road, marine roll-on/roll-off (RORO) and/or rail transport. Chassis are typically, but are not limited to, rectangular framed trailers with a suspension and axle system, wheels and tires, brakes, a lighting and electrical system, a coupling for towing behind a truck tractor, and a locking system or systems to secure the shipping container or containers to the chassis using twistlocks, slide pins or similar attachment devices to engage the corner fittings on the container or other payload.

Subject merchandise includes, but is not limited to, the following subassemblies:

- Chassis frames, or sections of chassis frames, including kingpins or kingpin assemblies, bolsters consisting of transverse beams with locking or support mechanisms, goosenecks, drop assemblies, extension mechanisms and/or rear impact guards;
- Running gear assemblies or axle assemblies for connection to the chassis frame, whether fixed in nature or capable of sliding fore and aft or lifting up and lowering down, which may or may not include suspension(s) (mechanical or pneumatic), wheel end components, slack adjusters, axles, brake chambers, locking pins, and tires and wheels;
- Landing gear (legs) or landing gear assemblies, for connection to the chassis frame, capable of supporting the chassis when it is not engaged to a tractor; and

• Assemblies and/or components that connect to the chassis frame or a section of the chassis frame, such as, but not limited to, pintle hooks or B-trains (which include a fifth wheel), which are capable of connecting a chassis to a converter dolly or another chassis.

Importation of any of these subassemblies, whether assembled or unassembled, constitutes an unfinished chassis for purposes of this investigation.

Subject merchandise also includes chassis, whether finished or unfinished, entered with or for further assembly with components such as, but not limited to: Hub and drum assemblies, brake assemblies (either drum or disc), axles, brake chambers, suspensions and suspension components, wheel end components, landing gear legs, spoke or disc wheels, tires, brake control systems, electrical harnesses and lighting systems.

Processing of finished and unfinished chassis and components such as trimming, cutting, grinding, notching, punching, drilling, painting, coating, staining, finishing, assembly, or any other processing either in the country of manufacture of the in-scope product or in a third country does not remove the product from the scope. Inclusion of other components not identified as comprising the finished or unfinished chassis does not remove the product from the scope.

This scope excludes dry van trailers, refrigerated van trailers and flatbed trailers. Dry van trailers are trailers with a wholly enclosed cargo space comprised of fixed sides, nose, floor and roof, with articulated panels (doors) across the rear and occasionally at selected places on the sides, with the cargo space being permanently incorporated in the trailer itself. Refrigerated van trailers are trailers with a wholly enclosed cargo space comprised of fixed sides, nose, floor and roof, with articulated panels (doors) across the rear and occasionally at selected places on the sides, with the cargo space being permanently incorporated in the trailer and being insulated, possessing specific thermal properties intended for use with self-contained refrigeration systems. Flatbed (or platform) trailers consist of load-carrying main frames and a solid, flat or stepped loading deck or floor permanently incorporated with and supported by frame rails and cross members.

The finished and unfinished chassis subject to this investigation are typically classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 8716.39.00 or 8716.90.50 (statistical reporting numbers 8716.39.0090 or 8716.90.5060). Imports of finished and unfinished chassis may also be reported under HTSUS statistical reporting number 8716.90.5010. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.''

*Background.*—The final phase of these investigations is being scheduled pursuant to section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)), as a result of an affirmative preliminary determination by Commerce that certain benefits which constitute subsidies within the meaning of § 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in China of chassis. The investigations were requested in petitions filed on July 30, 2020, by the Coalition of American Chassis Manufacturers, consisting of Cheetah Chassis Corporation, Fairless Hills, Pennsylvania, Hercules Enterprises, LLC, Hillsborough, New Jersey, Pitts Enterprises, Inc., Pittsview, Alabama, Pratt Industries, Inc., Bridgman, Michigan, and Stoughton Trailers, LLC, Stoughton, Wisconsin.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

*Participation in the investigations and public service list.*—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.*—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Staff report.*—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on March 4, 2021, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

*Hearing.*—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Tuesday, March 16, 2021. Information about the place and form of the hearing, including about how to participate in and/or view the hearing, will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.* Interested parties should check the Commission's website periodically for updates. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before Thursday, March 11, 2021. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on Monday, March 15, 2021. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

*Written submissions.*—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is March 10 2021. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is March 24, 2021. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before March 24, 2021. On April 8, 2021, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before April 12, 2021, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

*Authority:* These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: January 8, 2021.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2021–00622 Filed 1–13–21; 8:45 am]

**BILLING CODE 7020–02–P**

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## INTERNATIONAL TRADE COMMISSION

**[Investigation No. TA–201–77]**

### Fresh, Chilled, or Frozen Blueberries; Change in Starting Time of January 12, 2021 Hearing to 9:00 a.m. From 9:30 a.m.

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**FOR FURTHER INFORMATION CONTACT:** Jordan Harriman (202–205–2610), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:** On October 9, 2020, the Commission published a notice in the **Federal Register** concerning the institution and scheduling of Investigation No. TA–201–77 pursuant to section 202 of the Trade Act of 1974 (''the Act'') to determine whether fresh, chilled, or frozen blueberries are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported articles (85 FR 64162, as amended by 85 FR 66360 on October 19, 2020). This notice updates the time at which the hearing on injury will begin. This hearing, originally scheduled to begin at 9:30 a.m. EST on January 12, 2021, now will begin at 9:00 a.m. EST on January 12, 2021.

*Authority:* This investigation is being conducted under authority of Section 202 of the Act; this notice is published pursuant to section 202(b)(3) of the Act.

By order of the Commission.

Issued: January 8, 2021.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2021–00623 Filed 1–13–21; 8:45 am]

**BILLING CODE 7020–02–P**

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## JUDICIAL CONFERENCE OF THE UNITED STATES

### Advisory Committee on Criminal Rules; Meeting of the Judicial Conference

**AGENCY:** Judicial Conference of the United States.

**ACTION:** Advisory Committee on Criminal Rules, Notice of open meeting.

**SUMMARY:** The Advisory Committee on Criminal Rules will hold a meeting on May 11, 2021 in Washington, DC. The meeting will be open to public observation but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

**DATES:** May 11, 2021, 9 a.m.–5 p.m. (Eastern).

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

**Authority:** 28 U.S.C. 2073.

Dated: January 11, 2021.

**Rebecca A. Womeldorf,**

*Rules Committee Secretary, Rules Committee Staff.*

[FR Doc. 2021–00676 Filed 1–13–21; 8:45 am]

**BILLING CODE 2210–55–P**

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## JUDICIAL CONFERENCE OF THE UNITED STATES

### Advisory Committee on Bankruptcy Rules; Meeting of the Judicial Conference

**AGENCY:** Judicial Conference of the United States.

**ACTION:** Advisory Committee on Bankruptcy Rules, notice of open meeting.

**SUMMARY:** The Advisory Committee on Bankruptcy Rules will hold a meeting on April 8, 2021 and April 9, 2021 in San Diego, CA. The meeting will be open to public observation but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

**DATES:** April 8–9, 2021, 9 a.m.–5 p.m. (Pacific).

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

**Authority:** 28 U.S.C. 2073.

Dated: January 11, 2021.

**Rebecca A. Womeldorf,**

*Rules Committee Secretary, Rules Committee Staff.*

[FR Doc. 2021–00675 Filed 1–13–21; 8:45 am]

**BILLING CODE 2210–55–P**

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Advisory Committee on Appellate Rules; Meeting of the Judicial Conference

**AGENCY:** Judicial Conference of the United States.

**ACTION:** Advisory Committee on Appellate Rules, notice of open meeting.

**SUMMARY:** The Advisory Committee on Appellate Rules will hold a meeting on April 7, 2021 in San Diego, CA. The meeting will be open to public observation but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

**DATES:** April 7, 2021, 9 a.m.–5 p.m. (Pacific).

**FOR FURTHER INFORMATION CONTACT:** Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

**Authority:** 28 U.S.C. 2073.

Dated: January 11, 2021.

**Rebecca A. Womeldorf,**

*Rules Committee Secretary, Rules Committee Staff.*

[FR Doc. 2021–00674 Filed 1–13–21; 8:45 am]

**BILLING CODE 2210–55–P**

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Advisory Committee on Evidence Rules; Meeting of the Judicial Conference

**AGENCY:** Judicial Conference of the United States.

**ACTION:** Advisory Committee on Evidence Rules, notice of open meeting.

**SUMMARY:** The Advisory Committee on Evidence Rules will hold a meeting on April 30, 2021 in Washington, DC. The meeting will be open to public observation but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

**DATES:** April 30, 2021, 9 a.m.–5 p.m. (Eastern).

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

**Authority:** 28 U.S.C. 2073.

Dated: January 11, 2021.

**Rebecca A. Womeldorf,**

*Rules Committee Secretary, Rules Committee Staff.*

[FR Doc. 2021–00677 Filed 1–13–21; 8:45 am]

**BILLING CODE 2210–55–P**

## DEPARTMENT OF JUSTICE

### Bureau of Alcohol, Tobacco, Firearms and Explosives

**[OMB Number 1140–0030]**

### Agency Information Collection Activities; Proposed eCollection of eComments Requested; Extension with Change of a Currently Approved Collection; Records and Supporting Data: Importation, Receipt, Storage, and Disposition by Explosives Importers, Manufacturers, Dealers, and Users

**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 15, 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: Anita Scheddel, Program Analyst, Firearms and Explosives Industry Division, Explosives Industry Programs Branch, Mailstop 6N–518, either by mail at 99 New York Ave. NE, Washington, DC 20226, or by email at *eipbinformationcollection@atf.gov,* or by telephone at (202) 648–7120.

**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): Extension with change of a currently approved collection.

2. *The Title of the Form/Collection:* Records and Supporting Data: Importation, Receipt, Storage, and Disposition by Explosives Importers, Manufacturers, Dealers, and Users Licensed Under Title 18 U.S.C. Chapter 40 Explosives.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): None.

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: Business or other for-profit.

Other (if applicable): None.

Abstract: This information collection requires the maintenance of records showing daily activities in the importation, manufacture, receipt, storage, and disposition of all explosive materials covered under 18 U.S.C. Chapter 40 Explosives. These records must also show where and to whom explosive materials are sent, thereby ensuring that any diversions will be readily apparent, and that ATF will be immediately notified if these materials are lost or stolen.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 9,411 respondents will prepare records for this information collection annually, and it will take each respondent approximately 12.6 hours to prepare the required records.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 592,893 hours, which is equal to 47,055 (# of annual responses) * 12.6 (# of hours per response).

7. *An Explanation of the Change in Estimates:* The adjustments associated with this collection include a decrease in the number of respondents, responses and total burden hours by 516, 2,580, and 32,508 hours respectively, since the last IC renewal in 2017.

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: January 11, 2021.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2021–00743 Filed 1–13–21; 8:45 am]

**BILLING CODE 4410–02–P**

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. DEA–768]**

### Bulk Manufacturer of Controlled Substances Application: Siemens Healthcare Diagnostics Inc.

**AGENCY:** Drug Enforcement Administration, Justice.

**ACTION:** Notice of application.

**SUMMARY:** Siemens Healthcare Diagnostics Inc. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

**DATES:** Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before March 15, 2021. Such persons may also file a written request for a hearing on the application on or before March 15, 2021.

**ADDRESSES:** Written comments should be sent to: Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

**SUPPLEMENTARY INFORMATION:** In accordance with 21 CFR 1301.33(a), this is notice that on December 11, 2020, Siemens Healthcare Diagnostics Inc., 100 GBC Drive, Mailstop 514, Newark, Delaware 19702–2461, applied to be registered as a bulk manufacturer of the following basic class of controlled substance:

| Controlled substance | Drug code | Schedule |
|---|---|---|
| Ecgonine | 9180 | II |

The company plans to produce the listed controlled substance in bulk to be used in the manufacture of DEA exempt products. No other activities for these drug codes are authorized for this registration.

**William T. McDermott,**

*Assistant Administrator.*

[FR Doc. 2021–00648 Filed 1–13–21; 8:45 am]

**BILLING CODE P**

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. DEA–766]**

### Bulk Manufacturer of Controlled Substances Application: IsoSciences, LLC

**AGENCY:** Drug Enforcement Administration, Justice.

**ACTION:** Notice of application.

**SUMMARY:** IsoSciences, LLC has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTAL INFORMATION** listed below for further drug information.

**DATES:** Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before March 15, 2021. Such persons may also file a written request for a hearing on the application on or before March 15, 2021.

**ADDRESSES:** Written comments should be sent to: Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

**SUPPLEMENTARY INFORMATION:** In accordance with 21 CFR 1301.33(a), this is notice that on November 11, 2020, IsoSciences, LLC, 340 Mathers Road, Ambler, Pennsylvania 19002–3420, applied to be registered as an bulk manufacturer of the following basic class(es) of controlled substance(s):

| Controlled substance | Drug code | Schedule |
|---|---|---|
| Cathinone | 1235 | I |
| Methcathinone | 1237 | I |
| Lysergic acid diethylamide | 7315 | I |
| Marihuana | 7360 | I |

| Controlled substance | Drug code | Schedule |
|---|---|---|
| Tetrahydrocannabinols | 7370 | I |
| 3,4-Methylene dioxyamphetamine. | 7400 | I |
| 3,4-Methylenedioxy-N-ethylamphetamine. | 7404 | I |
| 3,4-Methylene dioxymethamphetamine. | 7405 | I |
| 5-Methoxy-N–N-dimethyltryptamine. | 7431 | I |
| Alpha-methyltryptamine | 7432 | I |
| Bufotenine | 7433 | I |
| Diethyltryptamine | 7434 | I |
| Dimethyltryptamine | 7435 | I |
| Psilocybin | 7437 | I |
| Psilocyn | 7438 | I |
| 5-Methoxy-N,N-diisopropyltryptamine. | 7439 | I |
| Dihydromorphine | 9145 | I |
| Heroin | 9200 | I |
| Nicocodeine | 9309 | I |
| Nicomorphine | 9312 | I |
| Normorphine | 9313 | I |
| Thebacon | 9315 | I |
| Normethadone | 9635 | I |
| Acryl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacrylamide). | 9811 | I |
| Para-Fluorofentanyl | 9812 | I |
| 3-Methylfentanyl | 9813 | I |
| Alpha-methylfentanyl | 9814 | I |
| Acetyl-alpha-methylfentanyl | 9815 | I |
| N-(2-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)propionamide. | 9816 | I |
| Acetyl Fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide). | 9821 | I |
| Butyryl Fentanyl | 9822 | I |
| 4-Fluoroisobutyryl fentanyl (N-(4-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)isobutyramide). | 9824 | I |
| 2-methoxy-N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide. | 9825 | I |
| Beta-hydroxyfentanyl | 9830 | I |
| Beta-hydroxy-3-methylfentanyl | 9831 | I |
| Alpha-methylthiofentanyl | 9832 | I |
| 3-Methylthiofentanyl | 9833 | I |
| Furanyl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylfuran-2-carboxamide). | 9834 | I |
| Thiofentanyl | 9835 | I |
| Beta-hydroxythiofentanyl | 9836 | I |
| N-(1-phenethylpiperidin-4-yl)-N-phenyltetrahydrofuran-2-carboxamide. | 9843 | I |
| Amphetamine | 1100 | II |
| Methamphetamine | 1105 | II |
| Codeine | 9050 | II |
| Dihydrocodeine | 9120 | II |
| Oxycodone | 9143 | II |
| Hydromorphone | 9150 | II |
| Hydrocodone | 9193 | II |
| Isomethadone | 9226 | II |
| Methadone | 9250 | II |
| Methadone intermediate | 9254 | II |
| Morphine | 9300 | II |
| Thebaine | 9333 | II |
| Levo-alphacetylmethadol | 9648 | II |
| Oxymorphone | 9652 | II |
| Thiafentanil | 9729 | II |
| Alfentanil | 9737 | II |
| Sufentanil | 9740 | II |
| Carfentanil | 9743 | II |
| Fentanyl | 9801 | II |

The company plans to manufacture bulk controlled substances for use in analytical testing. In reference to drug codes 7360 (Marihuana) and 7370 (Tetrahydrocannabinols), the company plans to bulk manufacture these drugs as synthetics. No other activities for these drug codes are authorized for this registration.

**William T. McDermott,**

*Assistant Administrator.*

[FR Doc. 2021–00647 Filed 1–13–21; 8:45 am]

BILLING CODE P

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## DEPARTMENT OF JUSTICE

**[OMB Number 1121–0269]**

## Agency Information Collection Activities: Proposed Collection; Comments Requested; Reinstatement, With Change, of a Previously Approved Collection for Which Approval Has Expired: 2020 Census of Publicly Funded Forensic Crime Laboratories (CPFFCL)

**AGENCY:** Bureau of Justice Statistics, Department of Justice.

**ACTION:** 60-day notice.

**SUMMARY:** The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until March 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments especially on 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 Connor Brooks, Statistician, Law Enforcement Statistics Unit, Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531 (email: *Connor.Brooks@usdoj.gov*; phone: 202–514–8633).

**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 Bureau of Justice Statistics, 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:* Reinstatement of the Census of Publicly Funded Forensic Crime Laboratories, with changes, of a previously approved collection for which approval has expired.

(2) *The Title of the Form/Collection:* 2020 Census of Publicly Funded Forensic Crime Laboratories.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is CFCL–20. The applicable component within the Department of Justice is the Bureau of Justice Statistics, Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

This information collection is a census of federal, state, and local publicly funded forensic crime laboratories that analyze criminal evidence. This data collection follows the 2014 study and will collect information on personnel, budgets, workloads, policies, and procedures of crime laboratories. BJS plans to field the 2020 CPFFCL from May to October 2021. The census form was assessed by practitioners and subject matter experts to update it from the 2014 form and ensure its relevance to forensic crime laboratories as well as reduce respondent burden. The form was then cognitively tested with 23 forensic crime laboratories of different sizes, regions, and government levels. In addition to collecting detailed data for the 2020 reference year, CPFFCL will also collect summary data for the 2019 reference year.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* A projected 500 respondents will take an average of 2.5 hours each to complete form, including time to research or find information not readily

available. BJS expects additional time will be needed for data quality follow-up for up to 250 respondents, which will require another 15 minutes of respondent's time.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1312.5 total burden hours associated with this information collection.

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: January 11, 2021.

**Melody Braswell,**

*Department Clearance Officer for PRA,U.S. Department of Justice.*

[FR Doc. 2021–00746 Filed 1–13–21; 8:45 am]

BILLING CODE 4410–02–P

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

On December 29, 2020, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Eastern District of Texas in the lawsuit entitled *United States et al.* v. *E. I. du Pont de Nemours and Company and The Chemours Company FC, LLC, Case No. 1:20–cv–00556.* The proposed Consent Decree resolves the United States' claims, on behalf of the National Oceanic and Atmospheric Administration and the United States Department of the Interior, as Federal Trustees, joined by the State of Texas, on behalf of the Texas Commission on Environmental Quality, the Texas General Land Office, and the Texas Parks and Wildlife Department, as State Trustees, pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), and the Texas Hazardous Substances Spill Prevention and Control Act, Texas Water Code §§ 26.261–26.267, for the recovery of damages for injury to, destruction of, loss of, and loss of use of natural resources and their services resulting from the release of hazardous substances at and from the Beaumont Works Industrial Park Complex into the West Marsh Site located in Beaumont, Texas. Plaintiffs are trustees for those natural resources. The proposed Consent Decree resolving these claims provides for Settling Defendants to implement a Restoration Project that entails recording a conservation easement on a 500-acre tract of valuable but otherwise unprotected habitat near the injured area (the ''Acquisition Property'') to compensate for the natural resource damages. The Restoration Project also includes the performance of baseline biological monitoring of the Acquisition Property, annual monitoring of Acquisition Property, and legal enforcement of the Conservation Easement. The Decree also provides for payments by Settling Defendants totaling $198,853 to reimburse the Trustees' costs of assessment and for payment of the Trustees' Future Costs of overseeing the Restoration Project.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States et al.* v. *E. I. du Pont de Nemours and Company and The Chemours Company FC, LLC, Case No. 1:20-cv-00556,* D.J. Ref. No. 90–11–3–10852. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

| *To submit comments:* | *Send them to:* |
|---|---|
| By e-mail | *pubcomment-ees.enrd@usdoj.gov.* |
| By mail | Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611. |

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $11.75 (25 cents per page reproduction cost) payable to the United States Treasury.

**Kenneth G. Long,**

*Acting Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2021–00689 Filed 1–13–21; 8:45 am]

BILLING CODE 4410–15–P

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

On December 16, 2020, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of Delaware in the lawsuit entitled *United States* v. *Delaware,* Civil Action No. 1:20–cv–01703–UNA.

The United States filed this lawsuit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against the state of Delaware. The complaint seeks recovery of past costs that the United States Environmental Protection Agency (EPA) incurred in responding to releases or threatened releases of hazardous substances at a former landfill at the Governor Bacon Health Center/Fort DuPont State Park in New Castle County, Delaware. Under the consent decree, Delaware agrees to pay $1,889,992.30 of EPA's past response costs, while the United States Department of Defense (Settling Federal Agency) agrees to pay $1,700,993.07 of EPA's past response costs. In return, the United States agrees not to sue Delaware under Sections 107 and 113 of CERCLA, and Delaware agrees not to sue the United States for any portion of EPA's past response costs, including under Sections 107 or 113 of CERCLA.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Delaware,* D.J. Ref. No. 90–11–3–11709. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

| *To submit comments:* | *Send them to:* |
|---|---|
| By email | *pubcomment-ees.enrd@usdoj.gov.* |
| By mail | Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611. |

During the public comment period, the consent decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $4.75 (25 cents per page reproduction cost) payable to the United States Treasury.

**Jeffrey Sands,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2021–00589 Filed 1–13–21; 8:45 am]

**BILLING CODE 4410–15–P**

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## DEPARTMENT OF JUSTICE

**[OMB Number 1140–NEW]**

## Agency Information Collection Activities; Proposed eCollection of eComments Requested; New Information Collection; Residency and Citizenship Questionnaire—ATF Form 8620.58

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

**ACTION:** 60-day notice.

**SUMMARY:** The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until March 15, 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 Ave. 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:* Residency and Citizenship Questionnaire.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): ATF Form 8620.58.

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 Residency and Citizenship Questionnaire—ATF Form 8620.58 will be used to determine if a candidate for Federal or contractor employment at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), meets U.S. residency and citizenship requirements.

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) * .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: January 11, 2021.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2021–00756 Filed 1–13–21; 8:45 am]

**BILLING CODE 4410–14–P**

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## DEPARTMENT OF JUSTICE

**[OMB Number 1110–0060]**

## Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection; Biographic Verification Form (1–791)

**AGENCY:** Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

**ACTION:** 60-day notice.

**SUMMARY:** Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until March 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments especially on 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 Gerry Lynn Brovey, Supervisory Information Liaison Specialist, FBI, CJIS, Resources Management Section, Administrative Unit, Module C–2, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306; phone: 304–625–4320 or email *glbrovey@fbi.gov.* Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted via email to *OIRA_submission@omb.eop.gov.*

**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 Bureau of Justice Statistics, 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: Revision of a currently approved collection.

(2) The Title of the Form/Collection: Biographic Verification Form.

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection: The form number is 1–791. The applicable component within the Sponsoring component: Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division.

(4) Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Agencies authorized to submit applicant fingerprints into the Next Generation Identification (NGI) system for noncriminal justice purposes such as employment, benefits, and licensing. This form is completed to obtain a biographic verification (name check) for an applicant when the fingerprints have been rejected twice for quality to ensure eligible individuals are not denied employment, benefits, or licensing.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 50,000 respondents will complete each form within approximately 8 minutes.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 6,700 total annual burden hours associated with this collection.

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: January 11, 2021.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2021–00747 Filed 1–13–21; 8:45 am]

**BILLING CODE 4410–02–P**

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## DEPARTMENT OF JUSTICE

**[OMB Number 1110–0072]**

## Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Currently Approved Collection; Address Verification/Change Request Form (1–797)

**AGENCY:** Criminal Justice Information Services Division, Department of Justice.

**ACTION:** 30-day notice.

**SUMMARY:** Department of Justice (DOJ), Federal Bureau of Investigation, Criminal Justice Information Services Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for an additional 30 day until February 16, 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:** 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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

**Overview of This Information Collection**

(1) Type of Information Collection: Extension of a currently approved collection.

(2) Title of the Form/Collection: Address Verification/Change Request Form (1–797).

(3) Agency form number, if any, and the applicable component of the Department sponsoring the collection: Agency form number: 1–797. Sponsoring component: Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. The form can be used by any requester who wishes to correct or verify the address submitted on their Departmental Order 556–73 request.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that 780 respondents will complete each form within approximately 2 minutes.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 26 total annual burden hours associated with this collection.

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: January 11, 2021.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2021–00749 Filed 1–13–21; 8:45 am]

**BILLING CODE 4410–14–P**

**DEPARTMENT OF LABOR**

**Office of the Secretary**

## Agency Information Collection Activities; Submission for OMB Review; Comment Request; Honoring Investments in Recruiting and Employing (HIRE) American Veterans (HIRE Vets) Medallion Program

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Veterans' Employment and Training Service (VETS)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before February 16, 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.

*Comments are invited on:* (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Anthony May by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** The HIRE Vets Medallion Program is a voluntary employer recognition program administered by the Department of Labor—Veteran's Employment and Training Service (VETS). Through the HIRE Vets Medallion Program, VETS will solicit voluntary applications from employers for an award called the HIRE Vets Medallion Award. These awards are intended to recognize employer efforts to recruit, employ, and retain our Nation's veterans. All employers who employ at least one employee are eligible to apply for the Award.

For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 3, 2020 (85 FR 69648).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–VETS.

*Title of Collection:* Honoring Investments in Recruiting and Employing (HIRE) American Veterans (HIRE Vets) Medallion Program.

*OMB Control Number:* 1293–0015.

*Affected Public:* Private Sector—Businesses or other for-profits.

*Total Estimated Number of Respondents:* 7,236.

*Total Estimated Number of Responses:* 34,711.

*Total Estimated Annual Time Burden:* 59,571 hours.

*Total Estimated Annual Other Costs Burden:* $0.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: January 8, 2021.

**Anthony May,**

*Management and Program Analyst.*

[FR Doc. 2021–00700 Filed 1–13–21; 8:45 am]

**BILLING CODE 4510–79–P**

**DEPARTMENT OF LABOR**

**Office of the Secretary**

## Agency Information Collection Activities; Submission for OMB Review; Comment Request; Certification and Qualification To Examine, Test, Operate Hoists and Perform Other Duties

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Mining Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before February 16, 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.

*Comments are invited on:* (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Anthony May by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811(a), authorizes the Secretary of Labor

(Secretary) to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

Under section 103(a) of the Mine Act, authorized representatives of the Secretary or Secretary of Health and Human Services must make frequent inspections and investigations in coal or other mines each year for the purpose of gathering information with respect to mandatory health or safety standards.

Title 30 Code of Federal Regulations (CFR) 75.159 and 77.106 require coal mine operators to maintain a list of persons who are certified and qualified to perform duties under 30 CFR parts 75 and 77, such as examining for hazardous conditions, testing for methane and oxygen deficiency, conducting tests of air flow, performing electrical work, repairing energized surface high-voltage lines, and performing the duties of hoisting engineer. This information collection is necessary to ensure that only persons who are properly trained and sufficiently experienced are permitted to perform these duties. Although MSHA does not specify a format for the recordkeeping, it normally consists of the names of the certified and qualified persons listed in two columns on a sheet of paper. One column is for certified persons and the other is for qualified persons.

Sections 75.100 and 77.100 pertain to the certification of certain persons to perform specific examinations and tests. Sections 75.155 and 77.105 outline the requirements necessary to be qualified as a hoisting engineer or hoist-man. Under sections 75.160, 75.161, 77.107, and 77.107–1, the mine operator must have an approved training plan developed to train and retrain the qualified and certified persons to effectively perform their tasks.

These regulations recognize State certification and qualification programs. However, where State programs are not available, MSHA may certify and qualify miners to carry out certain functions prescribed in the Mine Act. Under this program, MSHA will qualify or certify individuals if these individuals meet the requirements for qualification or certification, fulfill any applicable retraining requirements, and remain employed at the same mine or by the same independent contractor.

Applications for MSHA qualification or certification are submitted to the MSHA Qualification and Certification Unit in Denver, Colorado. MSHA Form 5000–41, Safety & Health Activity Certification or Hoisting Engineer Qualification Request provides the coal mining industry with a standardized reporting format that expedites the certification and qualification process while ensuring compliance with the regulations. MSHA uses the information collected through this form to determine if applicants satisfy the requirements to obtain the certification or qualification sought. Persons must meet certain minimum experience requirements depending on the type of certification or qualification sought. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 28, 2020 (85 FR 60837).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–MSHA.

*Title of Collection:* Certification and Qualification To Examine, Test, Operate Hoists and Perform Other Duties.

*OMB Control Number:* 1219–0127.

*Affected Public:* Businesses or other for-profits institutions.

*Total Estimated Number of Respondents:* 674.

*Total Estimated Number of Responses:* 3,259.

*Total Estimated Annual Time Burden:* 330 hours.

*Total Estimated Annual Other Costs Burden:* $56.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: January 8, 2021.

**Anthony May,**

*Management and Program Analyst.*

[FR Doc. 2021–00698 Filed 1–13–21; 8:45 am]

BILLING CODE 4510–43–P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Delinquent Filer Voluntary Compliance Program

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before February 16, 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.

*Comments are invited on:* (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Mara Blumenthal by telephone at 202–693–8538 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** Section 502(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), authorizes the Secretary of Labor to assess civil penalties against plan administrators who fail or refuse to file complete and timely annual reports (Form 5500 Annual Return/Report of Employee Benefit Plan (OMB Control

Number 1210–0110)) as required under section 101(b)(1) of ERISA and ERISA regulations codified in 29 CFR part 2520. Under the Delinquent Filer Voluntary Compliance Program (DFVC) Program, administrators otherwise subject to the assessment of higher civil penalties are permitted to pay reduced civil penalties for voluntarily complying with the annual reporting requirements under Title I of ERISA. This information collection requires providing data necessary to identify the plan along with the penalty payment. With respect to most pension plans and welfare plans, the requirement is satisfied by sending, along with the penalty payment, a copy of the delinquent annual report (without attachments or schedules) which is filed with the Department at a different address under the EFAST system. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 20, 2020 (85 FR 66580).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–EBSA.

*Title of Collection:* Delinquent Filer Voluntary Compliance Program.

*OMB Control Number:* 1210–0089.

*Affected Public:* Private Sector—Businesses or other for-profits and not-for-profit institutions.

*Total Estimated Number of Respondents:* 10,350.

*Total Estimated Number of Responses:* 10,350.

*Total Estimated Annual Time Burden:* 518 hours.

*Total Estimated Annual Other Costs Burden:* $778,718.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: January 8, 2021.

**Mara Blumenthal,**

*Senior PRA Analyst.*

[FR Doc. 2021–00696 Filed 1–13–21; 8:45 am]

BILLING CODE 4510–29–P

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## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Request for Assistance From the Department of Labor, Employee Benefits Security Administration

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before February 16, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Mara Blumenthal by telephone at 202–693–8538 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** EBSA assists participants in understanding their rights, responsibilities, and benefits under employee benefits laws and intervenes informally on their behalf with the plan sponsor in order to assist them in obtaining the health and retirement benefits to which they may have been inappropriately denied, which can avert the necessity for a formal investigation or a civil action. EBSA has made a request for assistance form available on its website for those wishing to obtain assistance in this manner. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 20, 2020 (85 FR 66580).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–EBSA.

*Title of Collection:* Request for Assistance from the Department of Labor, Employee Benefits Security Administration.

*OMB Control Number:* 1210–0146.

*Affected Public:* Individuals or Households.

*Total Estimated Number of Respondents:* 5,582.

*Total Estimated Number of Responses:* 5,582.

*Total Estimated Annual Time Burden:* 2,791 hours.

*Total Estimated Annual Other Costs Burden:* $0.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: January 8, 2021.

**Mara Blumenthal,**

*Senior PRA Analyst.*

[FR Doc. 2021–00697 Filed 1–13–21; 8:45 am]

BILLING CODE 4510–29–P

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Nondiscrimination Compliance Information Reporting

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Office of the Assistant Secretary for Administration and Management (OASAM)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before February 16, 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.

*Comments are invited on:* (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Anthony May by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

The Department of Labor collects the Nondiscrimination Compliance Information Reporting data to help ensure a recipient of certain DOL Federal financial assistance programs does not discriminate in the administration, management, or operation of programs and activities. Information collections covered by this ICR include:

• A grant applicant providing assurance that the applicant is aware of and, as a condition of receipt of Federal financial assistance, agrees to comply with the assurance requirements;

• a DOL funds recipient maintaining a record of E.O. characteristics data and a log of any E.O. complaints for activities under an applicable DOL funded program;

• a person who believes a relevant E.O. requirement may have been violated filing a complaint with either the funds recipient or with the DOL Civil Rights Center;

• a State periodically filing a plan outlining administrative methods the State will use to ensure funds are not used in a discriminatory manner; and

• a DOL funds recipient posting required notices.

For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 12, 2020 (85 FR 71946).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–OASAM.

*Title of Collection:* Certification and Qualification To Examine, Test, Operate Hoists and Perform Other Duties.

*OMB Control Number:* 1225–0077.

*Affected Public:* Businesses or other for-profits institutions.

*Total Estimated Number of Respondents:* 69,603.

*Total Estimated Number of Responses:* 56,425,453.

*Total Estimated Annual Time Burden:* 350,450 hours.

*Total Estimated Annual Other Costs Burden:* $0.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: January 8, 2021.

**Anthony May,**

*Management and Program Analyst.*

[FR Doc. 2021–00699 Filed 1–13–21; 8:45 am]

BILLING CODE 4510–04–P

## LIBRARY OF CONGRESS

### Copyright Office

**[Docket No. 2019–03]**

### Compendium of U.S. Copyright Office Practices

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Update to Compendium of U.S. Copyright Office Practices, Third Edition.

**SUMMARY:** The U.S. Copyright Office is releasing an update to its administrative manual, the Compendium of U.S. Copyright Office Practices, Third Edition.

**DATES:** The updated version of the *Compendium of U.S. Copyright Office Practices, Third Edition* is available on the Office's website as of January 28, 2021.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, by email at *rkas@copyright.gov*; Catherine Zaller Rowland, Associate Register of Copyrights and Director of Public Information and Education, by email at *crowland@copyright.gov*; or Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov.* All can be reached by telephone at 202–707–8350.

**SUPPLEMENTARY INFORMATION:** The *Compendium of U.S. Copyright Office Practices, Third Edition* (''*Compendium*'') is the administrative manual of the U.S. Copyright Office. It ''explains many of the practices and procedures concerning the Office's mandate and statutory duties under title 17 of the United States Code.'' 37 CFR 201.2(b)(7). ''It is both a technical manual for the Copyright Office's staff, as well as a guidebook for authors, copyright licensees, practitioners, scholars, the courts, and members of the general public.'' *Id.* The Office conducted a comprehensive revision of the *Compendium* beginning in 2011, which it released as the Third Edition in December 2014. 79 FR 78911 (Dec. 31, 2014). The Third Edition was revised in 2017 to ensure that its contents were consistent with case law and Office practices. 82 FR 45625 (Sept. 29, 2017).

The Office released the latest draft revision to the *Compendium* on March 15, 2019 (the ''Public Draft''). The Office posted the Public Draft on its public website and invited comments until May 31, 2019. The draft included proposed revisions to the sections discussing useful articles to reflect the Supreme Court's decision in *Star Athletica* v. *Varsity Brands,* 137 S. Ct. 1002 (2017), as well as to reflect rulemakings the Office conducted in the intervening months since the last revision. It provided information regarding the new group registration options for unpublished works, unpublished photographs, published photographs, and serial, newspaper, and newsletter issues. It discussed the new deposit requirements for literary monographs, printed music, and photographic databases, as well as the changes to regulations governing use of the Single Application and Standard Application forms and technical upgrades to the electronic registration system. It also clarified certain Office practices, including under what circumstances the Office communicates with applicants, attempts to correct deficiencies in an application, registers claims with annotations, and refuses registration. An archived copy of the Public Draft is available on the Office's website.[1]

The Office received twenty-four comments on the Public Draft.[2] After carefully reviewing these comments, the Office decided to further revise a number of sections of the Public Draft. The result is a final update (the ''Final Version''), which is discussed in detail below. Additionally, the Final Version: reflects the adoption of the Music Modernization Act in October 2018, the Marrakesh Treaty Implementation Act in October 2018, and the National Defense Authorization Act for Fiscal Year 2020; the Supreme Court's recent decisions in *Georgia* v. *Public.Resource.Org, Inc.,* 140 S. Ct. 1498 (2020), and *Fourth Estate Public Benefit Corp.* v. *Wall-Street.com, LLC,* 139 S. Ct. 881 (2019); the Second Circuit's May 2020 decision in *Sohm* v. *Scholastic Inc.,* 959 F.3d 39 (2d Cir. 2020); as well as rulemaking activity that post-dated the Public Draft, including changes to the fee schedule and to regulations regarding registration of architectural works, the group registration option for short online literary works, group registration options for serials, newspapers, and newsletters, and changes in Office practices regarding the group registration option for unpublished works. A complete list of all sections that have been added, amended, revised, or removed is available on the Office's website at *https://www.copyright.gov/comp3/revisions.html,* along with redlines that provide a direct comparison between the Final Version and the 2017 version of the Third Edition of the *Compendium.*

Key revisions to the Public Draft reflected in the Final Version are as follows:

**1. Correspondence and Refusals**

Many of the comments regarding the Public Draft related to changes in language providing examiners with greater discretion to correspond with the applicant regarding deficiencies in an application or to refuse registration.[3] Commenters expressed concern that these revisions signaled a change in the Office's procedures that would provide fewer opportunities for applicants to correct problems in their applications. Some commenters feared that an undue focus on examining applications efficiently could come at the expense of providing adequate customer service to applicants.

The Office has demonstrated a commitment to providing assistance to applicants as they navigate the registration process, including by publishing the *Compendium* and Circulars, providing a variety of other guidance documents on the Office's website, and through the Office of Public Information and Education. Examiners have always had discretion to correspond with applicants or refuse registration in appropriate cases. In the vast majority of cases, where the issues in an application can be fixed, Examiners have corresponded—and will continue to correspond—with the applicant to request a clarification or to correct information on the application.

However, correspondence is not always the preferred way to address issues. Correspondence can require a great deal of resources in certain situations and may not be productive. For example, if an applicant submits the incorrect form, transferring the application onto the correct form may require collecting additional fees or a different deposit, which cannot be done simply through correspondence. Other times, an applicant may make the same mistake repeatedly, despite guidance from the Office. In these situations, examiners need discretion to cease or forego correspondence and refuse registration. As explained in sections 608, 1702, and 1703 of the *Compendium,* if an application is refused, the applicant will be informed in writing of the refusal, will receive an explanation of the basis for the refusal, and will have the option to appeal the refusal.

To explain how the Office handles correspondence and refusals, and to address the concerns described above expressed by commenters, the Office has revised numerous sections of the *Compendium.* First, the Office further revised several sections in Chapter 600 to clarify how an examiner will respond to a variance in an application. The Office uses the term ''variance'' to refer to any instance in which registration materials submitted by an applicant provide conflicting information. Section 603 explains that there are four types of variances: immaterial; material but resolvable by reviewing the registration materials; material but potentially resolvable through correspondence; and material and not resolvable. The Office added definitions of the terms ''variance,'' ''material,'' and ''immaterial'' to the Glossary and added links to the sections in which those terms are used throughout Chapter 600. The Office removed the term ''deficiencies'' from sections 603.2(C) and 605.3(D) and replaced it with the term ''variances.'' Similarly, the term ''substantial variance'' was replaced with ''material variance'' in sections 610.6(B), 610.6(D)(1), 610.6(D)(4), 613.10(B), 613.10(E)(1)(b), and 618.8(E).

Second, the Office revised sections 603 and 603.2(C) to explain that only in ''exceptional cases'' will the examiner refuse registration based on material variances. Sections 618.1, 618.4(A), 618.8(A)(1), 618.8(A)(7), 618.8(D), 619.13(K), 621.8(C)(2), 621.9(F), and 621.9(H)(2) have been updated to identify specific situations in which the Office will typically correspond with an applicant.

Third, the Office provided representative examples of exceptional circumstances in which an examiner will refuse registration without providing the applicant an opportunity to correct or clarify information in the

[1] *See https://www.copyright.gov/comp3/docs/compendium-draft.pdf.*

[2] The comments can be found at *https://regulations.gov/document/COLC-2019-0001-0001/comment.*

[3] American Society of Media Photographers Comment at 2–3 (May 31, 2019); Copyright Alliance Comment at 2–5 (May 31, 2019); Digital Media Licensing Association Comment at 2–3 (May 31, 2019); Graphic Artists Guild Comment at 2–3 (May 31, 2019); Kernochan Center Comment at 1–2 (May 30, 2019); National Music Publishers' Association Comment at 2 (May 31, 2019); National Press Photographers Association Comment at 3–6 (May 31, 2019); North American Nature Photography Association Comment at 2–3 (May 31, 2019); Shaftel & Schmelzer Comment at 2–3 (May 30, 2019).

application. Section 603.2(C) provides examples of an applicant who repeatedly omits required information despite multiple reminders from the Office that the information is required, and an applicant who submits the wrong form and filing fee. Other examples of instances in which an examiner will refuse registration appear in sections 618.8(C), 618.8(C)(6), 618.8(D), 618.8(D)(4), 621.9(E)(6), 621.9(F), and 621.9(F)(4), which clarify that the Office will refuse registration if the claim appears to be limited to uncopyrightable or *de minimis* material or if there appears to be no basis for asserting a valid claim in the work.

Fourth, in response to the public comments discussed above, the Office revised several sections 204.3 and 609.1 of the *Compendium* to state that an examiner ''may,'' instead of ''will,'' refuse registration if the applicant has not satisfied the formal and legal requirements for registration or if the applicant selects the wrong version of the Standard Application.

Fifth, some revisions addressed important group registration issues. It can be particularly important for examiners to have the discretion to refuse registration when applicants fail to comply with the requirements for group registrations. The Copyright Office imposes requirements for group registration options to streamline the examination of multiple works within one application. Group registration options are not practicable unless applicants comply with the basic requirements for those options. Nevertheless, the Office has revised the *Compendium* to allow examiners discretion to correspond with applicants in appropriate circumstances. In response to comments from the North American Nature Photography Association,[4] the Office revised section 1105.3 to clarify that examiners may refuse registration if the applicant failed to satisfy the eligibility requirements for a particular option or may correspond if they determine the problem can easily be addressed. Similarly, changes to section 1114.1 clarify that if a photographer submits more than 750 photographs in connection with an application for group registration of photographs, the Office may register the first 750 photographs listed in the application and remove the rest of the photos from the claim, or may refuse registration.

Finally, the Office carefully considered a proposal relating to proper deposits but determined that the proposal would not be beneficial to the copyright system. The National Music Publishers' Association expressed concern about an examiner's discretion to refuse to register a work if the deposit was submitted in the wrong format, as discussed in section 625.2(B).[5] The Office cannot register a work unless a proper deposit has been submitted. *See* section 204.3. Nor can the Office examine a work unless it is submitted in a form that can be opened and displayed by the Office's system. The Office added new technology to the electronic system in December 2017 that prevents the submission of deposits in an incorrect format except in cases where the applicant uploads the deposit on a zip file or submits an electronic application and mails a physical copy that contains unacceptable file formats.[6] The Office also updated the automated emails sent in response to applicants when they submit applications and the instructions on the deposit submission screen to indicate that deposits must be submitted in an acceptable file format, with a link to the list of acceptable formats.[7] In light of these improvements, the Office believes it is appropriate to refuse registration if an applicant submits a deposit in an incorrect format.

**2. New Topics Reflecting Court Decisions**

The Public Draft has been updated in light of the Supreme Court's decision in *Fourth Estate Public Benefit Corp.* v. *Wall-Street.com, LLC,* 139 S. Ct. 881 (2019), which held that the owner of a copyright for a U.S. work must have received a registration decision from the Office prior to instituting a claim for infringement in a U.S. court. Prior to this decision, the Office had maintained in the *Compendium* that this was the correct reading of the Copyright Act rather than the ''application rule,'' which would have required only the submission of an application to register the copyright. The Court confirmed that the Office's interpretation was correct. The *Compendium* was revised in several places to delete references to courts that applied the ''application rule.'' Several sections in Chapter 1600 were also revised to reflect the Supreme Court's discussion of preregistration in the *Fourth Estate* decision.

The Public Draft has also been revised to account for the Supreme Court's decision in *Georgia* v. *Public.Resource.Org, Inc.,* 140 S. Ct. 1498 (2020), regarding the government edicts doctrine. Section 313.6(C)(2) was revised in light of the Court's holding that any ''work that [a] judge or legislator produces in the course of his [or her] judicial or legislative duties is not copyrightable.'' *Id.* at 1506. This section has also been revised to include several quotations from the decision that explain the Court's reasoning. Section 717 was also revised in light of the Court's decision to clarify that annotated codes or compilations of legal documents may be copyrightable if they contain sufficient original authorship and were prepared by a private party or non-lawmaking official not acting under the control of a legislative or judicial body.

The Office also revised the Public Draft to account for the Second Circuit's May 2020 decision in *Sohm* v. *Scholastic Inc.,* 959 F.3d 39 (2d Cir. 2020), holding that a registration for a collective work may cover the component works in certain circumstances even if the authors and titles of those works are not listed in the application. The Office added a citation to this case in section 613.10(F) and removed the citation to *Muench* v. *Houghton Mifflin,* a decision from the Southern District of New York that was abrogated by the decision in *Sohm.*

**3. THREAD–ID**

When an examiner sends an email concerning an application, the Office assigns a ''THREAD ID'' to that communication. Several commenters objected to the sections in the Public Draft that indicated that a claim would be closed if an applicant did not include the THEAD–ID in the body of an email replying to email correspondence from the examiner. Commenters suggested that it should be sufficient if the THREAD–ID or case number is included either in the subject line of a response email or the body of the response message.[8] While the Office understands this concern, the current system requires the inclusion of the THREAD–ID in the body of an email reply for the Office to be able to connect correspondence received from applicants with the relevant claims. As mentioned in a recent Statement of Policy and Notification of Inquiry regarding registration modernization, the Office intends to simplify the system

[4] North American Nature Photography Association Comment at 2–3.

[5] National Music Publishers' Association Comment at 2.

[6] *See https://www.copyright.gov/eco/updates/eco-updates.pdf.*

[7] *See https://www.copyright.gov/eco/help-file-types.html.*

[8] Copyright Alliance Comment at 7; Digital Media Licensing Association Comment at 4; Graphic Artists Guild, Inc. Comment at 3; National Press Photographers Association Comment at 5; Shaftel & Schmelzer Comment at 2.

for claims and correspondence when designing the next system.[9]

In response to public comments, the Office updated sections 605.3(A), 605.4, and 605.6(B) in the Final Version to clarify that the THREAD–ID must be included in the body, not the subject line, of any email reply from an applicant in order to connect the reply with the appropriate record. In November 2019, the Office also amended its correspondence templates so that all outgoing emails contain a clear warning at the beginning of the message instructing applicants that the THREAD–ID must be included in the body of any reply and explaining that the examiner will not receive the reply if the applicant does not comply with these instructions. The amended text found in all outgoing emails can be found in section 605.4 of the Final Version. The Office believes the revised text in the *Compendium* and in outgoing correspondence provide clear notice to applicants about the requirement to include the THREAD–ID in all email correspondence with examiners.

**4. No Replies**

One commenter urged the Office to reconsider its practice of closing a claim if there has been no response to written correspondence from the Office within forty-five days. The commenter noted that the original message could have been caught in a spam filter or overlooked by the applicant due to a variety of circumstances. The commenter requested that the Office call and send a second email to each applicant who has not responded to written correspondence within thirty days.[10]

It would be burdensome for the Office to call and send an email to every applicant who has not responded to written correspondence and technical constraints do not allow for that process to be automated within the current system. The Office will consider whether to include that functionality in the next system. Applicants bear the responsibility of providing the Office with accurate contact information and monitoring their email inboxes for correspondence. In the event that an applicant's failure to reply to written correspondence was caused by extraordinary circumstances outside the applicant's control, the applicant may use the process outlined in section 605.8 of the *Compendium* to request that a claim be reopened.

**5. Publication**

Several commenters requested additional guidance in the *Compendium* regarding the distinction between published and unpublished works.[11] The Office issued a Notification of Inquiry in December 2019 seeking comments from the public about possible strategies through which the Office can provide additional guidance regarding the determination as to whether a work has been published, particularly in the online context.[12] The Office is in the process of reviewing the 71 comments and reply comments it received in response to that Notification to determine the appropriate next steps. In the meantime, as suggested by commenters,[13] the Office has provided additional examples of published and unpublished works in various sections of the *Compendium.* Specifically, the Office added several examples to sections 1114.1, 1114.5, and 1114.6(G) to clarify that both the distribution of photographs and the offering of one or more copies of a photograph to someone for the purpose of further distribution or public display constitute publication. These new examples should also assist applicants in determining the date of first publication of their photographs. One of the examples explicitly discusses the scenario raised by the National Press Photographers Association (''NPPA'') in which a photographer posts photographs in a password-protected site with authorization for clients to download and distribute the photographs, and clarifies that this constitutes publication. The Office also revised section 1906.1, as requested by NPPA, to clarify that sending an image to *any* client, as opposed to only newspapers, magazines or websites, with a license authorizing further distribution constitutes publication.[14] The Office revised the definition of ''copies'' and ''phonorecords'' in the Glossary to clarify that they include the singulars ''copy'' and ''phonorecord,'' so that distributing a single copy or phonorecord of a work can constitute publication. The Office made a similar revision to sections 1905 and 1905.1, which discuss distribution to the public. The Office also revised section 1008.3 to clarify that streaming is a performance, which may not constitute publication of the streamed work absent the distribution or offering of copies of the work, including for purposes of furthering the performance or enjoyment of the work.[15]

The Office declined the request of one commenter to revise language in section 1906.1 that ''[o]ffering a work directly to the public constitutes publication where the offeror has completed all the steps necessary for distribution to the public, such that the only further action required is an offeree's action in obtaining a copy or phonorecord.'' [16] This sentence in section 1906.1 and the examples that follow focus on defining what constitutes an offer. The definition of publication in the statute and the language in the surrounding paragraphs of this section of the *Compendium* make it sufficiently clear that an offer to distribute copies of a work only constitutes publication if the purpose is for the copies to be further distributed, publicly performed, or publicly displayed.

**6. Duplicate Submissions**

Two commenters raised a concern regarding perceived inconsistent implementation of the Office's policy to not knowingly issue multiple registrations for the same claim, described in section 602.4(E) of the *Compendium.* Because the system does not allow the public to access information about pending applications, more than one music publisher may attempt to register the same composition without knowing that another application was filed previously. The commenters claimed that, in this situation, the Office has refused some applications and directed applicants to seek a supplementary registration that identifies additional authors and claimants, while the Office has instructed other applicants to remove the co-author/co-claimant identified on the first application from the second application, which results in the same work being registered twice.[17] The commenters requested that applicants in this situation be permitted to file applications for supplementary registrations at no cost.[18]

The Office is aware that multiple registrations for the same work can be issued if the examiner is not aware of

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[9] 85 FR 12704, 12711 (Mar. 3, 2020).

[10] Shaftel & Schmelzer Comment at 2–3.

[11] Graphic Artists Guild, Inc. Comment at 3–4; National Press Photographers Association Comment at 10–11; North American Nature Photography Association Comment at 4.

[12] 84 FR 66328 (Dec. 4, 2019).

[13] National Press Photographers Association Comment at 7–9; American Society of Media Photographers Comment at 3.

[14] National Press Photographers Association Comment at 8.

[15] 17 U.S.C. 115.

[16] Daniel Ballard Comment at 1 (June 3, 2019).

[17] The Office is not aware of any instances in which it has instructed an applicant seeking to register a work that has already been registered to remove the name of a co-author or co-claimant from an application, but it would be happy to discuss any such instances with applicants.

[18] National Music Publishers' Association Comment at 2–3; Copyright Alliance Comment at 7.

the prior registration at the time of the examination. There are also adverse claims, in which a second applicant claims to be the true author or owner of the copyright rather than the first applicant. If the examiner is aware of the prior registration and the applicant claims to be a co-claimant, the examiner should generally advise the applicant to seek a supplementary registration to identify additional authors and claimants, which would require payment of an additional fee. Additionally, recordation can be used to establish the filer's co-ownership in the previously registered work. To the extent the application is filed by a new owner after a transfer from a previous owner, that is established in the public catalog by recording the transfer rather than amending the registration.

**7. Copyright Protection and Other Forms of Legal Protection**

As suggested by the Kernochan Center,[19] the Office revised sections 310.11, 905, and 924.5 to clarify that a work may be eligible for copyright protection, regardless of whether it may or may not be protected by other forms of legal protection.

**8. Useful Articles and Works of Artistic Craftsmanship**

Chapter 900 of the *Compendium* has been updated to reflect the Supreme Court's decision in *Star Athletica* v. *Varsity Brands,* 137 S. Ct. 1002 (2017). In providing new guidance for claims involving useful articles, the chapter also addresses claims concerning works of artistic craftsmanship. In light of our new guidance, the Kernochan Center and attorney Daan Erikson requested additional guidance on how to determine whether a work is a useful article.[20]

In reviewing Chapter 900, the Kernochan Center noted that ''there are no examples of useful articles that in their entirety might be perceived as [pictorial, graphic, or sculptural] works.'' [21] It advised the Office ''to say up front that separability analysis doesn't apply to the entire shape of the article.'' [22] In consideration of this comment, the Office revised several sections, including sections 924, 924.2, 924.3(B), 924.3(E), 924.3(F), and 925.3, to confirm that copyright does not protect the overall shape of a useful article. Rather, copyright protects the design features that can be conceptually separated from a useful article.

In addition, the Office revised the draft to provide guidance on how to determine whether an item has an intrinsic utilitarian function and thus should be treated as a ''useful article.'' The *Compendium* makes clear that the Office does not consider the intended use of articles in industry when deciding whether a design is copyrightable. The Kernochan Center probed, however, ''[d]oesn't 'intended use' bear on whether the article has an 'intrinsic utilitarian purpose'?'' [23] In response, the Office revised sections 924.1 and 924.3(D) to confirm that when determining whether an article has an intrinsic utilitarian function, the Office focuses on the inherent, observable characteristics of the article, but will not consider the subjective intent or subjective reaction of any person in relation to that article. The Office also expanded sections 911, 920.2, 924.1, and 924.3(A) to list additional examples of two- and three-dimensional useful articles and confirmed that templates, stencils, and many costume designs are useful articles.[24]

Even if an article has an intrinsic utilitarian function, it will not necessarily be considered a useful article. Copyright law defines a useful article as ''an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.'' [25] In response to a comment,[26] the Office revised several sections to explain that certain articles, including maps, x-rays, and technical drawings, are not useful articles because their only utilitarian function is to convey information.

The Office has made other revisions to clarify the two-step test to determine whether the design of a useful article may be eligible for copyright protection.[27] Regarding the first prong, the *Compendium* further explains that the artistic feature that is extracted must ''qualify as a nonuseful pictorial, graphic, or sculptural work on its own.'' *Star Athletica,* 137 S. Ct. at 1013. Because prior to the imaginary removal of the feature the work was a useful article and the removed feature must not be a useful article, at least some portion of the useful article must remain in the viewer's mind after the artistic feature has been imaginatively removed from the article. The Kernochan Center asked the Office to confirm whether '''some portion' needs to remain physically or imaginatively,'' and, ''if the latter,'' whether the Office is adopting the test proposed in *Kieselstein Cord* v. *Accessories by Pearl*.[28] 632 F.2d 989 (2d Cir. 1980). The Office revised the *Compendium* to specify that the Supreme Court explicitly declined to adopt alternate tests that had previously been applied by lower courts, and therefore the Office only applies the separability test set forth in *Star Athletica,* 137 S. Ct. at 1010–12. The Kernochan Center also suggested revisions to sections 924.3(A) and (B), which the Office adopted for clarity.[29]

In addition to revising chapter 900 to provide additional guidance on useful articles, the Office also revised several sections addressing works of artistic craftsmanship. The Kernochan Center requested clarification on how the Office distinguished a useful article from a work of artistic craftsmanship.[30] In response, the Office revised sections 925.1, 925.2, and 925.3 to modify the definition of works of artistic craftsmanship, add context from legislative history and examples of works with mechanical or utilitarian aspects, and provide additional information about the test the Office uses to determine if a work of artistic craftsmanship is copyrightable. The Office also clarified in section 908.1 that jewelry may be registered as works of artistic craftsmanship in certain circumstances (such as earrings, necklaces, rings), but jewelry designs affixed to useful articles are subject to the separability test.

**9. Puppets**

Shaftel & Schmelzer suggested that the *Compendium* explicitly address how puppets are examined and whether applicants should classify them as works of artistic craftsmanship or sculptures.[31] The Office edited several sections of the *Compendium,* including sections 503.1(B), 618.4(C), 808.11(D), 904, 910, to clarify that toys, dolls, stuffed animals, and puppets are typically treated as three-dimensional sculptural works.

**10. Short Online Literary Work**

The Final Version includes several sections that discuss the short online literary work group registration option, which was announced in the **Federal Register** on June 22, 2020.[32] Sections 1111.1 through 1111.7(R) discuss the

[19] Kernochan Center Comment at 2.

[20] *Id.* at 2–3; Daan Erikson Comment at 1–2 (May 31, 2019).

[21] Kernochan Center Comment at 2.

[22] *Id.*

[23] *Id.* at 3.

[24] Daan Erikson Comment at 2.

[25] 17 U.S.C. 101 (defining ''useful article'').

[26] Daan Erikson Comment at 1–2.

[27] *See id.* at 2.

[28] Kernochan Center Comment at 3.

[29] *Id.* at 2.

[30] *Id.* at 3–4.

[31] Shaftel & Schmelzer Comment at 4.

[32] *See* 85 FR 37341 (June 22, 2020).

eligibility requirements for this group registration option, as well as the filing fee and deposit requirements, and provide guidance on completing the application. The Office revised sections 1407 and 1802 to add the new procedure for correcting or amending the information in a registration for short online literary works. This group registration option is also now listed as one of the available group registration options in numerous sections of the *Compendium.*

**11. Architectural Works**

The Final Version reflects the new requirements for registering architectural works, as described in the final rule published on April 23, 2019.[33] Section 503.1(B) includes updated examples of what constitutes an architectural work. Sections 609.2, 618.4(B), 619.13(E) and 1509.3(D) have been updated to reflect the requirement to submit an online application and provide a digital deposit when applying to register an architectural work. Sections 1404 and 1411 clarify that paper applications may not generally be used to register architectural works and describe the procedure for requesting a waiver to permit a paper application.

**12. Group Newspapers**

The Office amended several parts of section 1108 to reflect the changes to the regulations for the group registration option for newspapers that were finalized in November 2019.[34] The Office revised sections 1108.5 and 1116 to reflect the requirement to upload digital deposits and the phase-out of the option to submit microfilm as a deposit. The Office also updated section 1108.5(B) to explain the new procedure for requesting special relief from the digital deposit requirement.

**13. Group Newsletters**

The Final Version reflects the changes to the group registration option for newsletters, as described in the final rule published in May 2020.[35] The Office revised sections 1109 and 1116 and the Glossary to remove the requirement that newsletters be published at least two days per week to qualify for this registration option. Section 1109.5(B) was edited to clarify that special characters should not be included in the file name for the deposits. Section 1109.5(D) was updated to reflect the new procedure for requesting special relief from the digital deposit requirement.

**14. Group Serials**

The Office amended the Public Draft to reflect the changes to regulations for the group registration option for serials that were finalized in November 2019.[36] The Office revised several parts of sections 1107.5, 1107.6, 1116 and the Glossary to reflect the requirement to upload digital deposits and the phase-out of paper applications and physical deposits. The Office also updated section 1107.5(B) to explain the new procedure for requesting special relief from the digital deposit requirement.

**15. Group Photographs**

The NPPA requested clarification regarding a few points relating to group registration options for photographs. First, with respect to registration of a group of published photographs, the NPPA requested that the *Compendium* state more clearly that each photograph in the group must have been *first* published in the same calendar year, and that the applicant must specify the date each photograph was *first* published.[37] The Office revised section 1114.1 of the *Compendium* to make that point more clearly.

NPPA also requested clarification on the title and file names for specific photographs.[38] The Office revised section 1114.6(A) to specify that the title and file name for a particular photograph can be the same or different and that the file names provided with the list of titles must correspond to the file names included in the deposit. It is essential that the applicant provide title and file names and that each file name correspond to the file name of a photograph included in the deposit. If there is a discrepancy between the file names listed in the application and/or title list and those included in the deposit, section 1114.6 provides that the examiner may ask the applicant to exclude certain photographs from the claim or may refuse registration for the entire group, depending on the scope of the discrepancy.

**16. Unpublished Works**

The Office recently created a new group registration option for Unpublished Works. Since it issued the Public Draft, the Office developed new practices relating to the most common problems it has observed relating to these applications. The new practices are reflected in sections 1106, 1106.2, 1106.4, 1106.5, 1106.5(B), and 1106.5(E).

Specifically, sections 1106.4 and 1106.5(B) explain that, if the titles provided in the application do not match the file names shown in the deposit, the examiner may remove the mismatched titles and files from the record. These sections also include new examples that illustrate this practice. Section 1106.5(B) explains that if the applicant fails to provide titles of the works, the examiner may correspond with the applicant or may refuse registration. It also indicates that if an applicant provides a ''collection'' title (in addition to providing separate titles for each work), the collection title will be removed.

Section 1106 has been revised to specify that if any of the works are uncopyrightable, the examiner will refuse to register those works and issue a registration for any remaining works in the group, rather than requesting permission to remove the uncopyrightable works. This section also provides that applicants may appeal the examiner's decision.

Section 1106.2 explains that an application for a group registration for unpublished works must be filed using the online application designated for a ''Group of Unpublished Works.'' This section has been revised to clarify that if an applicant attempts to use the Standard Application or a paper application to register a group of unpublished works, the examiner may register the first copyrightable work listed in the application or the first copyrightable work uploaded to the electronic registration system. The examiner may notify the applicant that the registration extends only to the title listed in the certificate and explain how the remaining works may be registered. The examiner may also add an annotation stating that the registration only extends to the title listed in the certificate and remove the titles and deposits for the remaining works from the record.

The Office removed the language in section 1106.4 that encouraged applicants to submit their files in a zip folder. The Office has determined that PA/SR claims account for the majority of GRUW submissions, and it is difficult to examine these claims if they are submitted in a zip folder.

Sections 1802.4 and 1802.7(C) were revised to clarify that a supplementary registration may not be used to transform a registration for a group of unpublished works into a registration for a single published work. This is similar to the rule that applies to a

[33] *See* 84 FR 16784 (Apr. 23, 2019).

[34] *See* 84 FR 60917 (Nov. 12, 2019).

[35] *See* 85 FR 31981 (May 28, 2020).

[36] *See* 84 FR 60918 (Nov. 12, 2019).

[37] National Press Photographers Association Comment at 5–6.

[38] *Id.* at 7.

registration for an unpublished collection.

In addition to these changes in the *Compendium,* the Office plans to create a new landing page with links to a new circular, a set of FAQs, video tutorials, and help text for this new group registration option. The Office believes these new practices and updated materials will clarify the application procedures for this group registration option, making it easier for applicants to comply with the requirements.

**17. Unpublished Collections**

Chapter 1100 of the *Compendium* notes in several places that the unpublished collections registration option was eliminated as of March 15, 2019. Graphic Artists Guild commented that visual artists used that registration option frequently in the past and requested that the note regarding its elimination appear as a separate section for ease of reference.[39] The Office added section 1106.6, which discusses the elimination of the unpublished collections registration option in detail.

The Office also added cross-references in section 901 to the sections in the *Compendium* discussing the group registration option for unpublished works, as well as all other available registration options for visual art works.[40]

**18. Collective Works**

The Copyright Alliance criticized the description of the originality requirement for compilations in section 312.2 of the *Compendium,* which states that the Office ''generally will not register a compilation containing only two or three elements, because the selection is necessarily de minimis.'' The Copyright Alliance claims the Office relies on this language to refuse to register compilations containing fewer than four works.[41]

The Office has not revised this section of the *Compendium.* Section 312.2 clearly states that a compilation is registrable if there is ''some minimal degree of creativity'' in the selection, coordination, or arrangement of the component materials. The Office believes it is helpful to inform the public that, in general, the selection of fewer than four elements will not satisfy the originality requirement. However, the Office does not have a bright line rule, either in the *Compendium* or in practice, regarding the number of works that must be included in a compilation to be registrable. Each application is examined individually to determine if the work displays the requisite originality.

**19. Sound Recording/Recorded Work**

Section 1104 discusses the option to register a sound recording and a musical work embodied in that recording in one application with one filing fee. It explains that if the Office determines the works are eligible to be registered in one application, it will issue one certificate of registration for both works with a registration number beginning with the prefix SR or SRu, depending on whether the works are published or unpublished. NMPA expressed concern that the policy of registering a sound recording and a musical work with only an SR registration number may confuse those seeking to locate a musical work copyright owner and suggested that the Office grant two separate registration numbers in this situation, one for the sound recording and one for the musical work.[42] The Office appreciates this concern, but longstanding regulations only permit the Office to issue one registration based on one application. Applicants who want to have separate registration numbers for a sound recording and the musical work may submit separate applications on Form PA and Form SR.

**20. Musical Works**

The Final Version includes changes to the sections discussing the deposit requirements for musical works, which were updated in January 2018.[43] The Office revised Circular 50 (Musical Compositions) to reflect this change prior to releasing the Public Draft, but it inadvertently failed to make similar edits to the *Compendium.* Several parts of section 1509.2 were updated to explain that ''best edition'' copies are required if a musical work is published in printed form, but are not required if the work is published solely on phonorecords or in a motion picture.

**21. Artificial Intelligence**

Engine Advocacy and the Cyberlaw Clinic offered suggestions for evaluating the registrability of works created using artificial intelligence.[44] The Office recognizes that the increasing use of artificial intelligence in developing creative works raises important copyright issues. This is an evolving area of copyright law, and the Office is participating in and monitoring discussions on these issues. For example, the Office held a symposium with the World Intellectual Property Organization (WIPO) entitled Copyright in the Age of Artificial Intelligence in February 2020. The Office has no plans to amend the relevant sections of the *Compendium* at this time.

**22. Statutory Developments**

The Copyright Alliance noted that the Public Draft did not mention many new procedures the Office has established under the Music Modernization Act, including procedures for filing schedules for pre-1972 sound recordings, notices of noncommercial use, or opt-outs, and that references to pre-1972 sound recordings are inaccurate or out of date.[45] The Office is considering updating the *Compendium* to reflect all changes made in response to the passage of the Music Modernization Act, including new procedures adopted by the Office in connection with pre-1972 sound recordings and other procedures noted by the Copyright Alliance. Those changes would be made in a future revision of the *Compendium.* In the meantime, the Office added the Music Modernization Act to the list of major copyright legislation, explained that it provides remedies for unauthorized use of pre-1972 sound recordings if certain schedules are filed, revised its discussion of preemption, and provided a link to the Copyright Office's web page discussing pre-1972 sound recordings. Sections 102.5, 102.7, 202.1, 313.5, 608, 803.5(D), 1702.

The Final Version adds the Marrakesh Treaty to the list of copyright treaties the United States has ratified in sections 102.7 and 2004.1. And section 313.6(C)(1) indicates that certain literary works created by civilian faculty members of U.S. military academies and institutions are not ''U.S. Government Works,'' based on the National Defense Authorization Act for Fiscal Year 2020.

**23. Other Issues**

The Office revised various sections of the Public Draft to reflect new fees or new terminology added to the fee schedule adopted on February 19, 2020.[46] The Office made a number of additional changes in the Final Version to ensure that the contents are consistent with regulatory requirements and that the *Compendium* is internally consistent. These changes include revisions to:

[39] Graphic Artists Guild Comment at 4.

[40] Shaftel & Schmelzer Comment at 4.

[41] Copyright Alliance Comment at 6.

[42] National Music Publishers' Association Comment at 4.

[43] *See* 83 FR 2371 (Jan. 17, 2018).

[44] Engine Advocacy Comment at 8–11 (May 14, 2019); Cyberlaw Clinic Comment at 1–8 (May 31, 2019).

[45] Copyright Alliance Comment at 8.

[46] *See* 85 FR 9374 (Feb. 19, 2020).

• Section 611.2(B) to use language that matches language used in the eCo application;

• section 617.3 to clarify that an organization need not provide its country of citizenship if it has completed the domicile space;

• section 618.4 to remove language suggesting that ''direction'' is an acceptable authorship statement for a dramatic work;

• section 609 to clarify that Form SE may not be used to register an unpublished serial and to clarify which administrative classes the Office has established for registration purposes;

• sections 607, 1509.1(F) and 1509.1(F)(4)(b) to clarify that a computer program containing trade secrets may be registered with object code, but the applicant must include at least ten pages of source code in the deposit;

• sections 1010.3 and 1010.4 to clarify that, although digital uploads are preferred, physical deposits for claims involving online works may be sent to the Office by a commercial carrier, such as FedEx or UPS;

• section 1509.2(B)(4) to summarize the deposit requirements for sound recordings first published in a foreign country;

• sections 624.3, 1802.8(B)(6) and 1802.9(F) to explain that a typed or printed signature will be accepted on a paper application;

• section 625.3 to clarify that if there is a ''short fee,'' the effective date of registration will be the date the full fee is received;

• section 1807.4(B) to clarify that if the payment for a registration application ''bounces,'' the Office will cancel the registration and notify the applicant, as required by regulation;

• sections 618.4(A), 1010.4, and 1508.1 to reflect technical upgrades that have been made to the eCO system; and

• various sections to reflect a new format used for annotating registration certificates and to include commonly-used annotations.

The Final Version also corrects typographical errors and errors in citations or cross-references, replaces outdated terminology, and makes formatting changes. The Table of Authorities has been updated to reflect new citations used in or removed from the *Compendium.* Finally, the Office has added references to additional court decisions that have cited the *Compendium* since the 2017 version was released.

Dated: January 8, 2021.

**Shira Perlmutter,**

*Register of Copyrights and Director of the U.S. Copyright Office.*

[FR Doc. 2021–00604 Filed 1–13–21; 8:45 am]

**BILLING CODE 1410–30–P**

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## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: 21–001]**

### Notice of Intent To Grant a Partially Exclusive Patent License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of intent to grant a partially exclusive patent license.

**SUMMARY:** NASA hereby gives notice of its intent to grant an exclusive, co-exclusive or partially exclusive patent license in the United States of America to practice the invention(s) described and claimed in U.S Patent No. 9,023,642 B2, Method and Apparatus for a Miniature Bioreactor System for Long-Term Cell Culture to Brand Labs USA, LLC, having its principal place of business in Pompano Beach, Florida. The fields of use may be limited. NASA has not yet made a determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

**DATES:** The prospective exclusive may be granted unless NASA receives written objections including evidence and argument, no later than January 29, 2021 that establish that the grant of the license would not be consistent with the requirements regarding the licensing of federally owned inventions as set forth in the Bayh-Dole Act and implementing regulations. Competing applications completed and received by NASA no later than January 29, 2021 will also be treated as objections to the grant of the contemplated exclusive, co-exclusive or partially exclusive license. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act.

**ADDRESSES:** Objections relating to the prospective license may be submitted to Patent Counsel, Office of Chief Counsel, MS AL, NASA Johnson Space Center, 2101 NASA Parkway, Houston, TX 77058. Phone (281) 483–4871. Facsimile (281) 483–6936. Email: *jsc-patentof@mail.nasa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Walter Ugalde, Technology Transfer and Commercialization Office/XT1, Johnson Space Center, Houston, TX 77058, (281) 483–8615.

**SUPPLEMENTARY INFORMATION:** This notice of intent to grant an exclusive, co-exclusive or partially exclusive patent license is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective license will comply with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov.*

**Helen M. Galus,**

*Agency Counsel for Intellectual Property.*

[FR Doc. 2021–00610 Filed 1–13–21; 8:45 am]

**BILLING CODE 7510–13–P**

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## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: (21–002)]**

### Notice of Intent To Grant a Partially Exclusive License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of intent to grant partially exclusive patent license.

**SUMMARY:** NASA hereby gives notice of its intent to grant a partially exclusive patent license in the United States to practice the inventions described and claimed in U.S. Patent No. 7,075,295 B2 for an invention titled ''Magnetic Field Response Sensor for Conductive Media,'' NASA Case Number LAR–16571–1; U.S. Patent No. 7,589,525 B2 for an invention titled ''Magnetic Field Response Sensor for Conductive Media,'' NASA Case Number LAR–16571–2; U.S. Patent No. 7,759,932 B2 for an invention titled ''Magnetic Field Response Sensor for Conductive Media,'' NASA Case Number LAR–16571–3; U.S. Patent No. 7,086,593 B2 for an invention titled ''Magnetic Field Response Measurement Acquisition System,'' NASA Case Number LAR–16908–1; U.S. Patent No. 7,047,807 B2 for an invention titled ''Flexible Framework for Capacitive Sensing,'' NASA Case Number LAR–16974–1; U.S. Patent No. 7,159,774 B2 for an invention titled ''Magnetic Field Response Measurement Acquisition System,'' NASA Case Number LAR–17280–1; U.S. Patent No. 8,430,327 B2 for an invention titled ''Wireless Sensing System Using Open-Circuit, Electrically-Conductive

Spiral-Trace Sensor,'' NASA Case Number LAR–17294–1; U.S. Patent No. 8,673,649 B2 for an invention titled ''Wireless Chemical Sensor and Sensing Method for Use Therewith,'' NASA Case Number LAR–17579–1; U.S. Patent No. 9,329,149 B2 for an invention titled ''Wireless Chemical Sensor and Sensing Method for Use Therewith,'' NASA Case Number LAR–17579–2; U.S. Patent No. 9,733,203 B2 for an invention titled ''Wireless Chemical Sensing Method,'' NASA Case Number LAR–17579–3; U.S. Patent No. 10,031,031 B2 for an invention titled ''Wireless Temperature Sensing Method Using No Electrical Connections,'' NASA Case Number LAR–17747–1–CON; U.S. Patent No. 10,605,673 B2 for an invention titled ''Wireless Temperature Sensor Having No Electrical Connections,'' NASA Case Number LAR–17747–2–CON; U.S. Patent No. 10,180,341 B2 for an invention titled ''Multi-Layer Wireless Sensor Construct for Use at Electrically-Conductive Material Surfaces,'' NASA Case Number LAR–18399–1; and U.S. Patent Application No. 10,193,228 B2 for an invention titled ''Antenna for Far Field Transceiving,'' NASA Case Number LAR–18400–1 to Aquatherm LP, having its principal place of business in Lindon, UT. The fields of use may be limited to polypropylene and plastic containers and pipes, and associated fittings and joints, within residential structures, and including but not limited to the non-destructive evaluation of the aforementioned containers and pipes and the detection of conditions and states of the contents therein, and/or similar field(s) of use thereto. NASA has not yet made a determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

**DATES:** The prospective partially exclusive license may be granted unless NASA receives written objections including evidence and argument, no later than January 29, 2021 that establish that the grant of the license would not be consistent with the requirements regarding the licensing of federally owned inventions as set forth in the Bayh-Dohl Act and implementing regulations. Competing applications completed and received by NASA no later than January 29, 2021 will also be treated as objections to the grant of the contemplated partially exclusive license. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act.

**ADDRESSES:** Objections relating to the prospective license may be submitted to Patent Counsel, Office of the General Counsel, NASA Langley Research Center. Phone (757) 864–3221. Email: *robin.w.edwards@nasa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Robin W. Edwards, Patent Counsel, Office of the General Counsel, NASA Langley Research Center. Phone (757) 864–3221. Email: *robin.w.edwards@nasa.gov.*

**SUPPLEMENTARY INFORMATION:** This notice of intent to grant a partially exclusive patent license is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective partially exclusive license will comply with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov.*

**Helen M. Galus,**

*Agency Counsel for Intellectual Property.*

[FR Doc. 2021–00611 Filed 1–13–21; 8:45 am]

**BILLING CODE 7510–13–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS Native Hawaiian Library Services Grant Program Notice of Funding Opportunity

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Submission for OMB Review, comment request.

**SUMMARY:** The Institute of Museum and Library Services announces that the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments about this assessment process, instructions, and data collections.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **FOR FURTHER INFORMATION CONTACT** section below on or before February 15, 2021.

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Institute of Museum and Library Services'' under ''Currently Under Review;'' then check ''Only Show ICR for Public Comment'' checkbox. Once you have found this information collection request, select ''Comment,'' and enter or upload your comment and information. Alternatively, please mail your written comments to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, or call (202) 395–7316.

**FOR FURTHER INFORMATION CONTACT:** Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636 or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

*Current Actions:* The purpose of this collection is to support existing Native Hawaiian library operations and maintain core library services, particularly as they relate to the following goals in the Museum and Library Services Act (20 U.S.C. 9141).

1. Expanding services for learning and access to information and educational resources in a variety of formats (including new and emerging technology), in all types of libraries, for individuals of all ages in order to support such individuals' need for education, lifelong learning, workforce development, economic and business development, health information, critical thinking skills, digital library skills, and financial literacy and other types of literacy skills.

2. Establishing or enhancing electronic and other linkages and improved coordination among and between libraries and entities, as described in 20 U.S.C. 9134(b)(6), for the purpose of improving the quality of and access to library and information services.

3. Providing training and professional development, including continuing education, to enhance the skills of the current library workforce and leadership, and advance the delivery of library and information services; and enhancing efforts to recruit future professionals, including those from diverse and underrepresented backgrounds, to the field of library and information services.

4. Developing public and private partnerships with other agencies, tribes, and community-based organizations.

5. Targeting library services to individuals of diverse geographic, cultural, and socioeconomic backgrounds, to individuals with disabilities, and to individuals with limited functional literacy or information skills.

6. Targeting library and information services to persons having difficulty using a library and to underserved urban and rural communities, including children (from birth through age 17) from families with incomes below the poverty line (as defined by the Office of Management and Budget and revised annually in accordance with 42 U.S.C. 9902(2)) applicable to a family of the size involved.

7. Developing library services that provide all users access to information through local, State, regional, national, and international collaborations and networks.

8. Carrying out other activities consistent with the purposes of the Library Services and Technology subchapter of the IMLS statute (20 U.S.C. 9121).

Nonprofit organizations that primarily serve and represent Native Hawaiians (as the term is defined in 20 U.S.C. 7517) are eligible to apply for funding under the Naïve Hawaiian Library Program.

This action is to renew the forms and instructions for the Notice of Funding Opportunities for the next three years. The 60-day notice for the 2022–2024 IMLS Native Hawaiian Library Services Grant Program Notice of Funding Opportunity was published in the **Federal Register** on October 9, 2020, (85 FR 64169–64170). No comments were received.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS Native Hawaiian Library Services Grant Program Notice of Funding Opportunity.

*OMB Number:* 3137–0102.

*Frequency:* Once per year.

*Affected Public:* Nonprofit organizations serving Native Hawaiians.

*Number of Respondents:* 13.

*Estimated Average Burden per Response:* 40 hours.

*Estimated Total Annual Burden:* 520 hours.

*Total Annualized capital/startup costs:* n/a.

*Total Annual costs:* $15,480.40.

*Total Federal costs:* $1,768.88.

*Public Comments Invited:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 11, 2021.

**Kim Miller,**

*Senior Grants Management Specialist,Institute of Museum and Library Services.*

[FR Doc. 2021–00742 Filed 1–13–21; 8:45 am]

BILLING CODE 7036–01–P

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Submission for OMB Review, Comment Request, Proposed Collection Requests: Request for Advance or Reimbursement Web Form

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Submission for OMB review, comment request.

**SUMMARY:** The Institute of Museum and Library Services announces that the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments about the web form used by IMLS awardees to request advance or reimbursement payments. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **FOR FURTHER INFORMATION CONTACT** section below on or before February 10, 2021.

OMB is particularly interested in comments that help the agency to:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Institute of Museum and Library Services'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox or mail to Office of Information and Regulatory Affairs, *Attn.:* OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316.

**FOR FURTHER INFORMATION CONTACT:** Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636 or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

*Current Actions:* The purpose of this collection is to administer the IMLS process by which IMLS awardees request advance or reimbursement payments. The proposed form will be embedded in the electronic grants management system that the agency uses to monitor and service all active awards during the period of performance and through closeout.

The 60-day notice for the IMLS Grant Application Forms was published in the **Federal Register** on October 22, 2020, (85 FR 67379). No comments were received.

*Agency:* Institute of Museum and Library Services.

*Title:* Request for Advance or Reimbursement Web Form.

*OMB Number:* 3137–NEW.

*Frequency:* Annual.

*Affected Public:* Library and Museum funding awardees.

*Number of Respondents:* 5,000.

*Average Minutes per Response:* 60 minutes.

*Total Estimated Number of Annual Burden Hours:* 5,000.

*Cost Burden (dollars):* $145,500.00.

*Total Federal Costs:* $43,750.00.

Dated: January 8, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00586 Filed 1–13–21; 8:45 am]

BILLING CODE 7036–01–P

## NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

## National Endowment for the Humanities

## Civil Penalty Adjustments for 2021

**AGENCY:** National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

**ACTION:** Notice of civil penalty adjustments for 2021.

**SUMMARY:** The National Endowment for the Humanities (NEH) is giving notice of the adjusted maximum and minimum civil monetary penalties that it may impose for violations of its New Restrictions on Lobbying, as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act). The updated penalty amounts are adjusted for inflation and are effective from January 15, 2021 through January 14, 2022.

**DATES:** The updated civil penalties in this notice are applicable to penalties assessed on or after January 15, 2021 if the associated violations occurred after November 2, 2015.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *gencounsel@neh.gov.*

**SUPPLEMENTARY INFORMATION:**

### 1. Background on NEH's New Restrictions on Lobbying Regulation

On April 21, 2020, NEH published an interim final rule implementing the 2015 Act (28 U.S.C. 2461 note) and adjusting the civil penalties found in its New Restrictions on Lobbying regulation (45 CFR 1168) pursuant to the 2015 Act.[1] The interim final rule incorporated the initial ''catch up'' adjustment and the annual adjustment for 2020. NEH announced in its interim final rule that, for all future adjustments to penalties under its New Restrictions on Lobbying regulation required by the 2015 Act, NEH will publish a Notice in the **Federal Register** to notify the public of the updated penalty amounts no later than January 15 of each year.

NEH published a final rule on June 11, 2020, adopting the interim final rule without change.[2]

### 2. 2021 Adjustment to Civil Penalties Under NEH's New Restrictions on Lobbying Regulation

For 2020, the penalty range for violations under NEH's New Restrictions on Lobbying regulation was a minimum of $20,489 and a maximum of $204,892.[3] Therefore, the new, post-adjustment minimum penalty for 2021 under NEH's New Restrictions on Lobbying regulation is $\$20,489 \times 1.01182 = \$20,731.18$ which rounds to $20,731.

The new, post-adjustment maximum penalty for 2021 under NEH's New Restrictions on Lobbying regulation is $\$204,892 \times 1.01182 = \$207,313.823$, which rounds to $207,314. These post-adjustment penalties are less than 250 percent of the pre-adjustment penalties, so they do not implicate the post-adjustment amount limitation in the 2015 Act.

Thus, the range of penalties under NEH's New Restrictions on Lobbying regulation, for the purposes of the 2021 adjustment, is a minimum of $20,731 and a maximum of $207,314.

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[1] 85 FR 22025.

[2] 85 FR 35566.

[3] Table 1 details the annual adjustments to New Restrictions on Lobbying Civil Monetary Penalties for years 2016–2021.

TABLE 1—ANNUAL ADJUSTMENTS TO NEW RESTRICTIONS ON LOBBYING CIVIL MONETARY PENALTIES, 2016–2021

| Year | Baseline penalty range | Applicable multiplier based on percent increase in CPI–U | New baseline penalty range |
|---|---|---|---|
| 2016 | $10,000–$100,000 | [4] 1.89361 | $18,936–$189,361 |
| 2017 | $18,936–$189,361 | [5] 1.01636 | $19,246–$192,459 |
| 2018 | $19,246–$192,459 | [6] 1.02041 | $19,639–$196,387 |
| 2019 | $19,639–$196,387 | [7] 1.02522 | $20,134–$201,340 |
| 2020 | $20,134–$201,340 | [8] 1.01764 | $20,489–$204,892 |
| 2021 | $20,489–$204,892 | [9] 1.01182 | $20,731–$207,314 |

Dated: January 8, 2021.

**Caitlin Cater,**

*Attorney-Advisor, National Endowment for the Humanities.*

[FR Doc. 2021–00582 Filed 1–13–21; 8:45 am]

**BILLING CODE 7536–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–146, OMB Control No. 3235–0134]**

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of FOIA Services, Washington, DC 20549–2736

*Extension:*
Rule 15c1–7

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 15c1–7 (17 CFR 240.15c1–7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 15c1–7 states that any act of a broker-dealer designed to effect securities transactions with or for a customer account over which the broker-dealer (directly or through an agent or employee) has discretion will be considered a fraudulent, manipulative, or deceptive practice under the federal securities laws, unless a record is made of the transaction immediately by the broker-dealer. The record must include (a) the name of the customer, (b) the name, amount, and price of the security, and (c) the date and time when such transaction took place. The Commission estimates that 362 respondents collect information related to approximately 400,000 transactions annually under Rule 15c1–7 and that each respondent would spend approximately 5 minutes on the collection of information for each transaction, for approximately 33,333 aggregate hours per year (approximately 92.1 hours per respondent).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: January 11, 2021.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00728 Filed 1–13–21; 8:45 am]

**BILLING CODE 8011–01–P**

[4] OMB Memorandum M–16–06 (February 24, 2016).

[5] OMB Memorandum M–17–11 (December 16, 2016).

[6] OMB Memorandum M–18–03 (December 15, 2017).

[7] OMB Memorandum M–19–04 (December 14, 2018).

[8] OMB Memorandum M–20–05 (December 16, 2019).

[9] OMB Memorandum M–21–10 (December 23, 2020).

## SECURITIES AND EXCHANGE COMMISSION

**[Release Nos. 33–10919; 34–90882; File No. 265–32]**

### SEC Small Business Capital Formation Advisory Committee

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Notice of meeting.

**SUMMARY:** The Securities and Exchange Commission Small Business Capital Formation Advisory Committee, established pursuant to Section 40 of the Securities Exchange Act of 1934 as added by the SEC Small Business Advocate Act of 2016, is providing notice that it will hold a public meeting by videoconference. The public is invited to submit written statements to the Committee.

**DATES:** The meeting will be held on Friday, January 29, 2021, from 10:00 a.m. to 2:30 p.m. (ET) and will be open to the public. Written statements should be received on or before January 29, 2021.

**ADDRESSES:** The meeting will be conducted by remote means (videoconference). Members of the public may attend the meeting by viewing the webcast on the Commission's website at *www.sec.gov.* Written statements may be submitted by any of the following methods:

*Electronic Statements*

- Use the Commission's internet submission form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email message to *rule-comments@sec.gov.* Please include File Number
265–32 on the subject line; or

*Paper Statements*

- Send paper statements to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File No. 265–32. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method. The Commission will post all statements on the SEC's website at *www.sec.gov.*

Statements also 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. (ET). All statements received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Julie Z. Davis, Senior Special Counsel, Office of the Advocate for Small Business Capital Formation, at (202) 551–5407, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–3628.

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public. Persons needing special accommodations because of a disability should notify the contact person listed in the section above entitled **FOR FURTHER INFORMATION CONTACT**. The agenda for the meeting includes matters relating to rules and regulations affecting small and emerging companies and their investors under the federal securities laws.

Dated: January 11, 2021.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2021–00764 Filed 1–13–21; 8:45 am]

BILLING CODE P

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–422, OMB Control No. 3235–0471]**

## Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

*Extension:*
Rule 15c1–5

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ('PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 15c1–5 (17 CFR 240.15c1–5) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15c1–5 states that any broker-dealer controlled by, controlling, or under common control with the issuer of a security that the broker-dealer is trying to sell to or buy from a customer must give the customer written notification disclosing the control relationship at or before completion of the transaction. The Commission estimates that 181 respondents provide notifications annually under Rule 15c1–5 and that each respondent would spend approximately 10 hours per year complying with the requirements of the rule for a total burden of approximately 1,810 hours per year. There is no retention period requirement under Rule 15c1–5. This Rule does not involve the collection of confidential information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: January 11, 2021.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00732 Filed 1–13–21; 8:45 am]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–90880; File No. SR–Phlx–2021–03]**

## Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Proposed Rule Change To Modify Phlx Options 8, Section 26, "Trading Halts, Business Continuity and Disaster Recovery"

January 8, 2021.

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 January 7, 2021 Nasdaq PHLX LLC (''Phlx'' 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 modify Phlx Options 8, Section 26, ''Trading Halts, Business Continuity and Disaster Recovery'' to permit a Virtual Trading Crowd in the event that the Trading Floor is unavailable.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Phlx proposes to modify Phlx Options 8, Section 26, ''Trading Halts, Business Continuity and Disaster Recovery.'' This proposal creates an additional contingency within Phlx's Business Continuity Plan (''BCP'') to prepare for potential closure of its physical Trading Floor in light of COVID–19. Specifically, the Exchange proposes to amend Options 8, Section 26(g) to permit Phlx to operate a newly proposed Virtual Trading Crowd in the event the physical Trading Floor is unavailable.

Background

Currently, Options 8, Section 26(g) describes certain actions the Exchange may take as part of its BCP, if its Trading Floor became inoperable, so that it may maintain fair and orderly markets if unusual circumstances were to occur which may impact the Exchange's ability to conduct its options floor business. Specifically, in the event of loss of the Trading Floor, if the physical location [3] designated as the ''Trading Floor'' becomes unavailable Phlx will enact its BCP and designate the Philadelphia Navy Yard as its ''Back-Up Trading Floor.'' Further, in the event that the Back-Up Trading Floor becomes unavailable or inoperable, the Exchange will only operate its electronic market and will not operate a Trading Floor. The Exchange will operate only its electronic market until the Exchange's Trading Floor facility is operational. Open outcry trading will not be available in the interim.[4]

Phlx's Trading Floor closed on March 17, 2019,[5] as a result of precautions taken with respect to COVID–19.[6] The Exchange continued to operate in an all-electronic configuration during this time period. Since that time, Phlx has been exploring alternatives to permit open outcry trading in the event of an extended closure related to COVID–19 or potentially a second closure in 2020 and/or 2021 given the uncertainty related to the ongoing pandemic. Phlx notes that an all-electronic trading environment cannot fully replicate open outcry trading, and therefore, the Exchange continues to evaluate potential enhancements that it believes would permit trading, in the event the Trading Floor is inoperable, to more closely replicate its trading environment that exists during normal operations.[7]

Phlx proposes to amend Options 8, Section 26(g)(2) to provide,

> *Back-up Trading Floor Unavailable.* In the event that the Back-Up Trading Floor becomes inoperable, or the Exchange otherwise determines not to operate its Back-Up Trading Floor the Exchange will operate its electronic market and may elect to enact a Virtual Trading Crowd pursuant to subsection (g)(3).

Today, Options 8, Section 26(g)(2) provides that if the Back-Up Trading Floor becomes inoperable, the Exchange will only operate its electronic market and will not operate a Trading Floor. Further, the rule provides the Exchange will operate only its electronic market until the Exchange's Trading Floor facility is operational. Open outcry trading will not be available in the interim.

At this time, the Exchange desires to adopt a virtual option in the event the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor.[8] Specifically, Phlx's proposal would permit certain aspects of open outcry trading, which are normally conducted in-person on the Trading Floor, to be conducted in a virtual trading crowd (''Virtual Trading Crowd''). This proposal is intended to enhance Phlx's BCP by offering an alternative which comports with shelter-in-place and social distancing guidelines and would provide institutional investors with a means to execute orders that are unable to meet guidelines of the electronic market.[9] Specifically, this proposal would further enhance the Exchange's trading environment when the Trading Floor is unavailable, the Back-up Trading Floor is inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor, by permitting market participants that generally operate on the physical Trading Floor to continue to interact in a substantially similar manner as they do on the Trading Floor. Specifically, the Exchange proposes to further amend Options 7, Section 26(g) to permit it to make available an audio and video communication program to serve as a ''Virtual Trading Crowd'' if the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. The Exchange would create ''Virtual Trading Crowds,'' in each of which the Exchange will determine which options class(es) will be available for trading. This is similar to the Exchange's authority with respect to open outcry trading on the Trading Floor.[10] Phlx members will access a Virtual Trading Crowd via ''zones.'' [11] Multiple classes may trade in a single Virtual Trading Crowd available for trading in a single zone. This is similar to the physical Trading Floor today. The Exchange may determine to have only one zone or several zones as necessary to ensure a fair and orderly market. The Exchange will assign each Floor Market Maker to a zone and Floor Brokers may determine in which zone(s) they will be present. This is similar to the arrangement on the Exchange's physical Trading Floor. Unlike Cboe, Phlx has a requirement that each trading crowd have a Floor Market Maker present.[12] Phlx ensures that this requirement is met by assigning Floor Market Makers to a trading crowd.[13] If a Floor Market

[3] Phlx's physical Trading Floor is located at 2929 Walnut Street, Philadelphia, PA.

[4] This Rule does not preclude the Exchange from conducting business, in the event the Trading Floor and Back-Up Trading Floor are rendered inoperable, pursuant to Options 4, Section 10. Current Options 4, Section 10, Backup Trading Arrangements, outlines rules applicable to hosting Phlx at another exchange in the event Phlx is disabled.

[5] *See* Options Trader Alert #2020–07. Phlx's Trading Floor did not re-open until June 3, 2020. *See* Options Trader Alert #2020–08.

[6] On March 11, 2020, the World Health Organization characterized COVID–19 as a pandemic and to slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel, and closed non-essential businesses.

[7] Certain aspects of open outcry trading, particularly the ability for persons to negotiate pricing and to facilitate executions of larger orders in a trading crowd as well as the handling of high-risk and complicated strategies, are not easily replicated in electronic markets.

[8] The proposed rule regarding the Virtual Trading Crowd is located in the Exchange's broader rule regarding disaster recovery and business continuity, as the Exchange currently only plans to use the Virtual Trading Crowd for business continuity purposes if the physical Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. If the Exchange were to determine to use the Virtual Trading Crowd in more permanent manner, it would submit a separate rule filing.

[9] For example, there are certain aspects of trading where the rules differ electronically and on the Trading Floor. Complex Orders are traded differently electronically versus on the Trading Floor based on Exchange rules.

[10] *See* Options 8, Section 25(l) which provides, ''In the interest of fair and orderly markets, the Exchange may adopt policies affecting the location of members in the trading crowd on a crowd-by-crowd basis.''

[11] A ''zone'' is a virtual room representing a Virtual Trading Crowd. For example, each trading crowd will have its own zoom password-protected log-in.

[12] *See* Options 8, Section 28, ''. . . An Options Floor Broker shall ascertain that at least one Floor Market Maker is present at the trading post prior to representing an order for execution. . . .''

[13] The Exchange notes that as a result of COVID–19, the Exchange implemented various safety

Maker hears a Floor Broker located in another trading crowd represent an order, the Floor Market Maker may attempt to trade with that order. The Exchange intends that the concept of a zone replicate a crowd on the physical Trading Floor.

Phlx proposes to replicate the open outcry features on the physical Trading Floor within a Virtual Trading Crowd. The Exchange will use a communication program that has audio, video, and ''chat'' functionality.[14] Floor members would log into the Virtual Trading Crowd, as described in more detail below, and would communicate trades within the conferencing feature. This will allow the same communication capabilities floor members generally have on the physical Trading Floor so that they may conduct open outcry trading in the Virtual Trading Crowd in the same manner as they do on the physical Trading Floor.

All Options 8 Rules will apply to open outcry trading in the Virtual Trading Crowd, in the same manner as they apply to open outcry trading on the physical Trading Floor, except as otherwise provided for in proposed Options 8, Section 26(g)(3)(E). The proposed changes are described below. The Exchange proposes to adopt a new Options 8, Section 26(g)(3) to permit the Exchange to make available an audio and video communication program to serve as a ''Virtual Trading Crowd'' if the physical Trading Floor is not available.

Proposed Options 8, Section 26(g)(3)(A) lists certain terms in the Rules related to open outcry trading on the physical Trading Floor that will be deemed to refer to corresponding terms related to trading in the Virtual Trading Crowd. Specifically,

- References in the Rules to the ''floor,'' ''Trading Floor,'' and ''Exchange floor'' (and any other terms with the same meaning) will be deemed to refer to the ''Virtual Trading Crowd''; and
- References in the Rules to ''physical presence'' or ''on-floor'' or ''floor'' (and any other terms with the same meaning) will be deemed to refer to ''presence'' in a Virtual Trading Crowd.

The proposal does not amend or replace any aspects of Phlx's Options Floor Based Management System (''FBMS'') or order execution functionalities.[15] Today, FBMS is designed to execute orders entered by Floor Brokers,[16] including multi-leg orders up to 15 legs, after representation in the trading crowd. When a Floor Broker submits an order for execution through FBMS, the order will be executed based on market conditions at the time of execution and in accordance with Phlx rules. FBMS execution functionality checks the Order Book to ensure compliance with priority rules. Orders that do not comply with priority and trade-through rules will not be executed. All FBMS order and transaction data that would normally be available from the physical Trading Floor would continue to be captured by FBMS and the System. These compliance checks, which are crucial to ensuring compliance with Exchange rules, will continue with the Virtual Trading Crowd model.

Access to the Virtual Trading Crowd will be substantially similar to access to the physical Trading Floor. Only members registered to access Phlx's Trading Floor would be permitted to participate. The Exchange is not proposing to amend its membership requirements with respect to virtual open outcry trading. Currently, admission to the physical Trading Floor is limited to members and member organizations, Exchange employees, clerks employed by members and member organizations, Inactive Nominees, and Exchange visitors that receive authorized admission to the Trading Floor pursuant to Exchange policy, and any other persons that the Exchange authorizes admission to the Trading Floor.[17] Persons and entities may apply to become a Phlx member by complying with the membership requirements noted within Phlx General 3, Membership and Access. Proposed Options 8, Section 26(g)(3)(B) provides, ''Admission to the Virtual Trading Crowd is limited to members and member organizations, Clerks, Exchange employees, and any other persons the Exchange authorizes admission to the Virtual Trading Crowd.''

The Exchange proposes to limit the number of members, per member organization, that may participate in a Virtual Trading Crowd based on the ability of Phlx to accommodate members within the remote conferencing feature in an orderly fashion. The Exchange would limit personnel in a fair and equitable manner ensuring there is fair and equal representation from each member and member organization. This proposal would allow each of the trading crowds that exist on Phlx's physical Trading Floor to participate in this ''Virtual Trading Crowd'' in one or more separate zones as described above.

While clerks may access the Virtual Trading Crowd, they may only perform the same functions for their associated member organizations in connection with open outcry trading in the Virtual Trading Crowd as they do for open outcry trading on the physical Trading Floor. The Exchange understands permitting access to Clerks to access the Virtual Trading Crowd will provide them with access to the information that they normally have access to on the physical Trading Floor, which will make it more efficient for them to perform their tasks. Also, the Exchange would not permit visitors into the Virtual Trading Crowd as the Exchange believes that allowing these types of persons to have access to the Virtual Trading Crowd is unnecessary as these persons are not essential to the functioning of the Virtual Trading Crowd. As is the case with the physical Trading Floor, the Exchange will provide access to the Virtual Trading Crowd to members the Exchange has approved to perform a Trading Floor function (including Floor Brokers and Floor Market Makers).

While floor members would not be required to display badges, pursuant to Options 8, Section 39 at Regulation 3, in the Virtual Trading Crowd, as the size of the view on the communication program may not permit badges to be visible, members would be required to join the Virtual Trading Crowd in a manner that clearly identifies the member or member's employee.

Pursuant to proposed Options 3, Section 26(g)(3)(E)(8)(a), prior to speaking on remote conferencing, each member must announce themselves each time.[18] As specified within

protocols including socially distancing floor members by assigning spaces to all floor market participants on the physical Trading Floor.

[14] Currently available programs with this functionality include Zoom, Webex, Microsoft Teams, and others.

[15] FBMS, an order management system, is the gateway for the electronic execution of equity, equity index and U.S. dollar-settled foreign currency option orders represented by Floor Brokers on the Exchange's Options Floor. Floor Brokers contemporaneously upon receipt of an order and prior to the representation of such an order in the trading crowd, record all options orders represented by such Floor Broker to FBMS, which creates an electronic audit trail. The execution of orders to Phlx's electronic trading system also occurs via FBMS. The FBMS application is available on hand-held tablets and stationary desktops.

[16] The term ''Floor Broker'' means an individual who is registered with the Exchange for the purpose, while on the Options Floor, of accepting and handling options orders. *See* Options 8, Section 2(2).

[17] *See* General 3, Section 1, Options 8, Sections 5–9, and Options 8, Sections 11 and 12.

[18] Members would also be visible on video, however the Exchange will still require members to announce themselves.

proposed Options 8, Section 26(g)(3)(E)(2), members must join via a computer and either (a) computer audio; (b) cell phone; or (c) hard-wired phone, as determined by Nasdaq. Phlx will send a password-protected invitation to each floor participant permitted access to the Virtual Trading Crowd. This invitation will permit each permitted participant to access the Virtual Trading Crowd in a safe and secure manner. Any floor member may access any zone within the Virtual Trading Crowd, although Floor Market Makers will be required to be present in their assigned zone if present within the Virtual Trading Crowd. Any unidentified attendee will be removed from the Virtual Trading Crowd. The Exchange will have an audit trail of the telephone numbers that have joined each remote conferencing session in order to ensure that only members join the remote conferencing feature. Every member in the Virtual Trading Crowd must provide Market Operations with a contact number where Market Operations will be able to reach them during the trading day. The contact number may not be the same number that is being used to connect to the Virtual Trading Crowd. Floor members are responsible for maintaining updated contact information. This number must be updated immediately if it changes. Nasdaq staff must be able to reach a member if there is an issue with trading.[19] Nasdaq non-regulatory staff would be responsible for the operation of the remote conferencing feature, which includes monitoring members to ensure that only floor members and member's employees are admitted into remote conferencing and are properly identified.

As specified within proposed Options 3, Section 26(g)(3)(E)(1), every member and the member's employees in the Virtual Trading Crowd must consent to video and audio recording in order to participate in the Virtual Trading Crowd. Members and members' employees will be asked to provide this consent, as well as other consents, before being permitted to join the Virtual Trading Crowd. For example, member organizations would be required to execute an addendum to the Nasdaq Services Agreement regarding their use of the remote conferencing feature in addition to consenting to voice recording.

Today, pursuant to Options 8, Section 38, floor members must register their means of communication with the Exchange.[20] Pursuant to proposed Options 8, Section 26(g)(3)(E)(4), members and member organizations may use any equipment to access the Virtual Trading Crowd and do not need to register devices they use while in the Virtual Trading Crowd. Floor members and member organizations would be permitted remote access to FBMS when the Virtual Trading Floor is enacted.[21] The Exchange proposes to provide within Options 8, Section 26(g)(3)(C) that, ''. . . Notwithstanding Options 8, Section 28(g) and Options 8, Section 30(e), members and member organizations would be permitted remote access to the Options Floor Based Management System (''FBMS'') when the Virtual Trading Floor is enacted for the purpose of executing transactions which require exposure in open outcry.'' Floor members must use Exchange-provided FBMS, to the extent applicable, while transacting in the Virtual Trading Crowd. As noted above, prior to using a communications device for business purposes on the Trading Floor of the Exchange, members and member organizations must register the communications device in a form and manner prescribed by the Exchange. Because individuals in the Virtual Trading Crowd will not be on the Exchange's premises (and thus will not be using Exchange-provided bandwidth to be shared with all market participants and do not pose the same security risks), the proposed rule change will not require members and member organizations to register devices they use while in the Virtual Trading Crowd. Options 8, Section 38 will otherwise apply in the same manner to the Virtual Trading Crowd as it does to the physical Trading Floor (to the extent the context requires). This includes requirements related to audit trail and record retention, prohibition on using any device for the purpose of recording activities in the Virtual Trading Crowd or maintaining an open line of continuous communication whereby a person not located in the trading crowd may continuously monitor the activities in the trading crowd, and the prohibition on using devices to disseminate quotes or last sale reports. Surveillance staff will be present in each Virtual Trading Crowd to monitor the activity of each participant, who must be present by video, and to observe participant behavior. The Exchange will continue to surveil options transactions, as it does today, to identify transactions which are violative of Phlx Rules.[22] Phlx surveils for transactions which have been executed on its market to determine if those transactions utilized information which would have been available in open outcry trading and was not yet public or otherwise ascertainable due to the execution of a transaction. The Exchange notes that in both the electronic market and on the trading floor, members and member organizations must ensure that they have procedures reasonably designed to prevent the misuse of material, non-public information by employees.[23] Further, the Exchange proposes to provide within proposed Options 8, Section 26(g)(3)(E)(8)(g) that ''A member may not permit any unauthorized other person to gain audio or video access to the Virtual Trading Crowd. A member shall not record any trading sessions,'' to make clear that the Exchange will enforce the prohibitions of Options 8, Section 38 with respect to the remote conferencing aspects as well. Finally, the Exchange represents that it has the proper security infrastructure in place to offer FBMS remotely and securely to floor participants.

Today, members on the physical Trading Floor only verbalize their interest to trade against a represented order, so not requiring bids and offers to be included in a chat conforms to current practice on the Trading Floor. However, given potential limitations of communication software (such as

[19] The conferencing room would be password protected and equipped with audio, video and text capabilities. Attendance control requirements would be in place. Private chat features will not be permitted on the platform. Unknown callers would be removed from the conferencing room. Nasdaq non-regulatory staff would be in control of the conference room.

[20] Options 8, Section 38(a) provides, ''No member or member organization shall establish or maintain any private wire connection, private radio, television or wireless system, between the Exchange Trading Floor and a nonmember without application to and approval by the Exchange. Every such means of communication shall be registered with the Exchange. Notice of the discontinuance of any such means of communication shall be promptly given to the Exchange.''

[21] At the time of the Phlx Trading Floor closure in March 2020, the Exchange permitted Floor Brokers, who otherwise had no means of trading on Phlx in an electronic environment, to utilize FBMS remotely, solely for the purpose of submitting limit orders to the electronic limit order book pursuant to Options 8, Section 28(g), or submitting a Floor Qualified Contingent Cross Order to the System pursuant to Options 8, Section 30(e). *See* Options Trader Alert #2020–8.

Recently, the Exchange filed a proposal to amend Options 8, Section 28(g) and Options 8, Section 30(e) to continue to allow Floor Brokers the ability to submit limit orders to the electronic limit order book and Floor Qualified Contingent Cross Orders to the System via FBMS remotely, notwithstanding the existence of BCP measures. *See* SR–Phlx–2021–01. This recent proposal did not permit FBMS to be utilized remotely for the purpose of executing transactions which require exposure in open outcry.

[22] *See* Phlx Options 9, Section 1; and Options 9, Section 5. *See also* Options 3, Section 22(d).

[23] *See* Phlx General 9, Section 21.

limitations on how many people may be heard at the same time in a Virtual Trading Crowd or potential buffering or echoing), the Exchange believes it may be appropriate to require members to use a chat tool in the communication program to indicate their interest in participating in a trade so that the representing Floor Broker is able to know the market from the trading crowd and fairly allocate the trade pursuant to the Rules.[24] The Exchange would require members to utilize the chat function if Surveillance determines that increased volume or activity in the Virtual Trading Crowd warrant mandatory use of the chat feature for members to maintain a fair and orderly market. Chats will be visible to all participants in a zone and will not be permitted directly between individual participants (*i.e.,* the Exchange will disable direct messaging functionality within the communication program). The Exchange believes the flexibility to impose this requirement in a Virtual Trading Crowd is appropriate, as these limitations may ultimately not interfere with a Floor Broker's ability to hear all interest (particularly in Virtual Trading Crowd) and thus the additional requirement may potentially slow down executions. Flexibility will permit the Exchange to balance system limitations with the additional burden of a new workflow step for each class, some of which have different open outcry trading environments than others.

The Exchange will retain records of the chats as well as consents, and any other records related to the Virtual Trading Crowds that are subject to the Exchange's record retention obligations under the Exchange Act.

Pursuant to Options 3, Section 26(g)(3)(E)(8)(b), if a member experiences a technical issue accessing the remote conferencing, the Exchange will not be responsible for unexecuted trades. Also, pursuant to Options 3, Section 26(g)(3)(E)(8)(c), Floor Market Maker quotes will be considered firm in the event the Floor Market Maker is disconnected from the Virtual Trading Crowd and the parties have a meeting of the minds with respect to the terms of the transaction. A ''Meeting of the Minds'' means the contra-side(s) verbally confirmed participation in the trade. In the event that a Floor Market Maker is disconnected from the Virtual Trading Crowd, a Floor Market Maker quote would not be considered firm if the quote were provided and the parties did not have a Meeting of the Minds with respect to the terms of the transaction.

Today, Floor Market Maker quotes are considered firm when announced in open outcry [25] and once accepted the transaction may be effectuated within FBMS. A Floor Market Maker may declare he or she is ''out'' prior to a Meeting of the Minds occurring in open outcry and the Floor Broker submitting the trade into FBMS.[26] Today, a Floor Market Maker that experiences issues with internet connection,[27] makes an error or otherwise is unaware of recent news in a particular option, would be held to a quote verbalized in open outcry. In the event that the negotiation continues and the terms change, the Floor Marker Maker would not be held to the new terms without additional acceptance of those terms. In the event that the transaction is not effectuated in FBMS, the trade would not stand. To that end, the Exchange believes continuing to require quotes to remain firm once the parties have arrived at a Meeting of the Minds with respect to the terms of the transaction creates fair and equitable expectations for members trading in the Virtual Trading Crowd.

Today, FLEX transactions are permitted on the Trading Floor in accordance with Options 3, Section 34. With this proposal, FLEX Trade tickets must be sent by email to the Phlx Correction Post pursuant to proposed Options 8, Section 26(g)(3)(E)(8)(d). This proposal would allow the Exchange to receive these in a timely manner.

The Exchange notes within proposed Options 8, Section 26(g)(3)(E)(8)(e) that a break-out room may be utilized to declare a dispute or otherwise notify an Options Floor Official of any required notifications. The Exchange would establish a break-out room within the remote conferencing for each dispute. This would provide an effective manner in which to communicate disputes and maintain a record of those disputes.

Pursuant to proposed Options 8, Section 26(g)(3)(E)(8)(f) disruptive or unnecessary conversations or comments in the remote conferencing or on chat feature will not be permitted. This type of behavior would subject a member to disciplinary action. Today, disruptive behavior on the Trading Floor is subject to Options 8, Section 39 at Regulation 4.[28]

As noted above, the Exchange may determine to make the Virtual Trading Crowd available if the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. Proposed Options 8, Section 26(g)(3) provides that ''The Exchange may elect to permit open outcry trading to take place in a Virtual Trading Crowd if the Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor.'' These amendments to the Options 8 Rules are intended to make trading in a Virtual Trading Crowd similar to open outcry trading when open outcry trading is not available by replicating certain features of open outcry trading in the Virtual Trading Crowd. The Virtual Trading Crowd will permit open outcry trading to continue in a separate environment if the physical Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. Therefore, trading opportunities that are generally only available in open outcry trading will continue to be available in the Virtual Trading Crowd.

All trading in the Virtual Trading Crowd will occur in the same manner, including priority and allocation rules.[29] The Exchange will make the same order types and instructions available in the Virtual Trading Crowd as it makes available on the physical Trading Floor.[30] Floor Brokers will be subject to the responsibilities in each

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[24] The Exchange would issue an Options Trader Alert announcing any determination to require bids and offers to be expressed in a chat within the communication program pursuant to proposed Options 8, Section 26(g)(3)(D). The Exchange will provide such notice with sufficient advance notice.

[25] *See* Options 8, Section 22(c) Public Outcry—Pursuant to Options 8, Section 24 (this citation is being amended in this rule change from Section 35 to the correct Section 24) at Supplementary Material .01, bids and offers must be made in an audible tone of voice. A member shall be considered ''in'' on a bid or offer, while he remains at the post, unless he shall distinctly and audibly say ''out.'' A member bidding and offering in immediate and rapid succession shall be deemed ''in'' until he shall say ''out'' on either bid or offer. Once the trading crowd has provided a quote, it will remain in effect until: (A) A reasonable amount of time has passed, or (B) there is a significant change in the price of the underlying security, or (C) the market given in response to the request has been improved. In the case of a dispute, the term ''significant change'' will be interpreted on a case-by-case basis by an Options Exchange Official based upon the extent of the recent trading in the option and, in the case of equity and index options, in the underlying security, and any other relevant factors.

[26] *Id* at 25.

[27] The Exchange notes that today members are responsible for the operation of their own equipment while on the Trading Floor.

[28] Options 8, Section 39, Regulation 4(a) provides, ''Members and associated persons shall not conduct themselves in a disorderly manner on the trading floor or on the premises immediately adjacent to the trading floor. Further, members, participants and associated persons shall not conduct themselves in an indecorous manner that is disruptive to the conduct of business on the trading floor, including but not limited to the use of profanity.''

[29] *See* Options 8, Sections 25 and 30.

[30] *See* Options 8, Section 32.

environment.[31] Additionally, members and member organizations participating in the Virtual Trading Crowd will be subject to the same regulatory requirements as they are on the physical Trading Floor.[32] Orders must be systematized, and represented, and transactions reported, in connection with the Virtual Trading Crowd floor in the same manner as they are when trading on the physical Trading Floor.[33] Therefore, the audit trail for open outcry trading in the Virtual Trading Crowd will capture the same information that it does for open outcry trading on the physical Trading Floor.

Surveillance

Phlx Surveillance staff would remotely surveil transactions in the Virtual Trading Crowd, in real-time. Specifically, there would be an Options Floor Official present in each Virtual Trading Crowd. Nasdaq Surveillance would conduct real-time surveillance for violations of Phlx rules, as is the case with physical open outcry. Floor Surveillance Procedures would be updated to account for the conferencing and chat requirements, as well as any changes to surveil a Virtual Trading Crowd. All surveillance patterns would be operable and function normally.

The Exchange also proposes to re-number current Options 3, Section 26(g)(3) as (4). The Exchange notes that this proposal does not amend the manner in which fees or other pricing incentives, such as caps, apply to floor participants. Any transaction originating from open outcry on the Trading Floor is considered a floor transaction and would continue to be considered a floor transaction for purposes of the Virtual Trading Crowd. With offering FBMS remotely, the Exchange does not propose to amend the manner in which fees are assessed or rebates are paid for purposes of Options 7 pricing to Floor Brokers.

The Exchange has conducted several town halls with floor members in which the Exchange presented the functionality of the Virtual Trading Crowd and has made the Virtual Trading Crowd available for testing so that the Exchange will be ready to implement it if necessary. The Exchange has received positive feedback from floor members regarding the Virtual Trading Crowd and will continue to make updates as necessary and appropriate in response to comments it receives to make the Virtual Trading Crowd replicate the open outcry trading experience on the physical Trading Floor as much as possible. The Exchange believes this will provide the opportunity for as seamless a rollout as possible if circumstances cause the Exchange to make the Virtual Trading Crowd available.

Technical Amendments

The Exchange proposes to amend Options 8, Section 22, Execution of Options Transactions on the Trading Floor, to correct two citations in Options 8, Sections 22(b) and (c). The citations to Options 8, Section 35 should be to Options 8, Section 24. These corrections will ensure the rule text is accurate.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[34] in general, and furthers the objectives of Section 6(b)(5) of the Act,[35] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes the proposed rule change will 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, as it will permit open outcry trading to continue in the event the Exchange's Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. As discussed above, there are certain features of open outcry trading that are difficult to replicate in an electronic trading environment. The Exchange has observed, and understands from various market participants, that they have had difficulty executing certain orders, such as larger orders and high-risk and complicated strategies, in an all-electronic trading configuration without the element of human interaction to negotiate pricing for these orders. The proposed rule change would provide an environment in which this interaction would be available despite the potential unavailability of the physical Trading Floor. The Exchange believes the proposed rule change may facilitate continued trading of these orders if and when the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. As a result, the Exchange believes providing continuous access to open outcry trading when the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor will remove impediments to a free and open market and will ultimately benefit investors, particularly those desiring to execute high-risk and complex trading strategies.

The Virtual Trading Crowd would have the same capability to utilize FBMS as the primary Trading Floor today with the availability of remote FBMS.[36] The Exchange also believes the proposed rule change will promote just and equitable principles of trade as open outcry trading in a Virtual Trading Crowd will occur in accordance with the same trading rules and be subject to the same regulatory requirements that apply to open outcry trading on the physical Trading Floor, all of which have previously been filed with the Commission. The proposed rule change will merely permit this open outcry trading to occur in a virtual setting rather than a physical setting (which may be appropriate for health and safety purposes). For the Virtual Trading Crowd, open outcry trading will occur while market participants operate remotely as they do when they trade electronically. Open outcry trading on a physical Trading Floor or in a Virtual Trading Crowd will be subject to the same priority and allocation rules as open trading on the physical Trading Floor, as set forth in Options 8, Sections 25 and 30.

As is the case for open outcry trading on a physical Trading Floor, open outcry trading in a Virtual Trading Crowd is consistent with Section 11(a) of the Act, as Rule 5.85(a)(2)(E) (which will apply to open outcry trading in a Virtual Trading Crowd) requires members and member organizations relying on Section 11(a)(1)(G) of the Act and Rule 11a1–1(T) thereunder (the so called ''G exemption rule'') as an exemption must yield priority to any bid (offer) at the same price of Public Customer orders and broker-dealer orders resting in the Order Book, as well as any other bid (offer) that has priority over those broker-dealer orders under this Rule.

[31] *See* Options 8, Sections 18 and 28.

[32] *See* Options 8 generally.

[33] *See* Options 8 generally.

[34] 15 U.S.C. 78f(b).

[35] 15 U.S.C. 78f(b)(5).

[36] *See* note 15 above.

The Exchange further believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest by permitting the Exchange to establish zones. As discussed above, the zones are intended to replicate the physical Trading Floor's organization and will permit floor members to interact in a substantially similar way as they do on the physical Trading Floor. The zones will also encourage interaction of a reasonable number of people within the communication program. While the zones will include additional functionality that is not otherwise available on the physical Trading Floor, such as the chat functionality, the Exchange believes the creation of zones and inclusion of this functionality will create a virtual environment that promotes fair and orderly trading given the potential limitations of communication software.

The Exchange will make the same order types and instructions available in a Virtual Trading Crowd as it makes available on a physical Trading Floor pursuant to Options 8, Section 32. Floor Brokers will be subject to the responsibilities set forth in Options 8, Sections 18 and 28 in a Virtual Trading Crowd, as they are on a physical Trading Floor. Additionally, members and member organizations participating in a Virtual Trading Crowd will be subject to the same regulatory requirements in a Virtual Trading Crowd as they are on a physical Trading Floor, including those set forth generally within Options 8. Orders must be systematized and represented, and transactions reported, in connection with a Virtual Trading Crowd in the same manner as they are when trading on a physical Trading Floor. The Exchange will retain records of the chats as well as consents, and any other records related to the Virtual Trading Crowd that are subject to the Exchange's record retention obligations under the Exchange Act.

Pursuant to Options 3, Section 26(g)(3)(E)(8)(c), Floor Market Maker quotes will be considered firm in the event the Floor Market Maker is disconnected from the Virtual Trading Crowd and the parties have a Meeting of the Minds with respect to the terms of the transaction. A ''Meeting of the Minds'' means the contra-side(s) verbally confirmed participation in the trade. In the event that a Floor Market Maker is disconnected from the Virtual Trading Crowd, a Floor Market Maker quote would not be considered firm if the quote were provided and the parties did not have a Meeting of the Minds with respect to the terms of the transaction. Today, Floor Market Maker quotes are considered firm when announced in open outcry [37] and once accepted the transaction may be effectuated within FBMS. A Floor Market Maker may declare he or she is ''out'' prior to a Meeting of the Minds occurring in open outcry and the Floor Broker submitting the trade into FBMS.[38] Today, a Floor Market Maker that experiences issues with internet connection,[39] makes an error or otherwise is unaware of recent news in a particular option, would be held to a quote verbalized in open outcry. In the event that the negotiation continues and the terms change, the Floor Marker Maker would not be held to the new terms without additional acceptance of those terms. In the event that the transaction is not effectuated in FBMS, the trade would not stand. To that end, the Exchange believes continuing to require quotes to remain firm once the parties have arrived at a Meeting of the Minds with respect to the terms of the transaction is consistent with the Act as it creates fair and equitable expectations for members trading in the Virtual Trading Crowd as a Meeting of the Minds was arrived out between the parties, each of whom had an opportunity to participate in the trade.

The audit trail for open outcry trading in a Virtual Trading Crowd will capture the same information that it does for open outcry trading on a physical Trading Floor. The FBMS execution checks for compliance with priority and trade-through rules remain intact. The Exchange's proposal only seeks to replace the open outcry negotiations with a Virtual Trading Crowd. FBMS compliance checks were adopted to protect investor and the general public by automated enforcement of priority and trade-through rules. The Exchange would continue to cancel orders that failed to meet these compliance checks, as is the case today. These compliance checks ensure that allocation rules are complied with and that the proposed execution would not cause Phlx to trade-through an away market. Surveillance staff would remotely surveil transactions in a Virtual Trading Crowd, in real-time. Specifically, there would be an Options Floor Official present in each Virtual Trading Crowd. Nasdaq Surveillance would conduct real-time surveillance for violations of Phlx rules, as is the case with physical open outcry. Floor Surveillance Procedures would be updated to account for the conferencing and chat requirements, as well as any changes to surveil a Virtual Trading Crowd. All surveillance patterns would be operable and function normally. The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote fair and orderly trading. The Exchange believes it will promote just and equitable principles of trading for all open outcry trading to occur in substantially the same manner, whether it occurs while market participants are in the same physical setting or in remote settings being connected through a technological solution.

Controls and security features are proposed to ensure that the appropriate market participants are participating in trades and to minimize any disruptions. Nasdaq non-surveillance staff would be responsible for the operation of the remote conferencing feature, which includes monitoring members to ensure that only floor members and members' employees are admitted into remote conferencing and are properly identified. Member organizations would be required to execute an addendum to the Nasdaq Services Agreement regarding their use of the remote conferencing feature in addition to consenting to voice recording.

In addition, the Exchange believes the proposed rule change will not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as all individuals authorized to act on the physical Trading Floor (both member organizations authorized at the time the physical Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor and any member organization that becomes authorized

[37] *See* Options 8, Section 22(c) Public Outcry—Pursuant to Options 8, Section 35 at Supplementary Material .01, bids and offers must be made in an audible tone of voice. A member shall be considered ''in'' on a bid or offer, while he remains at the post, unless he shall distinctly and audibly say ''out.'' A member bidding and offering in immediate and rapid succession shall be deemed ''in'' until he shall say ''out'' on either bid or offer. Once the trading crowd has provided a quote, it will remain in effect until: (A) A reasonable amount of time has passed, or (B) there is a significant change in the price of the underlying security, or (C) the market given in response to the request has been improved. In the case of a dispute, the term ''significant change'' will be interpreted on a case-by-case basis by an Options Exchange Official based upon the extent of the recent trading in the option and, in the case of equity and index options, in the underlying security, and any other relevant factors.

[38] *Id* at 25.

[39] The Exchange notes that today members are responsible for the operation of their own equipment while on the Trading Floor.

after the physical Trading Floor becomes unavailable) will be provided with access to the Virtual Trading Crowd. Additionally, the proposed rule change to permit the Exchange to elect a Virtual Trading Crowd if the physical Trading Floor is unavailable will provide individuals unable to trade on the physical Trading Floor as a result of certain restrictions to participate in open outcry trading remotely.

Surveillance staff will be present in each Virtual Trading Crowd to monitor the activity of each participant, who must be present by video, and to observe participant behavior. The Exchange will continue to surveil options transactions, as it does today, to identify transactions which are violative of Phlx Rules.[40] Phlx surveils for transactions which have been executed on its market to determine if those transactions utilized information which would have been available in open outcry trading and was not yet public or otherwise ascertainable due to the execution of a transaction. The Exchange notes that in both the electronic market and on the trading floor, members and member organizations must ensure that they have procedures reasonably designed to prevent the misuse of material, non-public information by employees.[41]

The Exchange has conducted several town halls with floor members in which the Exchange presented the functionality of the Virtual Trading Crowd and has made the Virtual Trading Crowd available for testing so that the Exchange will be ready to implement it if necessary. The Exchange has received positive feedback from floor members regarding the Virtual Trading Crowd and will continue to make updates as necessary and appropriate in response to comments it receives to make the Virtual Trading Crowd replicate the open outcry trading experience on the physical Trading Floor as much as possible. The Exchange believes this will provide the opportunity for as seamless a rollout as possible if circumstances cause the Exchange to make the Virtual Trading Crowd available.

Finally, this proposal does not amend the manner in which fees or other pricing incentives, such as caps, apply to floor participants. Any transaction originating from open outcry on the Trading Floor is considered a floor transaction. With offering FBMS remotely, the Exchange has not amended the manner in which fees are assessed or rebates are paid for purposes of Options 7 pricing to floor participants.

Technical Amendments

The Exchange's proposal to update citations to Options 8, Section 35 to Options 8, Section 24 are consistent with the Act as these non-substantive amendments will ensure the rule text is accurate.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act, as all member organizations authorized by the Exchange, or that become authorized by the Exchange, to transact on the Trading Floor will receive access to the Virtual Trading Crowd.

The Exchange does not believe that the proposed rule change will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act, as it relates solely to the location of open outcry trading on the Exchange. The proposed rule change will merely permit open outcry trading that generally occurs while market participants are located in the same physical setting to occur while market participants are in a remote setting, connected by a technological solution (as electronic trading does).

The Exchange believes that the proposed rule change will relieve any burden on, or otherwise promote, competition. The Exchange believes the proposed rule change will provide market participants with continuous access to open outcry trading when the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. The Exchange believes this may facilitate continued, competitive price negotiations and trading of orders that the Exchange understands are more difficult to execute in an all-electronic trading environment without human interaction. Additionally, the proposed rule change will provide customer orders represented for open outcry execution with access to the same pool of liquidity when the Trading Floor is unavailable to which those orders would have access when the Trading Floor is operating in its normal state. Maintenance of this level of liquidity at all times, even when the Trading Floor is unavailable, may promote competition by providing these customer orders with increased liquidity than may otherwise be available, and thus increased execution opportunities and price discovery. Every Floor Market Maker and Floor Broker is permitted access to FBMS.

With respect to inter-market competition, the Exchange notes that each options market has a business continuity plan. Because the options markets are physically located in different regions of the United States, the conditions under which a business continuity plan is deployed may differ, based on regional differences. In addition, any options exchange with a trading floor could amend its rules to adopt similar business continuity plans that engaged similar controls.

Technical Amendments

The Exchange's proposal to update citations to Options 8, Section 35 to Options 8, Section 24 do not impose an undue burden on competition as these non-substantive amendments will ensure the rule text is accurate.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[40] *See* Phlx Options 9, Section 1; and Options 9, Section 5. *See also* Options 3, Section 22(d).

[41] *See* Phlx General 9, Section 21.

*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–Phlx–2021–03 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–Phlx–2021–03. 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–Phlx–2021–03 and should be submitted on or before February 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00591 Filed 1–13–21; 8:45 am]

**BILLING CODE 8011–01–P**

[42] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–184, OMB Control No. 3235–0236]**

## Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

*Extension:*
Form N–54C

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Certain investment companies can elect to be regulated as business development companies, as defined in section 2(a)(48) of the Investment Company Act of 1940 (''Investment Company Act''), under sections 55 through 65 of the Investment Company Act. Under section 54(a) of the Investment Company Act,[1] any company defined in section 2(a)(48)(A) and (B) of the Investment Company Act may, if it meets certain enumerated eligibility requirements, elect to be subject to the provisions of Sections 55 through 65 of the Investment Company Act by filing with the Commission a notification of election. Under section 54(c) of the Investment Company Act,[2] any business development company may voluntarily withdraw its election under section 54(a) of the Investment Company Act by filing a notice of withdrawal of election with the Commission. The Commission has adopted Form N–54C as the form for the notification of withdrawal of election to be subject to Sections 55 through 65 of the Investment Company Act. The purpose of Form N–54C is to notify the Commission that the business development company withdraws its election to be subject to Sections 55 through 65 of the Investment Company Act.

The Commission estimates that on average approximately eight business development companies file notifications on Form N–54C each year. Each of those business development companies need only make a single filing of Form N–54C. The Commission further estimates that this information collection imposes a burden of one hour, resulting in a total annual burden of eight hours. Based on the estimated wage rate, the total cost to the business development company industry of the hour burden for complying with Form N–54C would be approximately $2,944.[3] The Commission also estimates that cost burden for outside professionals associated with the filing of Form N–54C increased to $560 because the Commission believes that filers use third-party vendors to comply with this requirement.

The collection of information under Form N–54C is mandatory. The information provided by the form is not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following website, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Lindsay.M.Abate@omb.eop.gov;* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.* 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.

Dated: January 11, 2021.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00733 Filed 1–13–21; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 15 U.S.C. 80a–53(a).

[2] 15 U.S.C. 80a–53(c).

[3] The industry burden is calculated by multiplying the total annual hour burden to prepare Form N–54C (eight) by the estimated hourly wage rate of $368 for a compliance attorney or other business development company employee with similar duties and responsibilities. The estimated wage figure is based on published rates for compliance attorneys from the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013, 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, yielding an effective hourly rate of $2,944.

## DEPARTMENT OF STATE

**[Public Notice:11316]**

### Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: "Picasso, Figures" Exhibition

**SUMMARY:** Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the exhibition ''Picasso, Figures'' at the Frist Art Museum, Nashville, Tennessee, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned are in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Chi D. Tran, Program Administrator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

**SUPPLEMENTARY INFORMATION:** The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000.

**Marie Therese Porter Royce,**

*Assistant Secretary, Educational and Cultural Affairs, Department of State.*

[FR Doc. 2021–00659 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–05–P

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## DEPARTMENT OF STATE

**[Public Notice: 11304]**

### In the Matter of the Amendment of the Designation of ISIL Sinai Province (and Other Aliases) as a Specially Designated Global Terrorist

Based upon a review of the administrative record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I have concluded that there is a sufficient factual basis to find that ISIL Sinai Province, uses the additional aliases ISIS-Sinai Province, Islamic State of Iraq and ash-Sham—Sinai Province, Islamic State of Iraq and the Sham—Sinai Province, ISIS–SP, and Wilayat Sayna.

Therefore, pursuant to Section 1(b) of Executive Order 13224, I hereby amend the designation of ISIL Sinai Province as a Specially Designated Global Terrorist to include the following new aliases: ISIS-Sinai Province, Islamic State of Iraq and ash-Sham—Sinai Province, Islamic State of Iraq and the Sham—Sinai Province, ISIS–SP, and Wilayat Sayna.

This notice shall be published in the **Federal Register**.

Dated: December 22, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00607 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

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## DEPARTMENT OF STATE

**[Public Notice 11310]**

### Designation of Fuad Ahmad Nuri Ali al-Shakhan as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(a)(ii)(B) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, Executive Order 13284 of January 23, 2003, and Executive Order 13886 of September 9, 2019, I hereby determine that the person known as Fuad Ahmad Nuri Ali al-Shakan, also known as Bilal al-Chamchamali, also known as Bilal Kirkuki, also known as Mam Karim, is a foreign person who is a leader of al-Qa'ida Kurdish Battalions, a group whose property and interests in property are concurrently blocked pursuant to a determination by the Secretary of State pursuant to Executive Order 13224.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: January 6, 2021.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00629 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

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## DEPARTMENT OF STATE

**[Public Notice 11307]**

### Review of the Designations as Foreign Terrorist Organizations of Lashkar-e-Tayyiba (and Other Aliases); Jaysh Rijal al-Tariq al Naqshabandi (and Other Aliases); Jama'atu Ansarul Muslimina Fi Biladis-Sudan (Ansaru and Other Aliases); Harakat ul-Mujahidin (and Other Aliases); al-Nusrah Front (and Other Aliases); Popular Front for the Liberation of Palestine (and Other Aliases); Continuity Irish Republican Army (and Other Aliases); and the National Liberation Army (and Other Aliases)

Based upon a review of the Administrative Records assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the bases for the designations of the aforementioned organizations as Foreign Terrorist Organizations have not changed in such a manner as to warrant revocation of the designations and that the national security of the United States does not warrant a revocation of the designations.

Therefore, I hereby determine that the designations of the aforementioned organizations as Foreign Terrorist Organizations, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 22, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00619 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

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## DEPARTMENT OF STATE

**[Public Notice: 11309]**

### Designation of Isma'il Fu'ad Rasul Ahmed as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(a)(ii)(B) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, Executive Order

13284 of January 23, 2003, and Executive Order 13886 of September 9, 2019, I hereby determine that the person known as Isma'il Fu'ad Rasul Ahmed, also known as Abdallah Kurdi, is a foreign person who is a leader of al-Qa'ida Kurdish Battalions, a group whose property and interests in property are concurrently blocked pursuant to a determination by the Secretary of State pursuant to Executive Order 13224.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: January 6, 2021.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00628 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF STATE

**[Public Notice: 11314]**

### Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Facing America: Mario Schifano 1960–1965'' Exhibition

**SUMMARY:** Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition ''Facing America: Mario Schifano 1960–1966'' at the Center for Italian Modern Art, New York, New York, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Chi D. Tran, Program Administrator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

**SUPPLEMENTARY INFORMATION:** The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000.

**Marie Therese Porter Royce,**

*Assistant Secretary, Educational and Cultural Affairs, Department of State.*

[FR Doc. 2021–00658 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–05–P

## DEPARTMENT OF STATE

**[Public Notice 11301]**

### Review and Amendment of the Designation of ISIL-Sinai Province (and Other Aliases) as a Foreign Terrorist Organization

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization (and other aliases) as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation. I also conclude that there is a sufficient factual basis to find that the following are additional aliases of the aforementioned organization (and other aliases): ISIS-Sinai Province, Islamic State of Iraq and ash-Sham—Sinai Province, Islamic State of Iraq and the Sham—Sinai Province, ISIS–SP, and Wilayat Sayna.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained. Additionally, pursuant to Section 219(b) of the INA, as amended (8 U.S.C. 1189(b)), I hereby amend the designation of the aforementioned organization (and other aliases) as a Foreign Terrorist Organization to include the following new aliases: ISIS-Sinai Province, Islamic State of Iraq and ash-Sham—Sinai Province, Islamic State of Iraq and the Sham—Sinai Province, ISIS–SP, and Wilayat Sayna.

This determination shall be published in the **Federal Register**.

Dated: December 22, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00600 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF STATE

**[Public Notice 11306]**

### Review of the Designation as a Foreign Terrorist Organization of Palestinian Islamic Jihad (and Other Aliases)

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This notice shall be published in the **Federal Register**.

Dated: December 22, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00618 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF STATE

**[Public Notice 11311]**

### Designation of Sultan Yusuf Hasan al-'Arif as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(a)(ii)(B) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, Executive Order 13284 of January 23, 2003, and Executive Order 13886 of September 9, 2019, I hereby determine that the person known as Sultan Yusuf Hasan al-'Arif, also known as Qital al-'Abdali, also known as Qattal al-'Abdali, also known as Qital al-Najdi, also known as Abu Musab al-Saudi, is a foreign person who is a leader of al-Qa'ida, a group whose property and interests in property are concurrently blocked pursuant to a determination by the Secretary of State pursuant to Executive Order 13224.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: January 6, 2021.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00632 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF STATE

**[Public Notice: 11305]**

### In the Matter of the Designation of Harakat Sawa'd Misr (and Other Aliases) as a Foreign Terrorist Organization

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter ''INA'') (8 U.S.C. 1189), exist with respect to Harakat Sawa'd Misr, also known as Harakah Sawa'id Misr, also known as Harikat Souaid Misr, also known as HASM, also known as HASM Movement, also known as Hassam Movement, also known as Arms of Egypt Movement, also known as Movement of Egypt's Arms, also known as Movement of Egypt's Forearms, also known as Hassm, also known as Hamms, also known as Hassam, also known as Hasam.

Therefore, I hereby designate the aforementioned organization and its aliases as a foreign terrorist organization pursuant to section 219 of the INA.

This determination shall be published in the **Federal Register**.

Dated: December 22, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00608 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF STATE

**[Public Notice: 11315]**

### Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: "Americans in Spain: Painting and Travel, 1820–1920" Exhibition

**SUMMARY:** Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition ''Americans in Spain: Painting and Travel, 1820–1920'' at the Chrysler Museum of Art, Norfolk, Virginia, at the Milwaukee Art Museum, Milwaukee, Wisconsin, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Chi D. Tran, Program Administrator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

**SUPPLEMENTARY INFORMATION:** The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000.

**Marie Therese Porter Royce,**

*Assistant Secretary, Educational and Cultural Affairs, Department of State.*

[FR Doc. 2021–00656 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–05–P

## DEPARTMENT OF STATE

**[Public Notice 11302]**

### Review and Amendment of the Designation of Lashkar i Jhangvi (and Other Aliases) as a Foreign Terrorist Organization

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization (and other aliases) as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation. I also conclude that there is a sufficient factual basis to find that the following are additional aliases of the aforementioned organization (and other aliases): Lashkar e Jhangvi al-Alami, also known as Lashkar e Jhangvi al-Almi, also known as LeJ al-Alami.

Therefore, I hereby determine that the designation of the aforementioned organization (and other aliases) as a Foreign Terrorist Organization, pursuant to Section 219 of the INA, as amended (8 U.S.C. 1189), shall be maintained. Additionally, pursuant to Section 219(b) of the INA, as amended (8 U.S.C. 1189(b)), I hereby amend the designation of the aforementioned organization (and other aliases) as a Foreign Terrorist Organization to include the following new aliases: Lashkar e Jhangvi al-Alami, also known as Lashkar e Jhangvi al-Almi, also known as LeJ al-Alami.

This determination shall be published in the **Federal Register**.

Dated: December 22, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00601 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF STATE

**[Public Notice: 11303]**

### In the Matter of the Amendment of the Designation of Lashkar i Jhangvi (and Other Aliases) as a Specially Designated Global Terrorist

Based upon a review of the administrative record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I have concluded that there is a sufficient factual basis to find that Lashkar i Jhangvi, uses the additional alias Lashkar e Jhangvi al-Alami, also known as Lashkar e Jhangvi al-Almi, also known as LeJ al-Alami.

Therefore, pursuant to Section 1(b) of Executive Order 13224, I hereby amend the designation of Lashkar i Jhangvi as a Specially Designated Global Terrorist to include the following new aliases: Lashkar e Jhangvi al-Alami, Lashkar e Jhangvi al-Almi, and LeJ al-Alami.

This notice shall be published in the **Federal Register**.

Dated: December 22, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00606 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF STATE

**[Public Notice: 11300]**

### Notice of Public Meeting To Prepare for International Maritime Organization Session

The Department of State will conduct a public meeting at 10:00 a.m. on Wednesday, February 10, 2021, by way of teleconference. Members of the public may participate up to the capacity of the teleconference phone line, which will handle 500 participants. To access the teleconference line, participants should call (202) 475–4000 and use Participant Code: 415 533 25#. The primary purpose of the meeting is to prepare for the seventh session of the International Maritime Organization's (IMO) Sub-Committee on Human Element, Training and Watchkeeping (HTW) to be held remotely, February 15–19, 2021.

The agenda items to be considered include:

—Adoption of the agenda
—Decisions of other IMO bodies
—Role of the human element
—Implementation of the STCW Convention
—Comprehensive review of the 1995 STCW–F Convention
—Development of amendments to the STCW Convention and Code for the use of electronic certificates and documents of seafarers
—Development of measures to ensure quality of onboard training as part of the mandatory seagoing service required by the STCW Convention
—Development of measures to facilitate mandatory seagoing service required under the STCW Convention
—Biennial status report and provisional agenda for HTW 8
—Election of Chair and Vice-Chair for 2022
—Any other business
—Report to the Maritime Safety Committee

*Please note:* The Sub-committee may, on short notice, adjust the HTW 7 agenda to accommodate the constraints associated with the virtual meeting format. Although no changes to the agenda are anticipated, if any are necessary, they will be provided to those who RSVP.

Those who plan to participate may contact the meeting coordinator, Mr. Kenneth Doyle, by email at *Kenneth.j.Doyle@uscg.mil,* by phone at (202) 372–1046, or in writing at 2703 Martin Luther King Jr. Ave. SE, Stop 7509, Washington DC 20593–7509.

Additional information regarding this and other IMO public meetings may be found at: *https://www.dco.uscg.mil/IMO.*

**Jeremy M. Greenwood,**

*Coast Guard Liaison Officer, Office of Ocean and Polar Affairs, Department of State.*

[FR Doc. 2021–00657 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–09–P

## DEPARTMENT OF STATE

**[Public Notice 11313]**

### Designation of Muhammad Abbatay as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(a)(ii)(B) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, Executive Order 13284 of January 23, 2003, and Executive Order 13886 of September 9, 2019, I hereby determine that the person known as Muhammad Abbatay, also known as Mohamed Abbatay, also known as Abd al-Rahman al-Maghrebi, also known as Abdul Rahman al-Maghrebi, is a foreign person who is a leader of al-Qa'ida, a group whose property and interests in property are concurrently blocked pursuant to a determination by the Secretary of State pursuant to Executive Order 13224.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: January 6, 2021.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2021–00633 Filed 1–13–21; 8:45 am]

BILLING CODE 4710–AD–P

## DEPARTMENT OF TRANSPORTATION

**Federal Aviation Administration**

**[FAA–2021–0007]**

### Notice of Availability of the Las Vegas Metroplex Project Written Re-Evaluation/Record of Decision for Changes to the Final Environmental Assessment Designs

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

**ACTION:** Notice of availability of the Written Re-evaluation/Record of Decision (WR/ROD).

**SUMMARY:** The FAA is issuing this notice to advise the public that it has issued a WR/ROD for changes to the Las Vegas Metroplex Project Final Environmental Assessment (EA) Design for five flight procedures.

**FOR FURTHER INFORMATION CONTACT:** Emily Sturnfield, Operations Support Group, Northwest Mountain Regional Office, Federal Aviation Administration, 2200 216th Street, Des Moines, Washington 98198; telephone: (206) 231–2415.

**SUPPLEMENTARY INFORMATION:** On July 17, 2020, the FAA published in the **Federal Register** notice of the availability of a Finding of No Significant Impact and Record of Decision (FONSI/ROD) for the Las Vegas Metroplex (LAS Metroplex) Final EA. The designs for five proposed procedures analyzed in the Final EA and approved for implementation in the FONSI/ROD require changes to comply with FAA safety criteria. This notice refers to these changes as the ''Design Changes.''

Four of the Design Changes are to the designs of procedures at McCarran International Airport (KLAS): (1) HOOVER SEVEN Standard Instrument Departure (SID), (2) Area Navigation (RNAV) (Required Navigation Performance [RNP]) Z Runway (RWY) 19R approach, (3) RNAV (Global Positioning System [GPS]) Y RWY 19R approach, and (4) RNAV (RNP) Z RWY

19L approach. The fifth change is to the design of a procedure at nearby Henderson Executive Airport (KHND), the GAMES Standard Terminal Arrival Route (STAR).

To determine whether the Design Changes require supplementation of the Final EA, the FAA has analyzed the potential environmental effects from the Design Changes, consistent with FAA Order 1050.1F, Paragraph 9–2.c.(1), to determine whether the changes to the Final EA Design would be ''substantial'' and ''relevant to environmental concerns,'' *i.e.,* ''paint[s] a dramatically different picture of impacts compared to the description of impacts in the [Final] EA'' (id., Paragraph 9–3). The FAA's analysis and determination are documented in a WR/ROD dated December 21, 2020. The WR/ROD analyzes the same environmental impact categories analyzed in the Final EA.

As documented in the WR/ROD, the FAA has determined that the Design Changes are not a substantial change in the FAA's proposed action, as analyzed in the Final EA for the Las Vegas Metroplex Project and approved in the FONSI/ROD, relevant to environmental concerns. The data and analyses contained in the Final EA and FONSI/ROD are still substantially valid and there are no significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Accordingly, the WR/ROD also documents the FAA's decision not to prepare a supplement to the Final EA.

The WR/ROD is publicly available at *https://www.faa.gov/air_traffic/community_involvement/las/* and *http://www.metroplexenvironmental.com/las_metroplex/las_docs.html.*

Issued in Des Moines, WA, on January 6, 2021.

**Byron Chew,**

*Acting Group Manager, Operations Support Group, Western Service Center.*

[FR Doc. 2021–00369 Filed 1–13–21; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Rescinding the Notice of Intent for a Supplemental Environmental Impact Statement: Lafourche Parish, LA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Rescind notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that effective immediately, we are rescinding a Notice of Intent (NOI) to prepare a Supplemental Environmental Impact Statement (SEIS) for the 2002 LA 1 Final Environmental Impact Statement (FEIS) in Lafourche Parish, LA.

**FOR FURTHER INFORMATION CONTACT:** Charles Bolinger, Division Administrator, Louisiana Division, Federal Highway Administration, 5304 Flanders Drive, Suite A, Baton Rouge, LA 70808 Telephone: 225.757.7600.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Louisiana Department of Transportation and Development (LADOTD), issued a NOI on March 15, 2017, to prepare a Supplemental Environmental Impact Statement (SEIS) to study local access modifications and right-of-way impacts to roadway approaches beyond the initial Final Environmental Impact Statement (FEIS) project limits.

The FHWA has determined, in conjunction with LADOTD, the NOI for the SEIS shall be rescinded due to the numerous impacts to traffic and right-of-way beyond the initial project limits identified in the FEIS. The project layout as previously identified in the FEIS will remain as the selected alternative.

Issued on: January 11, 2021.

**Charles Bolinger,**

*Division Administrator, Louisiana Division, Baton Rouge, Louisiana.*

[FR Doc. 2021–00683 Filed 1–13–21; 8:45 am]

**BILLING CODE 4910–22–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket Number FRA–2020–0099]**

### Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

Under part 235 of title 49 Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that on December 22, 2020, Norfolk Southern Corporation (NS) petitioned the Federal Railroad Administration (FRA) seeking approval to discontinue or modify a signal system. FRA assigned the petition Docket Number FRA–2020–0099.

Applicant: Norfolk Southern Corporation, Tommy A. Phillips, Senior Director—C&S Engineering, 1200 Peachtree Street, NE, Atlanta, GA 30309.

Specifically, NS requests permission to discontinue an automatic block signal (ABS) system which includes the control point (CP) at BV&E Junction, 20 automatic signals on the H Line, and all 9 automatic signals on the J-Line. An operative approach signal will be placed at milepost (MP) H–223.8 in approach to CP Columbus Junction. Two operative approach signals will be installed at MP H–239.7 and MP H–242.6 in approach to CP North Oglethorp. The main track between MP H–220 and MP J–295.0 on the Albany Line of the Georgia Division will be converted to NS Rule 171 operation.

The reason for the proposed discontinuance is that operations no longer require a signal system.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave., SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave., SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 1, 2021 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. 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 *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

**John Karl Alexy,**

*Associate Administrator for Railroad Safety, Chief Safety Officer.*

[FR Doc. 2021–00763 Filed 1–13–21; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2020–0001]**

## Requested Administrative Waiver of the Coastwise Trade Laws: Vessel NEVER ENOUGH II (Power Convertible); Invitation for Public Comments

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before February 16, 2021.

**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD–2020–0001 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0001 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0001, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

*Note:* If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

*Instructions:* All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

**FOR FURTHER INFORMATION CONTACT:** Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone 202–366–3157, Email *Russell.Haynes@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel Never Enough II is:

—Intended Commercial Use of Vessel: ''Charter fishing''

—Geographic Region Including Base of Operations: ''North Carolina'' (Base of Operations: Beaufort, NC)

—Vessel Length And Type: 35′ Power Convertible

The complete application is available for review identified in the DOT docket as MARAD–2020–0001 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

### Public Participation

*How do I submit comments?*

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

*Where do I go to read public comments, and find supporting information?*

Go to the docket online at *http://www.regulations.gov*, keyword search MARAD–2020–0001 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

*Will my comments be made available to the public?*

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

*May I submit comments confidentially?*

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

### 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, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

Dated: January 11, 2021.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2021–00669 Filed 1–13–21; 8:45 am]

BILLING CODE 4910–81–P

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Action

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of this person are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

**FOR FURTHER INFORMATION CONTACT:** OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480.

**SUPPLEMENTARY INFORMATION:**

#### Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treas.gov/ofac*).

#### Notice of OFAC Action(s)

On January 8, 2021, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following person are blocked under the relevant sanctions authority listed below.

*Individual*

1. AL–FAYYADH, Falih (a.k.a. AL FAYYADH, Falih Faisal Fahad; a.k.a. ALFAYYADH, Faleh; a.k.a. ALFAYYADH, Falih), Iraq; DOB 27 Mar 1956; POB Iraq; nationality Iraq; Gender Male; Passport D1019262 (Iraq) expires 14 Jul 2026 (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of Executive Order 13818 of December 20, 2017, ''Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption,'' 82 FR 60839, 3 CFR, 2018 Comp., p. 399, (E.O. 13818) for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

Dated: January 8, 2021.

**Andrea M. Gacki,**

*Director, Office of Foreign Assets Control, U.S. Department of the Treasury.*

[FR Doc. 2021–00590 Filed 1–13–21; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF TREASURY

### Internal Revenue Service

### Electronic Tax Administration Advisory Committee (ETAAC); Nominations

**AGENCY:** Internal Revenue Service, Department of Treasury.

**ACTION:** Request for nominations.

**SUMMARY:** The Internal Revenue Service (IRS) is requesting applications from individuals with experience in such areas as state tax administration, cybersecurity and information security, tax software development, tax preparation, payroll and tax financial product processing, systems management and improvement, implementation of customer service initiatives, public administration, and consumer advocacy to be considered for selection as members of the Electronic Tax Administration Advisory Committee (ETAAC).

**DATES:** Written nominations must be received on or before March 1, 2021.

**ADDRESSES:** Applications may be submitted via fax to 855–811–8020 or via email to *PublicLiaison@irs.gov.* Application packages are available on the IRS website at *https://www.irs.gov/e-file-providers/apply-for-membership-on-the-electronic-tax-administration-advisory-committee-etaac.* Application packages may also be requested by telephone from National Public Liaison, 202–317–6247 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:** Sean Parman at (202) 317–6247, or send an email to *publicliaison@irs.gov*.

**SUPPLEMENTARY INFORMATION:** The IRS strongly encourages representatives from consumer groups with an interest in tax issues to apply.

Nominations should describe and document the proposed member's qualifications for ETAAC membership, including the applicant's knowledge of regulations and the applicant's past or current affiliations and involvement with the particular tax segment or segments of the community that the applicant wishes to represent on the committee. Applications will be accepted for current vacancies from qualified individuals and from professional and public interest groups that wish to have representation on ETAAC. Submissions must include an application and resume.

ETAAC provides continuing input into the development and implementation of the IRS organizational strategy for electronic tax administration. The ETAAC provides an organized public forum for discussion of electronic tax administration issues—such as prevention of identity theft-related refund fraud—in support of the overriding goal that paperless filing should be the preferred and most convenient method of filing tax and information returns. ETAAC members work closely with the Security Summit, a joint effort of the IRS, state tax administrators and the nation's tax industry, to fight identity theft and refund fraud. ETAAC members convey the public's perceptions of IRS electronic tax administration activities, offer constructive observations about current or proposed policies, programs and procedures, and suggest improvements.

This is a volunteer position. Members will serve three-year terms on the ETAAC to allow for a rotation in membership and ensure different perspectives are represented. Travel expenses within government guidelines will be reimbursed. In accordance with Department of Treasury Directive 21–03, a clearance process including fingerprints, annual tax checks, a Federal Bureau of Investigation criminal check and a practitioner check with the Office of Professional Responsibility will be conducted.

The establishment and operation of the Electronic Tax Administration Advisory Committee (ETAAC) is required by the Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 (RRA 98), Title II, Section 2001(b)(2). ETAAC follows a charter in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. The ETAAC provides continued input into the development and implementation of the IRS's strategy for electronic tax administration. The ETAAC will research, analyze, consider, and make recommendations on a wide range of electronic tax administration issues and will provide input into the development of the strategic plan for electronic tax administration. Members will provide an annual report to Congress by June 30.

Applicants must complete the application form, which includes describing and documenting the applicant's qualifications for ETAAC membership. Applicants must submit a short one or two-page statement including recent examples of specific skills and qualifications as they relate to: cybersecurity and information security, tax software development, tax preparation, payroll and tax financial product processing, systems management and improvement, implementation of customer service initiatives, consumer advocacy and public administration. Examples of critical thinking, strategic planning and oral and written communication are desirable.

An acknowledgement of receipt will be sent to all applicants.

Equal opportunity practices will be followed in all appointments to the ETAAC in accordance with Department of Treasury and IRS policies. The IRS has a special interest in assuring that women and men, members of all races and national origins, and individuals with disabilities have an opportunity to serve on advisory committees. Therefore, IRS extends particular encouragement to nominations from such appropriately qualified individuals.

Dated: January 11, 2021.

**John Lipold,**

*Designated Federal Official.*

[FR Doc. 2021–00744 Filed 1–13–21; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE TREASURY

### United States Mint

### Notification of Citizens Coinage Advisory Committee January 19, 2021, Public Meeting

**ACTION:** Notice of meeting.

Pursuant to United States Code, Title 31, section 5135(b)(8)(C), the United States Mint announces the Citizens Coinage Advisory Committee (CCAC) teleconference public meeting scheduled for January 19, 2021.

*Date:* January 19, 2021.

*Time:* 10:30 a.m.–12:00 p.m.

Location: This meeting will occur via teleconference. Interested members of the public may dial in to listen to the meeting at (888) 330–1716; Access Code: 1137147.

*Subject:* Review and discussion of obverse and reverse candidate designs for the 2021 ''Morgan'' and ''Peace'' silver dollars authorized by Public Law 116–286, the 1921 Silver Dollar Coin Anniversary Act.

Interested persons should call the CCAC HOTLINE at (202) 354–7502 for the latest update on meeting time and access information.

The CCAC advises the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, Congressional Gold Medals, and national and other medals; advises the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made; and makes recommendations with respect to the mintage level for any commemorative coin recommended.

For members of the public interested in listening in to the provided call number, this is a reminder that the public attendance is for listening purposes only. Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by email to *info@ccac.gov.*

**FOR FURTHER INFORMATION CONTACT:** Jennifer Warren, United States Mint Liaison to the CCAC; 801 9th Street, NW; Washington, DC 20220; or call 202–354–7208.

(Authority: 31 U.S.C. 5135(b)(8)(C))

**Eric Anderson,**

*Executive Secretary, United States Mint.*

[FR Doc. 2021–00730 Filed 1–13–21; 8:45 am]

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## UNITED STATES INSTITUTE OF PEACE

### Notice of Meeting

*Agency:* United States Institute of Peace.

*Date/Time:* Friday, January 22, 2021 (10:00 a.m.-12:00 p.m.)

*Location:* Virtual Board Meeting Information: Join by video:*https://usip-org.zoomgov.com/j/1610908606?pwd=YmZoRFhvU2pSdm1FajRvbGtvL25XQT09.*

*Dial-in option:* +1–646–828–7666.

*Meeting ID:* 161 090 8606/Password: 220238.

*Status:* Open Session—Portions may be closed pursuant to Subsection (c) of Section 552(b) of Title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

*Agenda:* January 22, 2021 Board Meeting: Chair's Report; Vice Chair's Report; President's Report; approval of minutes of the October 23, 2020 Board meeting; Reports on USIP Priorities: *Afghanistan, Ethiopia, Strategic Stability and Security, Latin America* and *the Global Fragility Act;* Reports from USIP Building, Program, Audit & Finance, and Security Committees.

*Contact:* Megan O'Hare, Chief of Staff: *mohare@usip.org.*

**Authority:** 22 U.S.C. 4605(h)(3).

Dated: January 7, 2021.

**Megan O'Hare,**

*Chief of Staff.*

[FR Doc. 2021–00599 Filed 1–13–21; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF VETERANS AFFAIRS

### National Research Advisory Council, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the National Research Advisory Council will hold a meeting on Wednesday, March 3, 2021, by WebEx. The teleconference number is 1–404–397–1596, meeting number 199 427 0701. The weblink is: *https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=m6d6c6d2ab3141a185f0cb686798a3585.* The meeting will convene at 11:00 a.m. and end at 2:00 p.m. Eastern daylight time. This meeting is open to the public.

The purpose of the National Research Advisory Council is to advise the Secretary on research conducted by the Veterans Health Administration, including policies and programs targeting the high priority of Veterans' health care needs.

On March 3, 2021, the agenda will include a discussion of diversity, equity, and inclusion activities undertaken by the Office of Research and Development; alternative strategies for funding research in response to the Scott Hannon Act; report from the subcommittee on sensitive species; and report from the subcommittee on management of extramural funding. No time will be allocated at this meeting for receiving oral presentations from the public. Members of the public wanting to attend, have questions or presentations to present may contact Dr. Marisue Cody, Designated Federal Officer, Office of Research and Development (14RD), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at 202–443–5681, or *Marisue.Cody@va.gov* no later than close of business on January 29, 2021. All questions and presentations will be presented during the public comment section of the meeting. Any member of the public seeking additional information should contact Dr. Cody at the above phone number or email address noted above.

Dated: January 8, 2021.

**LaTonya L. Small,**

*Federal Advisory Committee Management Officer.*

[FR Doc. 2021–00598 Filed 1–13–21; 8:45 am]

BILLING CODE P

# FEDERAL REGISTER

Vol. 86 Thursday,

No. 9 January 14, 2021

Part II

## Commodity Futures Trading Commission

17 CFR Parts 1, 15, 17, et al.

Position Limits for Derivatives; Final Rule

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Parts 1, 15, 17, 19, 40, 140, 150 and 151**

**RIN 3038–AD99**

## Position Limits for Derivatives

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting amendments in this final rule (''Final Rule'') to conform regulations concerning speculative position limits to the relevant Wall Street Transparency and Accountability Act of 2010 (''Dodd-Frank Act'') amendments to the Commodity Exchange Act (''CEA''). Among other regulatory amendments, the Commission is adopting: New and amended Federal spot-month limits for 25 physical commodity derivatives; amended single month and all-months-combined limits for most of the agricultural contracts currently subject to Federal position limits; new and amended definitions for use throughout the position limits regulations, including a revised definition of ''bona fide hedging transaction or position'' and a new definition of ''economically equivalent swaps''; amended rules governing exchange-set limit levels and grants of exemptions therefrom; a new streamlined process for bona fide hedging recognitions for purposes of Federal position limits; new enumerated bona fide hedges; and amendments to certain regulatory provisions that would eliminate Form 204 while also enabling the Commission to leverage and receive cash-market reporting submitted directly to the exchanges by market participants.

**DATES:**

*Effective date:* This Final Rule will become effective on March 15, 2021.

*Compliance date:* Compliance dates for this Final Rule shall be as follows:

- January 1, 2022 in connection with the Federal speculative position limits for the 16 non-legacy core referenced futures contracts subject to Federal position limits for the first time under this Final Rule. This compliance date also applies to any associated referenced contracts other than economically equivalent swaps. Such swaps are subject to a separate compliance date noted below.
- January 1, 2022 in connection with an exchange's requirements under § 150.5, as adopted in this Final Rule.
- January 1, 2023 in connection with Federal speculative position limits for economically equivalent swaps, as defined under this Final Rule.
- January 1, 2023 in connection with the elimination of previously-granted risk management exemptions described in § 150.3(c), as adopted in this Final Rule.

**FOR FURTHER INFORMATION CONTACT:** Dorothy DeWitt, Director, (202) 418–6057, *ddewitt@cftc.gov*; Rachel Reicher, Chief Counsel, (202) 418–6233, *rreicher@cftc.gov*; Steven A. Haidar, Assistant Chief Counsel, (202) 418–5611, *shaidar@cftc.gov*; Aaron Brodsky, Senior Special Counsel, (202) 418–5349, *abrodsky@cftc.gov*; Steven Benton, Industry Economist, (202) 418–5617, *sbenton@cftc.gov*; Lillian Cardona, Assistant Chief Counsel, (202) 418–5012, *lcardona@cftc.gov*; Jeanette Curtis, Assistant Chief Counsel, (202) 418–5669, *jcurtis@cftc.gov*; Harold Hild, Policy Advisor, (202) 418–5376, *hhild@cftc.gov*; Division of Market Oversight, in each case, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; Michael Ehrstein, Special Counsel, (202) 418–5957, *mehrstein@cftc.gov*; Chang Jung, Special Counsel, (202) 418–5202, *cjung@cftc.gov*; Division of Swap Dealer and Intermediary Oversight, in each case, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; Rachel Hayes, Trial Attorney, (816) 960–7741, *rhayes@cftc.gov*; Division of Enforcement, Commodity Futures Trading Commission, 4900 Main Street, Suite 500, Kansas City, MO 64112; or Brigitte Weyls, Trial Attorney, (312) 596–0547, *bweyls@cftc.gov*; Division of Enforcement, Commodity Futures Trading Commission, 525 West Monroe Street, Suite 1100, Chicago, IL 60661.

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## I. Background

### A. Introduction

The Commission has long established and enforced speculative position limits for futures contracts and options on futures contracts on nine agricultural commodities as authorized by the CEA.[1] These nine agricultural commodity contracts, which have been subject to Federal position limits for decades, are generally referred to as the ''nine legacy agricultural contracts.'' Under this Final Rule, the Commission additionally will establish Federal speculative position limits for certain commodity derivatives contracts associated with 16 additional commodities. The Commission refers to these 16 new commodities and their associated commodity derivatives contracts throughout this release as the ''non-legacy'' contracts since they are subject to Federal position limits for the first time under this Final Rule. Accordingly, under the Final Rule, certain commodity derivatives contracts associated with 25 commodities are subject to Federal position limits.

The Commission's existing position limits regulations [2] in existing part 150

[1] 7 U.S.C. 1 *et seq.*

[2] 17 CFR part 150. Part 150 of the Commission's regulations establishes Federal position limits (that is, position limits established by the Commission) on the nine legacy agricultural contracts. The nine legacy agricultural contracts are: CBOT Corn (and Mini-Corn) (C), CBOT Oats (O), CBOT Soybeans (and Mini-Soybeans) (S), CBOT Wheat (and Mini-Wheat) (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX Hard Red Spring Wheat (MWE), CBOT KC Hard Red Winter Wheat (KW),

of the Commission's regulations include three components:

First, the Commission's existing regulations establish separate position limit levels for each of the nine legacy agricultural contracts. These Federal position limit levels set the maximum speculative positions in each of the nine legacy agricultural contracts that a person may hold in the spot month, individual month, and all-months-combined.[3]

Second, the existing Federal position limits framework provides exemptions to the Federal position limit levels for positions that constitute ''bona fide hedging transactions or positions'' and for certain ''spread or arbitrage'' positions.[4]

Third, the Commission's existing regulations determine which accounts and positions a person must aggregate for the purpose of determining compliance with the Federal position limit levels.[5]

The existing Federal speculative position limits function in parallel to exchange-set position limits and/or exchange-set position accountability required by designated contract market (''DCM'') Core Principle 5.[6] As a result, the nine legacy agricultural contracts are subject to both Federal and exchange-set limits, whereas other exchange-traded futures contracts and options on futures contracts are subject only to DCM-set limits and/or position accountability.

As part of the Dodd-Frank Act, Congress amended the CEA's position limits provisions, which since 1936 have authorized the Commission (and its predecessor) to impose limits on speculative positions to prevent the harms caused by excessive speculation. As discussed below, the Commission interprets these amendments as, among other things, tasking the Commission with establishing such position limits as it finds are ''necessary'' for the purpose of ''diminishing, eliminating, or preventing'' excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity.[7] The Commission also interprets these amendments as tasking the Commission with establishing position limits on any ''economically equivalent'' swaps.[8]

The Commission previously issued proposed and final rules in 2011 (''2011 Final Rulemaking'') to implement the provisions of the Dodd-Frank Act regarding position limits and the bona fide hedge definition.[9] A September 28, 2012 order of the U.S. District Court for the District of Columbia vacated the 2011 Final Rulemaking, with the exception of the rule's amendments to 17 CFR 150.2.[10]

Subsequently, the Commission proposed position limits regulations in 2013 (''2013 Proposal''), in June of 2016 (''2016 Supplemental Proposal''), and again in December of 2016 (''2016 Reproposal'').[11] The 2016 Reproposal would have amended part 150 of the Commission's regulations to, among other things: Establish Federal position limits for 25 physical commodity futures contracts and their linked futures contracts, options on futures contracts, and ''economically equivalent'' swaps; revise the existing exemptions from such limits, including for bona fide hedges; and establish a framework for exchanges[12] to recognize certain positions as bona fide hedges and thus exempt from position limits.

To date, the Commission has not issued any final rulemaking based on the 2013 Proposal, 2016 Supplemental Proposal, or 2016 Reproposal. The 2016 Reproposal generally addressed comments received in response to the 2013 Proposal and the 2016 Supplemental Proposal. In a separate 2016 proposed rulemaking, the CFTC also proposed, and later adopted in 2016, amendments to rules in § 150.4 of the Commission's regulations governing aggregation of positions for purposes of compliance with Federal position limits.[13] These aggregation rules currently apply only to the nine legacy agricultural contracts subject to existing Federal position limits. Going forward, these aggregation rules will apply to all commodity derivative contracts that are subject to Federal position limits under this Final Rule.

The Commission published a notice of a proposed rulemaking in the **Federal Register** on February 27, 2020 for a new position limits proposal (''2020 NPRM''). After reconsidering the prior proposals, including reviewing the comments responding thereto, the Commission in the 2020 NPRM withdrew from further consideration the 2013 Proposal, the 2016 Supplemental Proposal, and the 2016 Reproposal.[14]

In the 2020 NPRM, the Commission intended to: (1) Recognize differences across commodities and contracts, including differences in commercial hedging and cash-market reporting practices; (2) focus on commodity derivative contracts that are critical to price discovery and distribution of the underlying commodities such that the burden of excessive speculation in the commodity derivative contracts may have a particularly acute impact on interstate commerce for the underling commodities; and (3) reduce duplication and inefficiency by leveraging existing expertise and processes at DCMs.

The public comment period for the 2020 NPRM ended May 15, 2020,[15] and

and ICE Cotton No. 2 (CT). *See* 17 CFR 150.2. The Federal position limits on these agricultural contracts are referred to as ''legacy'' limits because these contracts have been subject to Federal position limits for decades.

[3] *See* 17 CFR 150.2.

[4] *See* 17 CFR 150.3.

[5] *See* 17 CFR 150.4.

[6] 7 U.S.C. 7(d)(5); 17 CFR 38.300. Paragraph (A) of DCM Core Principle 5 provides: To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. Position limits generally cannot be exceeded absent an exemption, whereas position accountability allows an exchange to establish a level at which market participants, including those participants who do not qualify for an exemption, are required to: Provide position information to the exchange prior to increasing a position above the accountability level; halt further position increases; and/or reduce positions in an orderly manner. Core Principle 6 in part 37 of the Commission's regulations for swap execution facilities (''SEFs'') contains similar language. 17 CFR 38.600.

[7] 7 U.S.C. 6a(a)(1); *see infra* Section III.C. (discussion of the necessity finding).

[8] 7 U.S.C. 6a(a)(5); *see also infra* Section II.B.1.iii.

[9] Position Limits for Derivatives, 76 FR 4752 (Jan. 26, 2011) (''2011 Proposal''); Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011) (''2011 Final Rulemaking'').

[10] *Int'l Swaps & Derivatives Ass'n* v. *U.S. Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012) (''*ISDA*'').

[11] Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013) (''2013 Proposal''); Position Limits for Derivatives: Certain Exemptions and Guidance, 81 FR 38458 (June 13, 2016) (''2016 Supplemental Proposal''); and Position Limits for Derivatives, 81 FR 96704 (Dec. 30, 2016) (''2016 Reproposal'').

[12] Unless indicated otherwise, the use of the term ''exchanges'' throughout this release refers to DCMs and SEFs.

[13] Aggregation of Positions, 81 FR 91454 (Dec. 16, 2016) (''Final Aggregation Rulemaking''); *see* 17 CFR 150.4. Under the Final Aggregation Rulemaking, unless an exemption applies, a person's positions must be aggregated with positions for which the person controls trading or for which the person holds a 10% or greater ownership interest. The Division of Market Oversight has issued time-limited no-action relief from some of the aggregation requirements contained in that rulemaking. *See* CFTC Letter No. 19–19 (July 31, 2019), available at *https://www.cftc.gov/csl/19-19/download.*

[14] Because the earlier proposals were withdrawn in the 2020 NPRM, comments on the earlier proposals are not part of the administrative record with respect to the 2020 NPRM nor with respect to this Final Rule, except where expressly referenced herein. In the 2020 NPRM, the Commission stated that commenters to the 2016 Reproposal should resubmit comments relevant to the subject proposal; commenters who wish to reference prior comment letters should cite those prior comment letters as specifically as possible. (85 FR at 11597). Accordingly, this Final Rule will not discuss comments submitted in connection with the 2016 Reproposal unless such comments were resubmitted for the 2020 NPRM.

[15] Comments were originally due by April 29, 2020. Due to the COVID–19 pandemic, the

Continued

the Commission received approximately 75 public comment letters.[16] After reviewing these public comment letters, and for the general reasons discussed in this release, the Commission is adopting the 2020 NPRM with certain modifications in this Final Rule.[17]

Before addressing the specifics of the Final Rule, the Commission outlines several themes underscoring the Commission's approach in the Final Rule.

First, the Commission believes that any position limits regime must take into account differences across commodities and contract types. The existing Federal position limits regulations apply only to the nine legacy agricultural contracts, all of which are physically-settled futures on agricultural commodities. Limits on these nine legacy agricultural contracts have been in place for decades, as have the Federal rules governing both the exemptions from these Federal position limits and the exchange-set position limits on the nine legacy agricultural contracts. The existing framework is largely a historical remnant of an approach that predates cash-settled futures contracts, institutional-investor interest in commodity indexes, highly liquid energy markets, and the Commission's jurisdiction over certain swaps.

Congress has tasked the Commission with establishing such limits as it finds are ''necessary'' for the purpose of preventing the burdens associated with excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of an underlying commodity; and establishing limits on swaps that are ''economically equivalent'' to any futures contracts or options on futures contracts subject to Federal position limits. An approach that is flexible enough to accommodate potential future, unpredictable developments in commercial hedging practices is well-suited for the current derivatives markets by accommodating differences in commodity types, contract specifications, hedging practices, cash-market trading practices, organizational structures of hedging participants, and liquidity profiles of individual markets.

The Commission is building this flexibility into several parts of the Final Rule, including: (1) Exchange-set limits or accountability levels outside of the spot month for referenced contracts based on commodities other than the nine legacy agricultural contracts; (2) the ability for exchanges to use more than one formula when setting their own limit levels; (3) an updated formula for Federal non-spot month position limit levels on the nine legacy agricultural contracts that is calibrated to recently observed open interest, which has generally increased over time; (4) a bona fide hedging definition that is broad enough to accommodate common commercial hedging practices, including unfixed-price transactions as well as anticipatory hedging practices, such as anticipatory merchandising; (5) a simplified process for market participants to submit a single application to obtain non-enumerated bona fide hedge recognitions for purposes of Federal and exchange-set position limits that are in line with common commercial hedging practices; (6) the elimination of a restriction for purposes of Federal position limits on holding positions during the last trading days of the spot month; and (7) broader discretion for market participants to measure risk in the manner most suitable for their businesses.

Second, the Final Rule establishes position limits with respect to 16 additional commodities during the spot month, for a total of 25 core referenced futures contracts, and certain derivative contracts linked thereto, for which the Commission finds that speculative position limits are necessary.[18] As described below, this necessity finding for the 25 core referenced futures contracts is based on two interrelated factors: (1) The importance of the 25 core referenced futures contracts to their respective underlying cash markets, including that they require physical delivery of the underlying commodity; and (2) the particular importance to the national economy of the commodities underlying the 25 contracts.[19]

Third, there is an opportunity for greater collaboration between the Commission and the exchanges within the statutorily created parallel Federal and exchange-set position limit regimes. Given the exchanges' obligations to carry out self-regulatory responsibilities, resources, deep knowledge of their markets and trading practices, close interactions with market participants, existing programs for addressing exemption requests, and direct ability to leverage these resources to generally act more quickly than the Commission, the Commission believes that cooperation between the Commission and the exchanges on position limits should not only be continued, but enhanced. For

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Commission extended the deadline to May 15, 2020.

[16] The Commission states ''approximately 75 relevant comment letters'' since several commenters submitted additional, or supplemental, comments. As a result, the total could change slightly depending on whether one includes these supplemental comment letters in the total. Thus, for the avoidance of doubt, the Commission uses ''approximately.'' The Commission received comments from: American Cotton Shippers Association (''ACSA''); American Feed Industry Association (''AFIA''); American Gas Association (''AGA''); AQR Capital Management, LLC (''AQR''); Archer Daniels Midland (''ADM''); AMCOT; Americans for Financial Reform (''AFR''); Arthur Dunavant Investments (''Dunavant''); ASR Group International, Inc. (''ASR''); Atlantic Cotton Association (''ACA''); Barnard, Chris (Individual); Better Markets, Inc. (''Better Markets''); Cargill, Inc. (''Cargill''); Castleton Commodities International LLC (''CCI''); Chevron USA Inc. (''Chevron''); Choice Cotton Company, Inc. (''Choice Cotton''); CHS Inc. (''CHS Inc.'') and CHS Hedging, LLC (''CHS Hedging'') (collectively, ''CHS''); Citadel; CME Group Inc. (''CME Group''); Commodity Markets Council (''CMC''); DECA Global LLC (''DECA''); East Cotton Company (''East Cotton''); Ecom Agroindustrial (''Ecom''); Edison Electric Institute (''EEI'') and Electric Power Supply Association (''EPSA'') (collectively, the ''Joint Associations'' or ''EEI/EPSA''); Futures Industry Association (''FIA''); Glencore Agriculture Limited, Glencore Agriculture B.V. (collectively, ''Glencore''); ICE Futures U.S. (''IFUS''); IMC Companies (''IMC''); Industrial Energy Consumers of America; Institute for Agriculture & Trade Policy (''IATP''); Intercontinental Exchange, Inc. (''ICE''); International Energy Credit Association (''IECA''); International Swaps and Derivatives Association, Inc. (''ISDA''); Jess Smith & Sons (''Jess Smith''); Lawson/O'Neill Global Institutional Commodity (LOGIC) Advisors (''Lawson/O'Neill''); Long Island Power Authority (''LIPA''); Louis Dreyfus Company (''LDC''); Mallory Alexander International Logistics (''Mallory Alexander''); Managed Funds Association and Alternative Investment Management Association (collectively, the ''Associations'' or ''MFA/AIMA''); Marshal, Gerald (Independent Trader); Matsen, Eric (Individual—Physical Commodity Risk Management Consultant); McMeekin Cotton LLC (''McMeekin''); Memtex Cotton Marketing, LLC (''Memtex''); Minneapolis Grain Exchange, Inc. (''MGEX''); Moody Compress & Warehouse Company (''Moody Compress''); Namoi Cotton Alliance (''Namoi''); National Cotton Council (''NCC''); National Council of Farmer Cooperatives (''NCFC''); National Council of Textile Organizations (''NCTO''); National Energy & Fuels Institute (''NEFI''); National Grain and Feed Association (''NGFA''); National Oilseed Processors Association (''NOPA''); National Rural Electric Cooperative; Association American Public Power Association; and American Public Gas Association (collectively, ''NRECA''); Natural Gas Supply Association (''NGSA''); Olam International Limited (''Olam''); Omnicotton Inc. (''Omnicotton''); Pacific Investment Management Company LLC (''PIMCO''); Parkdale Mills (''Parkdale''); Petroleum Marketers Association of America (''PMAA''); Public Citizen; Robert Rutkowski (''Rutkowski''); S. Canale Cotton Co. (''Canale Cotton''); Shell Energy North America (US), L.P. and Shell Trading (US) Company (collectively, ''Shell''); SIFMA Asset Management Group (''SIFMA AMG''); Skylar Capital Management LP (''SCM''); Southern Cotton Association (''Southern Cotton''); Southwest Ag Sourcing (''SW Ag''); Suncor Energy Marketing Inc. and Suncor Energy USA Marketing Inc. (collectively, ''SEMI''); Texas Cotton Association (''Texas Cotton''); The Coalition of Physical Energy Companies; The Commercial Energy Working Group (''CEWG''); The Walcot Trading Company, LLC (''Walcot''); Toyo Cotton Company (''Toyo''); VLM Commodities (''VLM''); Western Cotton Shippers Association (''WCSA''); White Gold Cotton Marketing, LLC (''White Gold'').

[17] The Final Rule's regulations are discussed in detail throughout this release.

[18] *See infra* Section III.C.2.

[19] *Id.*

example, exchanges are particularly well-positioned to: Provide the Commission with estimates of deliverable supply in connection with their commodity contracts that require physical delivery; recommend limit levels for the Commission's consideration; and help administer the program for recognizing bona fide hedges. Further, given that the Final Rule requires exchanges to collect, and provide to the Commission upon request, cash-market information from market participants requesting recognition of bona fide hedges, the Commission is eliminating the Form 204 and part of the Form 304, which market participants with bona fide hedging positions in excess of position limits currently file each month with the Commission to demonstrate cash-market positions justifying such overages. Under enhanced collaboration, the Commission will maintain its access to such information from the exchanges, which will result in a more efficient administrative process, in part by reducing duplication of efforts.

*B. Executive Summary*

This executive summary provides an overview of the key components of the Final Rule. The summary only highlights certain aspects of the final regulations and generally uses shorthand to summarize complex topics. The executive summary is neither intended to be a comprehensive recitation of the Final Rule nor intended to supplement, modify, or replace any interpretive or other language contained herein. Section II of this release includes a more detailed and comprehensive discussion of all of the final regulations. The final regulations and related appendices and guidance follow Section IV (Related Matters) of this release.

1. Contracts Subject to Federal Speculative Position Limits

Federal position limits apply to ''referenced contracts,'' which, as described in turn below, include: (i) 25 ''core referenced futures contracts'' (*i.e.,* the nine legacy agricultural contracts together with the new 16 non-legacy contracts); (ii) futures contracts and options on futures contracts directly or indirectly linked to a core referenced futures contract; and (iii) ''economically equivalent swaps.''

i. Core Referenced Futures Contracts

Federal position limits under the Final Rule will apply to the following 25 [20] physically-settled core referenced futures contracts:

[20] Reference to, or discussion of, derivatives contracts listed on IFUS, the DCM and subsidiary of ICE, will be referred to herein as ''ICE [Commodity] [IFUS Commodity Code]'' (*e.g.,* ICE Sugar No. 16 (SF)). Additionally, ''CBOT'' refers to the DCM Board of Trade of the City of Chicago, Inc.; ''CME'' refers to the DCM Chicago Mercantile Exchange, Inc.; ''COMEX'' refers to the DCM Commodity Exchange, Inc.; and ''NYMEX'' refers to the DCM New York Mercantile Exchange, Inc.

| **Legacy Agricultural** (Federal position limit levels during and outside the spot month) | **Non-Legacy Agricultural** (Federal position limit levels only during the spot month)[21] | **Metals** (Federal position limit levels only during the spot month) |
|---|---|---|
| CBOT Corn (C) | CBOT Rough Rice (RR) | COMEX Gold (GC) |
| CBOT Oats (O) | ICE Cocoa (CC) | COMEX Silver (SI) |
| CBOT Soybeans (S) | ICE Coffee C (KC) | COMEX Copper (HG) |
| CBOT Wheat (W) | ICE FCOJ-A (OJ) | NYMEX Platinum (PL) |
| CBOT Soybean Oil (SO) | ICE Sugar No. 11 (SB) | NYMEX Palladium (PA) |
| CBOT Soybean Meal (SM) | ICE Sugar No. 16 (SF) | **Energy** (Federal position limit levels only during the spot month) |
| MGEX Hard Red Spring Wheat (MWE) | CME Live Cattle (LC) | NYMEX Henry Hub Natural Gas (NG) |
| ICE Cotton No. 2 (CT) | | NYMEX Light Sweet Crude Oil (CL) |
| CBOT KC Hard Red Winter Wheat (KW) | | NYMEX New York Harbor ULSD Heating Oil (HO) |
| | | NYMEX New York Harbor RBOB Gasoline (RB) |

ii. Futures Contracts and Options on Futures Contracts Linked to a Core Referenced Futures Contract

The term ''referenced contract'' encompasses any core referenced futures contract as well as any futures contract and any option on a futures contract that is: (1) Directly or indirectly linked to the price of a core referenced futures contract; or (2) directly or indirectly linked to the price of the same commodity underlying the applicable core referenced futures contract, for delivery at the same location as specified in that core referenced futures contract.[22] The term ''referenced contract,'' however, explicitly excludes location basis contracts, commodity index contracts, contracts that are based on prices across a month (*i.e.,* contracts commonly referred to as calendar month average contracts, trade month average contracts, or balance of month contracts), outright contracts that are based on a price reporting agency index price, swap guarantees, and trade options that meet certain requirements.

iii. Economically Equivalent Swaps

The term referenced contracts also includes economically equivalent swaps, defined as swaps with ''identical material'' contractual specifications, terms, and conditions to a referenced contract. Swaps in a commodity other than natural gas that have identical material specifications, terms, and conditions to a referenced contract are still deemed economically equivalent swaps even if they differ from the referenced contract with respect to one or more of the following: (a) Lot size specifications or notional amounts, (b) delivery dates diverging by less than one calendar day for physically-settled swaps, or (c) post-trade risk management arrangement (*e.g.,* uncleared swaps versus cleared futures contracts).

The same general definition applies to natural gas swaps, except that the definition is expanded to include swaps with delivery dates diverging from the corresponding core referenced futures contract by less than *two* calendar days.

Instruments that are exempt from Commission jurisdiction or otherwise not deemed to be swaps under the Commission's regulations (*e.g.,* instruments that are excluded by the CEA's ''swap'' definition or Commission regulations as physically-settled forward contracts) are not ''economically equivalent swaps'' even if they otherwise fall within the ''economically equivalent swap'' definition.

2. Federal Position Limit Levels During the Spot Month

[21] While the Final Rule includes Federal non-spot month limits only for referenced cintracts on the nine legacy agricultural contracts, the Final Rule requires exchanges to establish, consistent with Commission standards set forth in this Final Rule, exchange-set position limits and/or position accountability levels in the non-spot months for the 16 non-legacy core referenced futures contracts and for any associated referenced contracts.

[22] For clarity, clause (2) is intended to encompass potential physically-settled ''look-alike'' contracts that do not directly reference a core referenced futures contract but that are nonetheless based on the same commodity and delivery location as a core referenced futures contract.

Federal spot month position limits apply to all 25 core referenced futures contracts and their associated referenced contracts. The Final Rule establishes the spot month position limit levels summarized in the table below. Each spot month limit is set at or below 25% of deliverable supply, as estimated using recent data provided by the DCM listing the core referenced futures contract, and verified by the Commission. The Federal spot month position limits apply on a futures-equivalent basis based on the size of the unit of trading of the relevant core referenced futures contract.

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| Core Referenced Futures Contract | 2020 Final Rule Federal Spot Month Limit Level | 2020 Proposed Federal Spot Month Limit Level | Existing Federal Spot Month Limit Level | Existing Exchange-Set Spot Month Limit Level[23] |
|---|---|---|---|---|
| | **Legacy Agricultural Contracts** | | | |
| CBOT Corn (C) | 1,200 | 1,200 | 600 | 600 |
| CBOT Oats (O) | 600 | 600 | 600 | 600 |
| CBOT Soybeans (S) | 1,200 | 1,200 | 600 | 600 |
| CBOT Soybean Meal (SM) | 1,500 | 1,500 | 720 | 720 |
| CBOT Soybean Oil (SO) | 1,100 | 1,100 | 540 | 540 |
| CBOT Wheat (W) | 1,200 | 1,200 | 600 | 600/500/400/300/220 |
| CBOT KC Hard Red Winter Wheat (KW) | 1,200 | 1,200 | 600 | 600 |
| MGEX Hard Red Spring Wheat (MWE) | 1,200 | 1,200 | 600 | 600 |
| ICE Cotton No. 2 (CT) | 900 | 1,800 | 300 | 300 |
| | **Other Agricultural Contracts** | | | |
| CME Live Cattle (LC) | 600/300/200[24] | 600/300/200 | n/a | 600/300/200 |
| CBOT Rough Rice (RR) | 800 | 800 | n/a | 600/200/250 |

| | | | | |
|---|---|---|---|---|
| ICE Cocoa (CC) | 4,900 | 4,900 | n/a | 1,000 |
| ICE Coffee C (KC) | 1,700 | 1,700 | n/a | 500 |
| ICE FCOJ-A (OJ) | 2,200 | 2,200 | n/a | 300 |
| ICE Sugar No. 11 (SB) | 25,800 | 25,800 | n/a | 5,000 |
| ICE Sugar No. 16 (SF) | 6,400 | 6,400 | n/a | n/a[25] |
| | **Metals Contracts** | | | |
| COMEX Gold (GC) | 6,000 | 6,000 | n/a | 6,000 |
| COMEX Silver (SI) | 3,000 | 3,000 | n/a | 1,500 |
| COMEX Copper (HG) | 1,000 | 1,000 | n/a | 1,000 |
| NYMEX Platinum (PL) | 500 | 500 | n/a | 500 |
| NYMEX Palladium (PA) | 50 | 50 | n/a | 50 |
| | **Energy Contracts** | | | |
| NYMEX Henry Hub Natural Gas (NG) | 2,000[26] | 2,000 | n/a | 1,000[27] |
| NYMEX Light Sweet Crude Oil (CL) | 6,000/5,000/4,000[28] | 6,000/5,000/4,000 | n/a | 3,000 |
| NYMEX New York Harbor ULSD Heating Oil (HO) | 2,000 | 2,000 | n/a | 1,000 |
| NYMEX New York Harbor RBOB Gasoline (RB) | 2,000 | 2,000 | n/a | 1,000 |

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[23] As of October 15, 2020.

[24] The Federal spot month limit for Live Cattle adopted herein features a step-down limit similar to the CME's existing Live Cattle step-down exchange-set limit. The Federal spot month step-down limit is: (1) 600 at the close of trading on the first business day following the first Friday of the contract month; (2) 300 at the close of trading on the business day prior to the last five trading days of the contract month; and (3) 200 at the close of trading on the business day prior to the last two trading days of the contract month.

[25] ICE technically does not have an exchange-set spot month position limit level for ICE Sugar No. 16 (SF). However, it does have a single-month position limit level of 1,000 contracts, which effectively operates as a spot month position limit.

[26] As discussed below, the NYMEX Henry Hub Natural Gas (NG) Federal spot month limit for cash-settled look-alike referenced contracts will apply on a per-exchange and per-OTC swaps market basis rather than on an aggregate basis across exchanges.

[27] Currently, the cash-settled natural gas contracts are subject to an exchange-set spot month position limit level of 1,000 equivalent-sized contracts *per exchange*. As of publication of the Final Rule, there are three exchanges that list cash-settled natural gas contracts: NYMEX, IFUS, and Nodal. As a result, a market participant may hold up to 3,000 equivalent-sized cash-settled natural gas contracts under existing exchange-set limits.

The exchanges also have a conditional position limit framework for natural gas contracts. This exchange-set conditional spot month position limit permits up to 5,000 cash-settled NYMEX NG equivalent-sized referenced contracts *per exchange* that lists such contracts, provided that the market participant does not hold positions in the physically-settled NYMEX NG referenced contract.

[28] The Federal spot month limit for Light Sweet Crude Oil adopted herein features the following step-down limit: (1) 6,000 contracts as of the close

i. Application of Federal Spot Month Limits to Commodities Other Than Natural Gas

With the exception of natural gas, the Federal spot month position limit levels apply in the aggregate across exchanges and the over-the-counter (''OTC'') swap markets.

During the spot month, Federal position limits apply ''separately'' to physically-settled and cash-settled referenced contracts.[29] Accordingly, during the spot month, a market participant is required to aggregate its net physically-settled positions, and separately its net cash-settled positions, across exchanges and the OTC swaps markets, but may not net cash-settled referenced contracts with physically-settled referenced contracts.

ii. Application of Federal Spot Month Limits to Natural Gas

For the NYMEX Henry Hub Natural Gas (''NYMEX NG'') physically-delivered core referenced futures contract and its associated cash-settled referenced contracts, the Final Rule modifies the 2020 NPRM by providing that Federal position limits apply to NYMEX NG cash-settled referenced contracts on a per-exchange and per-OTC swaps market basis (*i.e.,* cash-settled positions are *not* aggregated across different exchanges and the OTC swaps market).

Specifically, a market participant may hold up to 2,000 cash-settled NYMEX NG referenced contracts (*i.e.,* the NYMEX NG Federal spot month position limit) on each exchange that lists for trading a cash-settled NYMEX NG referenced contract as well as the OTC swap market. Currently, three exchanges (NYMEX, IFUS, and Nodal)[30] list cash-settled ''look-alike'' NYMEX NG referenced contracts. Thus, a market participant is able to hold 2,000 cash-settled NYMEX NG referenced futures contracts on each exchange, which is 6,000 cash-settled look-alike NYMEX NG referenced contracts in total. In addition, a market participant is able to hold a position of 2,000 cash-settled NYMEX NG equivalent-sized economically equivalent swaps in the OTC swaps markets for a total position of 8,000 cash-settled NYMEX NG referenced contracts across the four markets (*i.e.,* NYMEX, IFUS, Nodal, and the OTC swaps market).

As noted above, because Federal spot month position limit levels apply ''separately'' to cash-settled and physically-settled referenced contracts, a market participant further is able to hold an additional position of 2,000 physically-settled NYMEX NG referenced contracts for a total position of 10,000 NYMEX NG referenced contracts.

As discussed further below, market participants may hold additional cash-settled NYMEX NG referenced contracts under the Final Rule's Federal spot month conditional position limit exemption as long as the market participant satisfies certain requirements. However, for the avoidance of doubt, the Commission notes that the per-exchange 2,000 contract Federal spot month position limit level for cash-settled NYMEX NG referenced contracts discussed above is not part of the Federal spot month conditional position limit exemption but rather constitutes the default speculative Federal spot month position limit.

3. Federal Position Limit Levels Outside of the Spot Month

Under the Final Rule, Federal position limits outside of the spot month (''non-spot month'' position limits) apply only to the nine legacy agricultural contracts and their associated referenced contracts.

In contrast, referenced contracts based on the 16 core referenced futures contracts subject to Federal position limits for the first time under the Final Rule are only subject to Federal position limits during the spot month, and are otherwise only subject to exchange-set limits or position accountability outside of the spot month.

The following Federal non-spot month position limit levels, summarized in the table below, are set at 10% of open interest for the first 50,000 contracts, with an incremental increase of 2.5% of open interest thereafter, and apply on a futures-equivalent basis based on the size of the unit of trading of the relevant core referenced futures contract:

of trading three business days prior to the last trading day of the contract; (2) 5,000 contracts as of the close of trading two business days prior to the last trading day of the contract; and (3) 4,000 contracts as of the close of trading one business day prior to the last trading day of the contract.

[29] As discussed further under Section II.B.3.vi, cash-settled NYMEX NG referenced contracts under the Final Rule are subject to per-exchange and per-OTC swaps market Federal position limits. As a result, market participants are not required to aggregate their positions in natural gas referenced contracts across different exchanges and the OTC swaps markets but also may not net such positions across different exchanges or the OTC swaps market.

[30] ''Nodal'' refers to the Nodal Exchange, LLC.

| Core Referenced Futures Contract | 2020 Final Rule Federal Single Month[31] and All-Months-Combined Limit Levels | 2020 Proposed Federal Single Month and All-Months-Combined Limit Levels | Existing Federal Single Month and All-Months-Combined Limit Levels | Existing Exchange-Set Single Month and All-Months-Combined Limit Levels[32] |
|---|---|---|---|---|
| CBOT Corn (C) | 57,800 | 57,800 | 33,000 | 33,000 |
| CBOT Oats (O) | 2,000 | 2,000 | 2,000 | 2,000 |
| CBOT Soybean (S) | 27,300 | 27,300 | 15,000 | 15,000 |
| CBOT Soybean Meal (SM) | 16,900 | 16,900 | 6,500 | 6,500 |
| CBOT Soybean Oil (SO) | 17,400 | 17,400 | 8,000 | 8,000 |
| CBOT Wheat (W) | 19,300 | 19,300 | 12,000 | 12,000 |
| CBOT KC HRW Wheat (KW) | 12,000 | 12,000 | 12,000 | 12,000 |
| MGEX HRS Wheat (MWE) | 12,000 | 12,000 | 12,000 | 12,000 |
| ICE Cotton No. 2 (CT) | 5,950 (single month)[33] 11,900 (all-months-combined) | 11,900 | 5,000 | 5,000 |

4. Exchange-Set Limits and Exemptions Therefrom

i. Contracts Subject to Federal Position Limits

An exchange that lists a contract subject to Federal position limits, as specified above, is required to set its own limits for such contracts at a level that is no higher than the Federal level. Exchanges may grant exemptions from their own limits to a level that exceeds the applicable Federal limit, provided the exemption is self-effectuating (*e.g.,* an enumerated bona fide hedge or a spread that satisfies the ''spread transaction'' definition) or provided the exemption is recognized by the Commission for purposes of Federal position limits (pursuant to an application submitted either directly to the Commission under § 150.3 or indirectly to the Commission through an exchange under § 150.9, as applicable). Exchanges may grant exemptions that are not recognized by the Final Rule; however, such exemptions must be capped at a level that is not higher than the applicable Federal position limit level.

ii. Physical Commodity Contracts Not Subject to Federal Position Limits

For physical commodity contracts, for which no necessity finding was supported, and which are therefore not subject to Federal position limits, an exchange is generally required to set spot month position limit levels at no greater than 25% of deliverable supply, but has flexibility to submit other approaches for review by the Commission, provided the approach results in spot month position limit levels that are ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index'' and complies with all other applicable regulations.

Outside of the spot month, an exchange has additional flexibility to set either position limits or position accountability levels, provided the levels are ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' Non-exclusive Acceptable Practices are included in new Appendix F to part 150 under the Final Rule and provide several examples of formulas that the Commission has determined meet this standard, but an exchange has flexibility to develop other approaches.

An exchange has flexibility to grant a variety of exemption types. Exchanges must take into account whether the exemption results in a position that is

31 With the exception of the ICE Cotton No. 2 (CT) contract discussed below, for each of the legacy agricultural contracts, the single month limit is equal to the all-months-combined limit under the Final Rule.

32 As of October 15, 2020.

33 The single month limit for ICE Cotton No. 2 (CT) is set at 50% of the all-months-combined limit, or 5,950 contracts, as discussed more fully below.

''not in accord with sound commercial practices'' in the market for which the exchange is considering the application, and/or ''exceed[s] an amount that may be established and liquidated in an orderly fashion in that market.''

5. Limits on ''Pre-Existing Positions''

As discussed above, only swaps that qualify as ''economically equivalent swaps'' are subject to Federal position limits under the Final Rule. However, economically equivalent swaps entered into in good faith prior to the Final Rule's Effective Date, including both ''Pre-Enactment Swaps,'' which are swaps entered into prior to the Dodd-Frank Act whose terms have not expired, and ''Transition Period Swaps,'' which are swaps entered into between July 22, 2010 and the Final Rule's effective date, are not subject to Federal position limits. Other pre-existing positions (*i.e.,* pre-existing positions that are futures contracts or options on futures contracts) will be subject to the Final Rule's Federal position limits.[34]

Market participants may net down their post-Effective Date positions in commodity derivatives contracts with any pre-existing swaps (as long as such swaps qualify as economically equivalent swaps) for purposes of complying with non-spot month Federal position limits. In contrast, during the spot month, market participants may not apply these pre-existing swap positions to net down their positions so as to avoid rendering Federal spot month position limits ineffective. The Commission is particularly concerned about protecting the spot month in physically-delivered futures from price distortions or potential manipulation and consequent disruption of the hedging and price discovery utility of the related futures contract.

6. Legal Standards for Exemptions From Federal Position Limits

i. Bona Fide Hedge Recognition

A bona fide hedging transaction or position may exceed Federal position limits if the hedge position satisfies all three elements of the Final Rule's ''general'' bona fide hedging definition. That is, (1) the position represents a substitute for transactions or positions made or to be made at a later time in a physical marketing channel (''temporary substitute test''); (2) the position is economically appropriate to the reduction of price risks in the conduct and management of a commercial enterprise (''economically appropriate test''); and (3) the position arises from the potential change in value of actual or anticipated assets, liabilities, or services (''change in value requirement'').

The Final Rule makes several changes to the existing bona fide hedging definition, including those described immediately below:

First, the Commission is expanding the existing list of ''enumerated'' bona fide hedges to cover additional hedging practices, including adding a bona fide hedge for anticipated merchandising.[35] To provide greater certainty, the list of enumerated bona fide hedges is now incorporated into the regulation. In contrast, in the 2020 NPRM, this list of enumerated bona fide hedges was proposed in the form of non-binding acceptable practices in Appendix A to part 150. While the enumerated bona fide hedges will remain listed in Appendix A under the Final Rule, Appendix A to part 150 is now explicitly incorporated into Commission regulations and is part of the regulatory text rather than acceptable practices.

A person who holds a position that qualifies as a bona fide hedge and that is one of the enumerated hedges in Appendix A to part 150 is not required to request prior approval from the Commission to hold such bona fide hedge position above the Federal position limit. That is, the enumerated bona fide hedges are ''self-effectuating'' for purposes of Federal position limits. A person with an enumerated bona fide hedge position, however, would still need to request an exemption from the relevant exchange for any exchange-set limits.[36]

Second, with respect to the treatment of unfixed-price forward transactions and bona fide hedging under the Final Rule, the Commission clarifies that a commercial market participant may qualify for one of the Final Rule's enumerated anticipatory bona fide hedges (*i.e.,* enumerated bona fide hedges for unsold anticipated production, unfilled anticipated requirements, and anticipated merchandising) with respect to an unfixed-price forward transaction. The Commission believes that an unfixed-price forward transaction should not preclude a commercial market participant from qualifying for one of these enumerated anticipatory bona fide hedges, because such unfixed-price forward transactions do not give rise to outright price risk for a commercial market participant and do not otherwise fix an outright price. Accordingly, unfixed-price transactions do not ''fill'' or ''address'' the hedging need for which the enumerated anticipatory bona fide hedges are predicated.

The Commission notes that an unfixed-price forward transaction does not itself allow a market participant to qualify for one of these enumerated anticipatory bona fide hedges, and that a market participant must still satisfy the requirements of the applicable anticipatory bona fide hedge to qualify (*e.g.,* as an initial matter, by the commercial market participant being able to demonstrate its anticipated unsold production, anticipated unfilled requirements, and/or anticipated merchandising).

Third, the Final Rule clarifies whether and when market participants may measure risk on a gross basis rather than on a net basis. Instead of only being permitted to hedge on a ''net basis'' except in a narrow set of circumstances, a market participant is also able to generally hedge positions on a ''gross basis,'' provided that the participant has done so over time in a consistent manner and is not doing so to evade Federal position limits. Among other items, the Final Rule differs from the 2020 NPRM in that the Final Rule: (1) Eliminates the requirement that exchanges document their justifications when allowing gross hedging; (2) clarifies that market participants are not required to develop written policies or procedures that set forth when gross

[34] However, as discussed further below, the Commission is providing for a compliance period until January 1, 2022 for the 16 non-legacy referenced contracts that will be subject to Federal position limits for the first time under this Final Rule. Similarly, the Commission is providing for a compliance period for any economically equivalent swaps, as well as in connection with the elimination of the risk management exemption, until January 1, 2023.

[35] The existing definition of ''bona fide hedging transactions and positions'' enumerates the following hedging transactions or positions: (1) Hedges of inventory and cash commodity fixed-price purchase contracts under 1.3(z)(2)(i)(A); (2) hedges of unsold anticipated production under 1.3(z)(2)(i)(B); (3) hedges of cash commodity fixed-price sales and (4) hedges of fixed price sales of their cash products and byproducts contracts under 1.3(z)(2)(ii)(A) and (B); (5) hedges of unfilled anticipated requirements under 1.3(z)(2)(ii)(C); (6) hedges of offsetting unfixed price cash commodity sales and purchases under 1.3(z)(2)(iii); and (7) cross-commodity hedges under 1.3(z)(2)(iv). The following additional hedging practices are not enumerated in the existing regulation, but are included as enumerated hedges in the Final Rule: (1) Hedges of anticipated merchandising; (2) hedges by agents; (3) hedges of anticipated royalties; (4) hedges of services; and (5) offsets of commodity trade options.

[36] The processes for obtaining bona fide hedge recognitions and non-enumerated bona fide hedge recognitions are summarized in Section 7 below of this executive summary (Processes for Requesting Bona Fide Hedge Recognitions and Spread Exemptions).

versus net hedging is appropriate; and (3) clarifies that gross hedging is permissible for both enumerated and non-enumerated hedges.

Fourth, market participants are permitted to hold bona fide hedges in excess of Federal position limits during the last five days of the spot period (or during the time period for the spot month if less than five days). While the Final Rule does not include a Federal restriction on holding bona fide hedging positions in excess of Federal position limits during the spot period, exchanges continue to have the discretion to adopt such restrictions (commonly referred to by market participants as the "Five-Day Rule"), or similar restrictions, for purposes of exchange-set limits. The Final Rule also includes guidance on the application of spot-period restrictions, including factors for exchanges with such restrictions to consider when determining to grant exemptions that are not subject to any such restrictions for purposes of their own limits.

Finally, the Final Rule modifies the "temporary substitute test" to require that a bona fide hedging transaction or position in a physical commodity must *always,* and not just *normally,* be connected to the production, sale, or use of a physical cash-market commodity. Therefore, a market participant is generally no longer allowed to treat positions entered into for "risk management purposes" [37] as a bona fide hedge, unless the position qualifies as either: (i) An offset of a pass-through swap, where the offset reduces price risk attendant to the pass-through swap executed opposite a counterparty for whom the swap qualifies as a bona fide hedge; or (ii) a "swap offset," where the offset is used by a counterparty to reduce price risk attendant to a swap that qualifies as a bona fide hedge and that was previously entered into by that counterparty.

ii. Spread Exemption

A transaction or position may also exceed Federal position limits if it qualifies as a "spread transaction," which includes the following common types of spreads: Intra-market spreads; inter-market spreads; intra-commodity spreads; inter-commodity spreads; calendar spreads; quality differential spreads; processing spreads (such as energy "crack" or soybean "crush" spreads); product and by-product differential spreads; and futures-options spreads.[38]

Spread exemptions may be granted using the process described in Section 7 below of this executive summary (Processes for Requesting Bona Fide Hedge Recognitions and Spread Exemptions).

iii. Financial Distress Exemption

This exemption allows a market participant to exceed Federal position limits if necessary to take on the positions and associated risk of another market participant during a potential default or bankruptcy situation. This exemption is available on a case-by-case basis, depending on the facts and circumstances involved.

iv. Conditional Spot Month Limit Exemption in Natural Gas

As long as a market participant holds no physically-settled NYMEX NG contracts, the Final Rule allows that market participant to exceed the NYMEX NG Federal spot month position limit level of 2,000 cash-settled referenced contracts per exchange (and an additional 2,000 equivalent-sized economically equivalent OTC swaps) by holding 10,000 cash-settled NYMEX NG referenced contracts per DCM that lists cash-settled NYMEX NG referenced contracts, as well as an additional 10,000 equivalent-sized cash-settled economically equivalent NYMEX NG swaps. The Final Rule clarifies that market participants may not use a spread exemption to exceed the aforementioned conditional spot month limit for natural gas.

7. Processes for Requesting Bona Fide Hedge Recognitions and Spread Exemptions

i. Self-Effectuating Enumerated Bona Fide Hedges

A position that complies with the bona fide hedging definition in § 150.1 and falls within one of the enumerated bona fide hedges is self-effectuating for purposes of Federal position limits, provided the market participant separately applies to the relevant exchange for an exemption from exchange-set limits. Such market participants are no longer required to file Form 204/304 with the Commission on a monthly basis to demonstrate cash-market positions justifying Federal position limit overages. Instead, the Commission will have access to cash-market information that such market participants submit as part of their applications to an exchange for an exemption from exchange-set limits, typically filed on an annual basis.

ii. Bona Fide Hedges That Are Not Self-Effectuating

The Commission may consider adding to the list of enumerated bona fide hedges at a later time, as the Commission may find appropriate. Until that time, all bona fide hedge positions that are not enumerated in Appendix A to part 150 must be granted pursuant to one of the processes for requesting a non-enumerated bona fide hedge recognition, as explained below.

A market participant seeking to exceed Federal position limits for a non-enumerated bona fide hedging transaction or position is able to choose whether to apply directly to the Commission or, alternatively, apply indirectly to the Commission through the applicable exchange using a new streamlined process. If applying directly to the Commission, the market participant must also separately apply to the relevant exchange for relief from exchange-set position limits. If applying to an exchange using the new streamlined process, a market participant may file an application with an exchange, generally at least annually, which will be valid both for purposes of Federal and exchange-set position limits.

Under this streamlined process, if the exchange determines to grant a non-enumerated bona fide hedge recognition for purposes of its exchange-set position limits, the exchange must notify the Commission and the applicant simultaneously. Then, 10 business days (or two business days in the case of retroactive applications filed late due to sudden or unforeseen bona fide hedging needs) after the exchange issues such a determination, the bona fide hedge exemption may be deemed approved for purposes of Federal position limits unless the Commission (and not Commission staff) notifies the market participant otherwise. That is, after the 10 (or two) business days expire, the bona fide hedge exemption is considered approved for purposes of Federal position limits. Under the Final Rule, once the exchange notifies the Commission and the applicant of the exchange's determination to approve the application, the applicant may, at its own risk, exceed Federal position limits during the Commission's 10 business-day review period.

If the Commission determines to deny an exemption application, the applicant will not be subject to any Federal position limits violation, provided the

[37] The phrase "risk management" as used in this instance refers to derivatives positions, typically held by a swap dealer, used to offset a swap position, such as a commodity index swap, with another entity for which that swap is not a bona fide hedge.

[38] The Final Rule expands the 2020 NPRM's list of exempt spread transactions by also including intra-market spreads, inter-market spreads, and intra-commodity spreads.

person filed the application in good faith and brings the position into compliance with the applicable Federal position limit within a commercially reasonable amount of time, as applicable.

The Final Rule also allows a market participant with sudden or unforeseen hedging needs to file a request for a bona fide hedge exemption within five business days after exceeding the Federal limit (*i.e.,* commonly referred to as a ''retroactive'' exemption application). If the Commission denies such application, the market participant will not be subject to a Federal position limit violation, provided the market participant filed the application in good faith and brings the position into compliance with the applicable Federal position limit within a commercially reasonable amount of time, as applicable.

Among other changes, market participants are no longer required to file Forms 204 or 304, as applicable, with the Commission on a monthly basis to demonstrate cash-market positions justifying position limit overages. Under the Final Rule, the Commission will instead leverage cash-market information submitted directly to the exchanges.

iii. Spread Exemptions

For a referenced contract on any commodity, a spread exemption is self-effectuating for purposes of Federal position limits, provided that (1) the position falls within one of the categories set forth in the ''spread transaction'' definition, and (2) the market participant separately applies to the applicable exchange for a spread exemption from exchange-set position limits.[39]

A market participant with a spread position that does not fit within the ''spread transaction'' definition with respect to any of the commodities subject to Federal position limits may apply directly to the Commission, and must also separately apply to the applicable exchange.

8. Compliance Date and Effective Date

i. Summary

The Final Rule's effective date is March 15, 2021 (the ''Effective Date''). This means that all aspects of the Final Rule will be effective as of the Effective Date, including the new enumerated bona fide hedges (*e.g.,* anticipated merchandising) as well as the higher Federal position limits for the nine legacy agricultural contracts. However, as discussed below, the Commission is also providing for compliance dates that extend beyond the Effective Date in connection with several of the Final Rule's requirements.

The Final Rule provides market participants with a compliance date of January 1, 2022 for purposes of compliance with the Federal position limits for the 16 non-legacy core referenced futures contracts that are subject to Federal position limits for the first time under this Final Rule. This compliance date also applies to any referenced contracts (other than economically equivalent swaps, which have a separate compliance date as discussed further below) related to these 16 non-legacy core referenced futures contracts.

The Final Rule also provides exchanges with a compliance date of January 1, 2022 for purposes of establishing exchange-set position limits and provisions associated with exemptions therefrom, including certain obligations to collect cash-market information from market participants in connection with market participants' applications for bona fide hedging exemptions to exchange-set limits, and to share the same with the Commission, consistent with the requirements under the Final Rule.

Additionally, the Final Rule provides a compliance date of January 1, 2023 with respect to (i) the elimination of previously-granted risk management exemptions,[40] and (ii) Federal position limits for economically equivalent swaps.

Because the nine legacy agricultural contracts are currently subject to Federal position limits under the existing Federal framework, the Final Rule does not provide a compliance date for the new Federal position limits under the Final Rule for such contracts, or a formal phase-in period. Therefore, such limits go into effect on the Effective Date. Thus, as of the Effective Date, market participants will be able to avail themselves of the Federal position limits under the Final Rule for the nine legacy agricultural contracts, all of which are higher than the existing Federal position limits (except for CBOT Oats, which will maintain the existing Federal position limit levels). However, the Commission notes that exchange-set position limits will remain at current levels unless and until the relevant exchange submits a rule amendment pursuant to part 40 of the Commission's regulations to amend the relevant exchange-set position limit.

Furthermore, the Commission is delaying implementation of exchange-set position limits on swaps since exchanges cannot view market participants' positions in swap positions across the various places they trade, including on competitor exchanges.[41] However, after the January 1, 2023 compliance date for economically equivalent swaps (discussed above), the Commission underscores that it will enforce Federal position limits in connection with swaps.

For convenience, the Commission is providing a table below identifying the Final Rule's Effective Date and compliance dates for market participants and exchanges in connection with certain obligations.

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[39] The Commission understands that certain exchanges may distinguish between the terms ''spread,'' ''arbitrage,'' and ''straddle.'' For the purposes of the Commission's discussion and the Final Rule in general, the Commission's use of the term ''spread'' is meant to include all of these related trading strategies, and any Commission reference to ''spread'' rather than ''arbitrage'' or ''straddle'' is not intended to suggest a substantive difference in meaning.

[40] As discussed above in Section 6 of this executive summary (Legal Standards for Exemptions from Federal Position Limits), the Commission is no longer recognizing risk management exemptions as bona fide hedges under the Final Rule.

[41] In two years, the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms to implement DCM Core Principle 5 and SEF Core Principle 6 with respect to swaps.

| | |
|---|---|
| ***Effective Date*** | |
| All Final Rule provisions are effective on the Effective Date. | March 15, 2021 |
| For example, because all provisions of the Final Rule are effective on the Effective Date, this means, among other things, market participants may immediately avail themselves on the Effective Date of:<br>• The new enumerated bona fide hedge and spread exemptions<br>• The higher Federal position limits for the nine legacy agricultural contracts[42] | |
| ***Compliance Date*** | |
| **For market participants** | |
| Market participants must comply with Federal position limits for the 16 non-legacy core referenced futures contracts that are subject to Federal position limits for the first time under the Final Rule. | No later than January 1, 2022 |
| Market participants must comply with Federal position limits for economically equivalent swaps. | No later than January 1, 2023 |
| Positions based on previously-granted risk management exemptions must be reduced to levels that comply with the applicable Federal position limits.[43] | No later than January 1, 2023 |

| | |
|---|---|
| Until the applicable exchange that lists a given referenced contract implements § 150.5 under the Final Rule, market participants, if using bona fide hedges for Federal position limit purposes, must continue to provide the Commission with Form 204 and Parts I and II of Form 304 to the Commission consistent with the status quo.[44] | Exchanges must implement § 150.5 no later than January 1, 2022. |
| **For exchanges** | |
| Exchanges must comply with the processes and procedures in connection with § 150.5 (exchange-set position limits and exemptions therefrom). | No later than January 1, 2022 |
| Exchanges may implement the processes and procedures in connection with §150.9, including with respect to processing market participant applications for purposes of non-enumerated bona fide hedge exemptions for Federal position limit purposes. | Implementation of § 150.9 is voluntary for exchanges.<br><br>Exchanges may implement as soon as the Effective Date or any time thereafter (or they may choose not to implement at all). |
| Enforcement of exchange-set position limits on economically equivalent swaps. | No earlier than January 1, 2023.<br><br>In two years, the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms to implement DCM Core Principle 5 and Swap Execution Facility ("SEF") Core Principle 6 with respect to swaps. |

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*C. Section-by-Section Summary of Final Rule*

The Commission is adopting revisions to §§ 150.1, 150.2, 150.3, 150.5, and 150.6 and to parts 1, 15, 17, 19, 40, and 140, as well as adding §§ 150.8, 150.9, and Appendices A–G to part 150.[45] Most noteworthy, the Commission is adopting the following amendments to the foregoing rule sections, each of which, along with all other changes in the Final Rule, is discussed in greater detail in Section II of this release. The following summary is not intended to provide a substantive overview of this Final Rule, but rather is intended to provide a guide to the rule sections that address each topic. For an overview of this Final Rule organized by topic (rather than by section number), please see the executive summary above.

• The Commission finds that Federal speculative position limits are necessary for 25 core referenced futures contracts, and for any futures contracts and options on futures contracts linked thereto. The Commission adopts Federal position limits on physically-settled and linked cash-settled futures contracts, options on futures contracts, and ''economically equivalent swaps'' for such commodities. The 25 core referenced futures contracts include the nine ''legacy'' agricultural contracts currently subject to Federal position limits and 16 additional non-legacy contracts, which include: Seven additional agricultural contracts, four energy contracts, and five metals contracts.[46] Federal spot and non-spot

[42] As noted above, under the Final Rule the Federal position limit levels for all of the nine legacy agricultural contracts will increase, other than CBOT Oats. However, the Commission notes that exchange-set position limits will remain at current levels unless and until the relevant exchange submits a rule amendment pursuant to part 40 of the Commission's regulations to amend the relevant exchange-set position limit.

[43] As discussed further in this release, the Commission will no longer recognize risk management exemptions under the Final Rule. However, positions that are entered into based on a market participant's previously-granted risk management exemptions will be subject to an extended compliance date until January 1, 2023 with respect to Federal position limits. That is, a market participant with a previously granted risk management exemption will have a compliance date of January 1, 2023 with respect to the elimination of such risk management exemption.

[44] Form 204 (for all nine legacy agricultural contracts other than cotton) and Parts I and II of Form 304 (for cotton) are submitted by a market participant to the Commission under the existing Federal position limits regulations in connection with Federal enumerated bona fide hedges employed by the market participants.

[45] The 2020 NPRM proposed to remove and reserve part 151. It did not propose to amend current § 150.4 dealing with aggregation of positions for purposes of compliance with Federal position limits, which was amended in 2016 in a prior rulemaking. *See* Final Aggregation Rulemaking, 81 FR at 91454.

[46] The seven additional agricultural contracts that are subject to Federal spot month limits are: CME Live Cattle (LC), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ–A (OJ), ICE Sugar

Continued

month limits apply to the nine ''legacy'' agricultural contracts currently subject to Federal position limits,[47] and only Federal spot-month limits apply to the additional 16 non-legacy contracts. Outside of the spot month, these 16 non-legacy contracts are subject to exchange-set limits and/or accountability levels if listed on an exchange.

• Amendments to § 150.1 add or revise several definitions for use throughout part 150, including: New definitions of the terms ''core referenced futures contract'' (pertaining to the 25 physically-settled futures contracts explicitly listed in the regulations) and ''referenced contract'' (pertaining to futures contracts and options on futures contracts that have certain direct and/or indirect linkages to the core referenced futures contracts, and to ''economically equivalent swaps'') to be used as shorthand to refer to contracts subject to Federal position limits; an expanded ''spread transaction'' definition; and a ''bona fide hedging transaction or position'' definition that is broad enough to accommodate hedging practices in a variety of contract types, including hedging practices that may develop over time.

• Amendments to § 150.2 list the 25 core referenced futures contracts which, along with any associated referenced contracts, are subject to Federal position limits; and specify the Federal spot and non-spot month position limit levels. Federal spot month position limit levels are set at or below 25 percent of estimated deliverable supply, whereas Federal non-spot month limit levels are set at 10% of open interest for the first 50,000 contracts of open interest, with an incremental increase of 2.5% of open interest thereafter.

• Amendments to § 150.3 specify the types of positions for which exemptions from Federal position limit requirements may be granted, and set forth and/or reference the processes for requesting such exemptions, including recognitions of bona fide hedges and exemptions for spread positions, financial distress positions, certain natural gas positions held during the spot month, and pre-enactment and transition period swaps. For all contracts subject to Federal position limits, bona fide hedge exemptions listed in Appendix A to part 150 as an enumerated bona fide hedge are self-effectuating for purposes of Federal position limits. For non-enumerated bona fide hedges, market participants must submit an application either directly to the Commission under § 150.3 or indirectly through an exchange for Federal position limit purposes under new § 150.9 (discussed below).

• Amendments to § 150.5 refine the process, and establish non-exclusive methodologies, by which exchanges may set exchange-level limits and grant exemptions therefrom with respect to futures and options on futures, including separate methodologies for contracts subject to Federal position limits and physical commodity derivatives not subject to Federal position limits.[48] While the Commission will oversee compliance with Federal position limits on swaps, the Commission has also determined to delay the enforcement of exchange-set position limits on swaps otherwise required in amended § 150.5 because exchanges cannot view market participants' positions in swaps across the various places they trade, including on competitor exchanges.[49]

• New § 150.9 establishes a streamlined process for addressing requests for bona fide hedging recognitions for purposes of Federal position limits, and leveraging exchange expertise and resources. This process will be used by market participants with non-enumerated bona fide hedge positions. Under the Final Rule, market participants can provide one application for a non-enumerated bona fide hedge to a DCM or SEF, as applicable, and receive approval of such request based on the same application from both the exchange for purposes of exchange-set limits and from the Commission for purposes of Federal position limits.

• New Appendix A to part 150 contains a list of enumerated bona fide hedges. Positions that comply with the bona fide hedging transaction or position definition in § 150.1 and that are enumerated in Appendix A may exceed Federal position limits to the extent that all applicable requirements in part 150 are met. Persons holding such positions enumerated in Appendix A may exceed Federal position limits without being required to request prior approval under § 150.3 or § 150.9. Positions that do not fall within any of the enumerated hedges could still potentially be recognized as bona fide hedging positions, provided the positions otherwise comply with the proposed bona fide hedging definition and all other applicable requirements, including the approval process under § 150.3 or § 150.9.

• Amendments to part 19 and related provisions eliminate Form 204 (and corresponding Parts I and II of Form 304 for cotton), enabling the Commission to leverage cash-market reporting submitted directly to the exchanges under §§ 150.5 and 150.9. The Final Rule maintains Part III of Form 304, related to the cotton on-call report.

### *D. Effective Date and Compliance Period*

The 2020 NPRM included proposed § 150.2(e), which provided that the Federal position limit levels for the 25 core referenced futures contracts would have a compliance date 365 days after publication of the final position limits regulations in the **Federal Register**. Additionally, proposed § 150.3(c) provided that previously-granted risk management exemptions shall not be effective after the Final Rule's effective date.

The Commission is removing from the Final Rule the compliance date requirements in proposed §§ 150.2(e) and 150.3(c) and instead addressing the effective and compliance dates together within this **Federal Register** release. The Commission is making two modifications from the 2020 NPRM relating to the effective date and compliance period of the Final Rule.

First, as noted above in the executive summary, the Commission is providing a general compliance date of January 1,

No. 11 (SB), and ICE Sugar No. 16 (SF). The four energy contracts that are subject to Federal spot month limits are: NYMEX Light Sweet Crude Oil (CL), NYMEX New York Harbor ULSD Heating Oil (HO), NYMEX New York Harbor RBOB Gasoline (RB), and NYMEX Henry Hub Natural Gas (NG). The five metals contracts that are subject to Federal spot month limits are: COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Palladium (PA), and NYMEX Platinum (PL). As discussed below, any contracts for which the Commission is adopting Federal position limits only during the spot month are subject to exchange-set limits and/or accountability levels outside of the spot month.

[47] The Commission currently sets and enforces speculative position limits with respect to certain enumerated agricultural products. The ''enumerated'' agricultural products refer to the list of commodities contained in the definition of ''commodity'' in CEA section 1a; 7 U.S.C. 1a. These agricultural products consist of the following nine currently traded contracts: CBOT Corn (and Mini-Corn) (C), CBOT Oats (O), CBOT Soybeans (and Mini-Soybeans) (S), CBOT Wheat (and Mini-Wheat) (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX HRS Wheat (MWE), CBOT KC HRW Wheat (KW), and ICE Cotton No. 2 (CT). *See* 17 CFR 150.2.

[48] Rule § 150.5 addresses exchange-set position limits and exemptions therefrom, whereas § 150.3 addresses exemptions from Federal position limits, and § 150.9 addresses a streamlined process for recognizing non-enumerated bona fide hedges for purposes of Federal position limits. Exchange rules typically refer to ''exemptions'' in connection with bona fide hedging and spread positions, whereas the Commission uses the nomenclature ''recognition'' with respect to bona fide hedges, and ''exemption'' with respect to spreads.

[49] With respect to exchange-set position limits on swaps, in two years the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms to implement DCM Core Principle 5 and SEF Core Principle 6.

2022 for both market participants and exchanges. In contrast, the 2020 NPRM did not provide a specific date as the compliance date but rather stated 365 days after publication in the **Federal Register**.[50]

This compliance date of January 1, 2022 applies to (i) the Federal position limits set forth in Appendix E to part 150 for only the 16 non-legacy core referenced futures contracts that are subject to Federal position limits for the first time under this Final Rule, and (ii) exchange obligations under final § 150.5. This compliance date also applies to referenced contracts for any of the 16 non-legacy core referenced futures contracts (other than economically equivalent swaps, which have a separate compliance date as discussed immediately below). In contrast, the 2020 NPRM's compliance date applied only to market participants' compliance with the new Federal position limit levels. However, as discussed below, the Final Rule does not provide a separate compliance date for the nine legacy agricultural contracts since they are already subject to existing Federal position limits.

Second, the Commission is establishing a separate compliance date of January 1, 2023 in connection with (i) economically equivalent swaps and (ii) the elimination of previously-granted risk management exemptions (*i.e.,* market participants may continue to rely on their previously-granted risk management exemptions until January 1, 2023). As noted above, the 2020 NPRM only had a single general compliance date and did not provide a separate compliance date for economically equivalent swaps or related to previously-granted risk management exemptions.

In this section, the Commission will discuss the following related issues: (i) Compliance with Federal position limits for the nine legacy agricultural contracts; (ii) compliance by exchanges with § 150.5 under the Final Rule and market participants' related obligation to temporarily continue providing Forms 204/304 in connection with bona fide hedges; (iii) exchanges' voluntary implementation of § 150.9 under the Final Rule; and (iv) comments received in connection with the compliance date proposed in the 2020 NPRM.

i. Compliance With Federal Position Limits for the Nine Legacy Agricultural Contracts

With respect to the nine legacy agricultural contracts, the Commission is not providing a compliance date with respect to the spot month and non-spot month Federal position limit levels. Accordingly, the new Federal position limit levels under the Final Rule will become effective on the Effective Date. The nine legacy agricultural contracts are currently subject to Federal position limits and will continue to be subject under the Final Rule, which, as noted above, is increasing the Federal position limit levels for the nine legacy agricultural contracts (other than CBOT Oats, which will maintain the existing Federal position limit levels). The Commission has determined not to provide a separate compliance date for the nine legacy agricultural contracts since market participants trading in these markets already are familiar with Federal position limits and have established the necessary monitoring and compliance oversight processes, in connection with these legacy contracts.

With respect to exchange-set position limits, the Final Rule does not require exchanges to increase their respective exchange-set position limit levels. Rather, the Final Rule only requires that exchange-set position limits are established at a level no higher than the corresponding Federal position limits. As a result, in response to the Final Rule, an exchange may: (1) Raise its exchange-set limits to be as high as (or lower than) the corresponding Federal position limits immediately on the Effective Date or anytime thereafter; (2) implement a phase-in period where exchange-set position limits increase from existing exchange-set levels over time; or (3) not increase the exchange-set position limit levels at all, in each case as the exchange may determine appropriate for its markets.

ii. Exchange Implementation of § 150.5 and Market Participants' Obligations To Continue Providing Forms 204 and 304, as Applicable, in Connection With Federal Enumerated Bona Fide Hedges

For clarity, in connection with the nine legacy agricultural contracts, market participants may avail themselves of the new enumerated bona fide hedges (*e.g.,* anticipatory merchandising) immediately upon the Effective Date (market participants will not need to be concerned with availing themselves of bona fide hedge recognitions for the 16 non-legacy contracts upon the Effective Date since these contracts will have a compliance date of January 1, 2022). To the extent that market participants seek to rely on any Federal enumerated bona fide hedges, market participants must continue to provide, as applicable, the Commission with Forms 204/304, which are otherwise eliminated by the Final Rule upon the Effective Date, until the relevant exchange that lists the applicable referenced contract implements § 150.5 under the Final Rule. As discussed below, final § 150.5 governs, among other things, exchange rules and procedures, including (i) the exchange's collection of certain cash-market information from market participants in connection with their bona fide hedge applications for exchange-set limits and (ii) the exchange's sharing of related information with the Commission. As discussed further below, the Final Rule predicates the elimination of Forms 204/304 on the relevant exchange's sharing of the information with the Commission under final § 150.5 (which provides for a new process for the exchange to share data with the Commission similar to data that the Commission previously obtained through Forms 204/304 under the Federal framework existing prior to the Final Rule).[51] Exchanges must implement final § 150.5 by the Final Rule's general compliance date of January 1, 2022.

iii. Exchange Implementation of § 150.9 in Connection With the Market Participants' Applications Through Exchanges for Non-Enumerated Bona Fide Hedges for Purposes of Federal Position Limits

As discussed above, the Final Rule establishes a streamlined process for market participants to apply through exchanges for non-enumerated bona fide hedges for purposes of Federal position limits. That is, a market participant may submit a single non-enumerated bona fide hedge exemption application to an exchange for purposes of both Federal and exchange-set position limits, and the Commission will review, and make a determination based on, the application that the market participant submitted to the exchange. For clarity, the Commission notes that the Final Rule does not require exchanges to participate in such process.

However, if an exchange chooses to do so, the Commission is clarifying, for

[50] The Commission is adopting calendar dates for compliance to provide clarity rather than the 2020 NPRM's approach of stating that the compliance period ends 365 days after publication in the **Federal Register** since the Commission believes that providing a set calendar date provides greater clarity to market participants. Based on the timing of the Final Rule, the Commission believes that the January 1, 2022 general compliance date will not reduce the compliance period compared to the 2020 NPRM's approach and may provide slightly more time prior to the commencement of the compliance period.

[51] For further discussion of the elimination of Form 204 and Parts I and II of Form 304, *see* Section II.H.2, *infra.*

the avoidance of doubt, that the exchange may implement this streamlined process for non-enumerated bona fide hedge applications as soon as the Effective Date, or anytime thereafter (or not at all). In response to certain concerns by market participants and exchanges, discussed immediately below, the Commission believes that, to the extent an exchange chooses to participate in this streamlined application process, the implementation of § 150.9 soon after the Effective Date may help ensure minimal disruption to market participants' existing trading strategies as well as avoid having the potentially unfeasible situation of requiring the exchanges to process a number of non-enumerated bona fide hedge applications simultaneously at the end of the general compliance period on January 1, 2022. Furthermore, the Commission clarifies in Section II.G.3.iii that market participants with existing Commission-granted non-enumerated or anticipatory bona fide hedge recognitions in connection with the nine legacy agricultural contracts under the existing framework are *not* required to reapply to the Commission for a new recognition under the Final Rule.

iv. Comments—Compliance Period

Generally, commenters supported the proposed compliance date, noting that an adequate compliance period would afford sufficient time to make necessary business adjustments (*e.g.,* time to build compliance systems, develop technology, train personnel, etc.).[52] The Commission agrees with these observations and believes that a general compliance date of January 1, 2022, except for economically equivalent swaps and positions based on a previously-granted risk management exemption, will provide exchanges and market participants sufficient time to adjust their operations and compliance and monitoring systems.

Some commenters also requested an extended compliance date (beyond the general compliance date) for economically equivalent swaps to mitigate the numerous legal, operational, and compliance challenges of implementing position limits for swaps for the first time.[53] Unlike exchange-listed contracts that are currently subject to either Federal position limits or exchange-set limits, commenters noted that exchanges do not have existing compliance and monitoring resources for economically equivalent swaps from which to leverage. The Commission agrees with commenters that additional time for economically equivalent swaps is warranted, and, as discussed above, is thus delaying the compliance date for economically equivalent swaps for an additional year, until January 1, 2023.

CME Group expressed concern that it may receive an influx of exemption applications at the end of the compliance period, and therefore suggested a rolling process where market participants are grandfathered into their current exemptions, permitting them to file for those exemptions on the same annual schedule.[54] The Commission believes this concern is mitigated since exchanges, at their discretion, may implement final § 150.9 as soon as the Effective Date, which will allow exchanges to review non-enumerated bona fide hedge applications on a rolling basis between the Effective Date and the end of the compliance period rather than having to process a large number of applications at once. Furthermore, as noted above, market participants with existing Commission-granted non-enumerated or anticipatory bona fide hedge recognitions are *not* required to reapply to the Commission for a new recognition under the Final Rule.

*E. The Commission Construes CEA Section 4a(a) To Require the Commission To Make a Necessity Finding Before Establishing Position Limits for Physical Commodities Other Than Excluded Commodities*

The Commission is required by *ISDA* to determine whether CEA section 4a(a)(2)(A) requires the Commission to find, before establishing a position limit, that such limit is ''necessary.'' [55] The provision states in relevant part that ''the Commission shall'' establish position limits ''as appropriate'' for futures contracts in physical commodities other than excluded commodities ''[i]n accordance with the standards set forth in'' the preexisting section 4a(a)(1).[56] That preexisting provision requires the Commission to establish position limits as it ''finds are necessary to diminish, eliminate, or prevent'' certain enumerated burdens on interstate commerce.[57] In the 2011 Final Rulemaking, the Commission interpreted this language as an unambiguous mandate to establish position limits without first finding that such limits are necessary, but with discretion to determine the ''appropriate'' levels for each.[58] In *ISDA,* the U.S. District Court for the District of Columbia disagreed and held that section 4a(a)(2)(A) is ambiguous as to whether the ''standards set forth in paragraph (1)'' include the requirement of an antecedent finding that a position limit is necessary.[59] The court vacated the 2011 Final Rulemaking and directed the Commission to apply its experience and expertise to resolve that ambiguity.[60] The Commission has done so and determines that section 4a(a)(2)(A) should be interpreted to require that before establishing position limits, the Commission must determine that limits are necessary.[61] A full legal analysis is set forth *infra* at Sections III.C.–E.

The Commission finds that position limits are necessary for the 25 core referenced futures contracts, including certain commodity derivative contracts that are directly or indirectly linked to a core referenced futures contract. The Commission's finding with respect to the 25 core referenced futures contracts is based on two interrelated factors: The particular importance of the 25 core referenced futures contracts to their respective underlying cash markets, including that they require physical delivery of the underlying commodity, and, the commodities' particular importance to the national economy. Separately, the Commission finds that position limits are necessary during the spot month for all 25 core referenced futures contracts and outside of the spot month only for the nine legacy agricultural commodity contracts (in each instance including certain commodity derivative contracts that are directly or indirectly linked to a core referenced futures contract). A full discussion of the necessity findings is set forth *infra* at Sections III.C.–E.

*F. The Commission's Use of Certain Terminology*

The Commission is aware that this Final Rule will likely be reviewed by a diverse range of members of the public from varied backgrounds and industries and with different levels of knowledge and experience with derivatives markets. Furthermore, even among experienced market participants, terminology may differ by industry, commodity, or exchange. The Commission also recognizes that certain

[52] CME Group at 8; FIA at 2–3; ISDA at 2, 8; Shell at 4; and SIFMA AMG at 2, 9–10.

[53] MFA/AIMA at 8; NCFC at 6; NGSA at 15–16; SIFMA AMG at 9–10; and Citadel at 9–10.

[54] CME Group at 8.

[55] *ISDA,* 887 F.Supp.2d at 281.

[56] 7 U.S.C. 6a(a)(2)(A).

[57] 7 U.S.C. 6a(a)(1).

[58] 76 FR at 71626, 71627.

[59] *ISDA,* 887 F.Supp.2d at 279–280.

[60] *Id.* at 281.

[61] *See infra* Section III.B.

terms commonly referenced by market participants may differ from the technical legal terms used in the Commission's regulations and/or the CEA.

Accordingly, unless otherwise noted, the Commission will attempt to use terms and phrases in their ordinary, plain English sense. When required, the Commission will explicitly identify technical or nuanced legal/regulatory or industry ''terms of art.'' The Commission wishes to briefly review certain terms and phrases used throughout this release below, as follows:

- *Bona fide hedges.* The CEA uses the legal term ''bona fide hedging transaction or position'' in both the singular and plural. The Commission currently defines the term in existing § 1.3 in the plural as ''bona fide hedging transactions or positions'' while the Final Rule now incorporates the singular ''bona fide hedging transaction or position.'' The Commission understands that most market participants simply refer to ''bona fide hedge(s)'' (in both the singular and the plural). Accordingly, for short hand throughout this release, the Commission may refer to ''bona fide hedges,'' ''bona fide hedge positions,'' ''bona fide hedge transactions,'' ''bona fide hedges,'' ''bona fide hedging positions,'' and similar phrasing.

These terms are meant to apply as short hand and are not intended to imply a substantive difference either with the defined legal term ''bona fide hedging transaction or position'' or with one another.

Similarly, the plural term in the existing Commission regulations and the singular in the Final Rule, as discussed below, are not intended to reflect a substantive difference.

- *Federal position limits.* The Final Rule creates a new defined term, ''speculative position limit,'' in part 150 of the Commission's regulations to refer to the maximum position, net long or net short, that a market participant may maintain in a referenced contract. Throughout this release, the Commission will use as a general term either ''position limits'' or ''Federal position limits'' to refer to the general Federal position limits framework and related regulations, including the defined term ''speculative position limit.'' When discussing the individual ''speculative position limit'' levels for each commodity derivative contract, as opposed to the Final Rule's general Federal regulatory framework, the Commission instead may refer to the ''Federal position limit *levels,*'' although all these phrases are intended to refer to the same general concept. The Commission may also specifically refer to *exchange-set* position limits when referring to the general framework, process, or specific position limit levels established by the respective exchanges.
- *Exchanges.* This Final Rule applies to both DCMs and SEFs. Unless otherwise distinguished, the Commission will refer to ''exchanges'' throughout this release to refer to any relevant DCM or SEF.
- *Cash-Settled* and *Physically-Settled.* The Commission throughout this release refers to ''cash-settled'' and ''physically-settled'' commodity derivative contracts.

When a futures contract expires, all open futures contract positions in such contract are settled by either: (1) Physical delivery, which the Commission refers to as a ''*physically-settled*'' contract, or (2) cash settlement, which the Commission refers to as a ''*cash-settled*'' contract, in each case depending on the contract terms set by the exchange. Deliveries on ''physically-settled'' futures contracts are made through the exchange's clearinghouse, and the delivery of the physical commodity must be consummated between the buyer and seller per the exchange rules and contract specifications. On the other hand, other futures contracts are ''cash-settled'' because they do not involve the transfer of physical commodity ownership and require that all open positions at expiration be settled by a transfer of cash to or from the clearinghouse based upon the final settlement price of the contracts.

The Commission further notes that some market participants may instead use the terms ''physical-delivery'' contracts or ''financially-settled'' contracts instead of the Commission's terms ''physically-settled'' contracts and ''cash-settled'' contracts, respectively. The Commission does not intend a substantive difference in meaning with the choice of its terms.

- *Spread Positions.* The Commission views its use of the term ''spread'' to mean the same as ''arbitrage'' or ''straddle'' as those terms are used in CEA section 4a(a) and existing § 150.3(a)(3) of the Commission's regulations. Consistent with existing regulations, the Commission's sole use of the term ''spread'' in this Final Rule is intended to also capture arbitrage or straddle strategies referred to in CEA section 4a(a) and existing § 150.3(a)(3), and referring to ''spread'' rather than ''arbitrage'' or ''straddle'' is not intended to be a substantive difference. The Commission notes that certain exchanges may distinguish between ''spread'' and ''arbitrage'' positions for purposes of exchange exemptions, but the Commission does not make that distinction here for purposes of its ''spread transaction'' definition as used in this release.
- *Unfixed Price Forward Transactions.* Throughout this release, the Commission will use as general terms either ''unfixed price forward transactions,'' ''unfixed price transactions,'' ''unfixed price forward contracts,'' and/or ''unfixed price contracts'' to refer to transactions that are either purchases or sales of a cash commodity where the purchase or sales price, as applicable, is determined based on the settlement price of a benchmark, such as the settlement price of a commodity derivative contract on a certain date (*e.g.,* the price on the settlement date of a core referenced futures contract) or other index price (*e.g.,* a spot index price). Market participants may also refer to unfixed price transactions as ''floating price'' transactions, and the Commission does not intend a substantive difference in meaning with the choice of these terms.

### *G. Recent Volatility in the WTI Contract*

Several commenters noted the volatility in the NYMEX Light Sweet Crude Oil (CL) contract, also known as the West Texas Intermediate crude oil contract (''WTI contract''), that occurred in April 2020 (subsequent to the issuance of the 2020 NPRM) in their comments to the 2020 NPRM. Some commenters suggested that the volatility may have been caused, in part, by excessive speculation [62] or highly leveraged traders,[63] or both. Better Markets suggested that a combination of passive exchange-traded funds,[64] the use of trading-at-settlement (''TAS'') orders,[65] automated trading,[66] and, according to Better Markets, a lack of ''meaningful position limits,'' [67] may have contributed to the volatility. Other commenters suggested that this event could have been mitigated through additional liquidity provided by financial end users during the critical

[62] PMAA at 2.

[63] NEFI at 3–4.

[64] Better Markets at 9.

[65] Better Markets at 13. A TAS order is an order that is placed during the trading session but is executed at the settlement price (or with a small price range around the settlement price). Trading at Settlement (TAS), *https://www.cmegroup.com/trading/trading-at-settlement.html* (last visited Aug. 29, 2020); TRADE AT SETTLEMENT (TAS) FREQUENTLY ASKED QUESTIONS July 2020, *https://www.theice.com/publicdocs/futures_us/TAS_FAQ.pdf* (last visited Aug. 29, 2020).

[66] Better Markets at 14–17.

[67] Better Markets at 10.

time period, among other measures.[68] Commenters also pointed to the event to bolster arguments for and against Commission deference to exchanges in implementing position limits.[69] A few commenters requested that the Commission refrain from finalizing the rule until it better understands this event and other issues.[70]

The Commission has been closely examining the circumstances surrounding the volatility in the WTI contract since it occurred in April 2020. The Commission will continue to analyze the events of April 2020 to evaluate whether any changes to the position limits regulations may be warranted in light of the circumstances surrounding the volatility in the WTI contract. Any proposed changes that the Commission finds may be warranted would be subject to public comment pursuant to the requirements of the Administrative Procedure Act.

*H. Brief Summary of Comments Received*

As stated previously, the Commission received approximately 75 relevant comment letters in response to the 2020 NPRM.[71] Though several commenters did not support the Commission adopting the 2020 NPRM and requested its withdrawal,[72] most of the 75 comments received generally supported the 2020 NPRM, or supported specific elements of the 2020 NPRM. However, many of these commenters suggested modifications to portions of the 2020 NPRM, which are discussed in the relevant sections discussing the Final Rule below. In addition, several commenters requested Commission action beyond the scope of the 2020 NPRM, also discussed in the relevant sections below.

**II. Final Rule**

*A. § 150.1—Definitions*

Definitions relevant to the existing position limits regime currently appear in both §§ 1.3 and 150.1 of the Commission's regulations.[73] The Commission proposed to update and supplement the definitions in § 150.1, including moving a revised definition of ''bona fide hedging transactions and positions'' from § 1.3 into § 150.1. The proposed changes were intended, among other things, to conform the definitions to certain of the Dodd-Frank Act amendments to the CEA.[74] Each proposed defined term is discussed in alphabetical order below.

1. ''Bona Fide Hedging Transaction or Position''

i. Background—Bona Fide Hedging Transaction or Position

Under CEA section 4a(c)(1), position limits shall not apply to transactions or positions that are shown to be bona fide hedging transactions or positions, as such terms shall be defined by the Commission.[75] The Dodd-Frank Act directed the Commission, for purposes of implementing CEA section 4a(a)(2), to adopt a bona fide hedging definition consistent with CEA section 4a(c)(2).[76] The existing definition of ''bona fide hedging transactions and positions,'' which first appeared in § 1.3 of the Commission's regulations in the 1970s,[77] is inconsistent, in certain ways described below, with the revised statutory definition in CEA section 4a(c)(2).

Accordingly, and for the reasons outlined below, the Commission proposed to remove the existing bona fide hedging definition from § 1.3 and replace it with a revised bona fide hedging definition that would appear alongside all of the other position limits related definitions in proposed § 150.1.[78] This definition would be applied in determining whether a position in a commodity derivative contract is a bona fide hedge that may exceed Federal position limits set forth in § 150.2.

This section of the release discusses the bona fide hedging definition and the substantive standards for bona fide hedges. The process for granting bona fide hedge recognitions is discussed later in this release in connection with §§ 150.3 and 150.9.[79]

The discussion in this section is organized as follows:

i. This background section discussion;

[68] AQR at 5–7 (''The inability of position limits themselves to eliminate the unpredictability of commodity futures markets highlights the importance of existing Commission and exchange oversight of these markets and the dangers of overreliance on a single regulatory tool to address market dynamics for which it may not have been designed . . . [W]e encourage the Commission to consider not only concerns around potential manipulation, but also the potential unintended consequences of such limits and the need for liquidity during sensitive time periods for commodity futures markets.''); SCM at 2–3 (''This liquidity, provided by financial trading firms and hedge funds . . ., is essential to balance, check and smooth the otherwise uncontrollable trading that can occur when only commercial firms and unsophisticated trading participants are active in a market.'').

[69] IATP suggested that the event demonstrates the problems of Commission deference to DCMs' ''experience and capacity'' on many of the provisions in the 2020 NPRM. *See* IATP at 18. Conversely, SEMI stated that a final rule should not be overly restrictive in response to the recent market conditions in WTI oil markets, given that it is the exchanges that ''have the expertise, experience and existing tools to effectively manage the orderly expiration of futures contracts that are in the spot month under such circumstances.'' SEMI at 13.

[70] AFR at 3; Rutkowski at 2; IATP at 2–3.

[71] *See supra,* n.16.

[72] *E.g.* AFR; Better Markets; IATP; Eric Matsen; NEFI; Public Citizen; Robert Rutkowski; SCM; and VLM.

[73] 17 CFR 1.3 and 150.1, respectively.

[74] In addition to the amendments described below, the Commission proposed to re-order the defined terms so that they appear in alphabetical order, rather than in a lettered list, so that terms can be more quickly located. Moving forward, any new defined terms would be inserted in alphabetical order, as recommended by the Office of the Federal Register. *See Document Drafting Handbook,* Office of the Federal Register, National Archives and Records Administration, 2–31 (Revision 5, Oct. 2, 2017) (stating, ''[i]n sections or paragraphs containing only definitions, we recommend that you do not use paragraph designations if you list the terms in alphabetical order. Begin the definition paragraph with the term that you are defining.'').

[75] 7 U.S.C. 6a(c)(1).

[76] 7 U.S.C. 6a(c)(2).

[77] *See, e.g.,* Definition of Bona Fide Hedging and Related Reporting Requirements, 42 FR 42748 (Aug. 24, 1977). Previously, the Secretary of Agriculture, pursuant to section 404 of the Commodity Futures Trading Commission Act of 1974 (Pub. L. 93–463), promulgated a definition of bona fide hedging transactions and positions. Hedging Definition, Reports, and Conforming Amendments, 40 FR 11560 (Mar. 12, 1975). That definition, largely reflecting the statutory definition previously in effect, remained in effect until the newly-established Commission defined that term. *Id.*

[78] In a 2018 rulemaking, the Commission amended § 1.3 to replace the sub-paragraphs that had for years been identified with an alphabetic designation for each defined term with an alphabetized list. *See* Definitions, 83 FR 7979 (Feb. 23, 2018). The bona fide hedging definition, therefore, is now a paragraph, located in alphabetical order, in § 1.3, rather than in § 1.3(z). Accordingly, for purposes of clarity and ease of discussion, when discussing the Commission's existing version of the bona fide hedging definition, this release will refer to the bona fide hedging definition in § 1.3.

Further, the version of § 1.3 that appears in the Code of Federal Regulations applies only to excluded commodities and is not the version of the bona fide hedging definition currently in effect. The version currently in effect, the substance of which remains as it was amended in 1987, applies to all commodities, not just to excluded commodities. *See* Revision of Federal Speculative Position Limits, 52 FR 38914 (Oct. 20, 1987). While the 2011 Final Rulemaking amended the § 1.3 bona fide hedging definition to apply only to excluded commodities, that rulemaking was vacated, as noted previously, by a September 28, 2012 order of the U.S. District Court for the District of Columbia, with the exception of the rule's amendments to 17 CFR 150.2. Although the 2011 Final Rulemaking was vacated, the 2011 version of the bona fide hedging definition in § 1.3, which applied only to excluded commodities, has not yet been formally removed from the Code of Federal Regulations. The currently-in-effect version of the Commission's bona fide hedging definition thus does not currently appear in the Code of Federal Regulations. The closest to a ''current'' version of the definition is the 2010 version of § 1.3, which, while substantively current, still includes the ''(z)'' denomination that was removed in 2018. The Commission proposed to address the need to formally remove the incorrect version of the bona fide hedging definition as part of the 2020 NPRM.

[79] *See infra* Section II.C. (discussing § 150.3) and Section II.G. (discussing § 150.9).

ii. An overview of the existing ''general'' elements of the bona fide hedging definition and the specific ''enumerated'' bona fide hedges listed in the existing bona fide hedge definition;

iii. A discussion of each of the elements of the existing ''general'' bona fide hedging definition, including the (a) temporary substitute test (and the related elimination of the risk management exemption), (b) economically appropriate test, (c) change in value requirement, (d) incidental test, and (e) orderly trading requirement;

iv. The treatment of unfixed-price transactions under the Final Rule;

v. A discussion of each enumerated bona fide hedge in the Final Rule;

vi. A discussion of the elimination of the Five-Day Rule;

vii. A discussion of the guidance on measuring risk (*i.e.,* gross versus net hedging);

viii. A discussion of the Final Rule's implementation of the CEA's statutory pass-through swap and pass-through swap offset provisions; and

ix. A discussion of the form, location, and organization of the enumerated bona fide hedges.

ii. Overview of the Commission's Existing Bona Fide Hedging Definition in § 1.3

Paragraph (1) of the existing bona fide hedging definition in Commission regulation § 1.3 contains what is currently labeled the ''general definition'' of bona fide hedging. This ''general'' bona fide hedging definition comprises five key elements which require that in order for a position to be deemed a bona fide hedge for Federal position limits, the position must:

• ''normally'' represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel (''temporary substitute test'');

• be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (''economically appropriate test'');

• arise from the potential change in value of (1) assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising, (2) liabilities which a person owns or anticipates incurring, or (3) services which a person provides, purchases, or anticipates providing or purchasing (''change in value requirement'');

• have a purpose to offset price risks incidental to commercial cash or spot operations (''incidental test''); and

• be established and liquidated in an orderly manner (''orderly trading requirement'').[80]

As discussed more fully below, the Dodd-Frank Act's amendments to the CEA included the first three factors in the amended CEA, but did not include the last two factors.

Additionally, paragraph (2) of the bona fide hedging definition in existing § 1.3 currently sets forth a non-exclusive list of seven total enumerated bona fide hedges, contained in four general bona fide hedging transaction categories, that comply with the general bona fide hedging definition in paragraph (1). These bona fide hedge categories that are explicitly listed in existing § 1.3's bona fide hedging definition are generally referred to as the ''enumerated'' bona fide hedges, a term the Commission uses throughout in this release. Market participants thus need not seek approval from the Commission of such positions as bona fide hedges prior to exceeding limits for such positions. Rather, market participants must simply report any such positions on the monthly Form 204 (or Form 304 for cotton), as required by part 19 of the Commission's existing regulations.[81]

The seven existing enumerated hedges fall into the following four categories: (1) Sales of futures contracts to hedge (i) ownership or fixed-price cash commodity purchases and (ii) unsold anticipated production; (2) purchases of futures contracts to hedge (i) fixed-price cash commodity sales of the same commodity, (ii) fixed-price sales of the cash commodity's cash products and by-products, and (iii) unfilled anticipated requirements; (3) offsetting sales and purchases of futures contracts to hedge offsetting unfixed-price cash commodity sales and purchases; and (4) cross-commodity hedges.[82]

As discussed further below, market participants may not use either the existing enumerated bona fide hedges for unsold anticipated production or unfilled anticipated requirements to hedge more than twelve-months' unsold production or unfilled requirements, respectively (the ''twelve-month restriction''). Further, the existing enumerated bona fide hedges for unsold production and for offsetting sales and purchases of unfixed price transactions do not apply during the five last trading days. Similarly, the existing enumerated bona fide hedge for unfilled anticipated requirements has a modified version of the Five-Day Rule and provides that during the ''five last trading days'' a market participant may not maintain a position that exceeds the market participant's unfilled anticipated requirement for ''that month and for the next succeeding month.''

Paragraph (3) of the current bona fide hedging definition states that the Commission may recognize ''non-enumerated'' bona fide hedging transactions and positions pursuant to a specific request by a market participant using the process described in § 1.47 of the Commission's regulations.[83]

iii. Amended Bona Fide Hedge Definition for Physical Commodities in § 150.1; ''General'' Elements of the Bona Fide Hedge Definition Under the Final Rule

The Commission is adopting the proposed general elements currently found in the bona fide hedging definition in § 1.3 that conform to the revised statutory bona fide hedging definition in CEA section 4a(c)(2), as amended by the Dodd-Frank Act, and is eliminating the general elements that do not conform.[84] In particular, the Commission is adopting updated versions of the temporary substitute test, economically appropriate test, and change in value requirements that are described below, and eliminating the incidental test and orderly trading requirement, which are not included in the revised statutory text. Each of these changes is discussed in more detail below.[85]

a. Temporary Substitute Test

(1) Background—Temporary Substitute Test

The language of the temporary substitute test in the Commission's existing bona fide hedging definition is inconsistent with the language of the temporary substitute test that appears in the CEA, as amended by the Dodd-Frank Act. Specifically, the Commission's existing regulatory definition currently provides that a bona fide hedging

[80] 17 CFR 1.3.

[81] 17 CFR part 19.

[82] 17 CFR 1.3.

[83] *Id.*

[84] The Commission is also making a non-substantive change to the introductory language of § 150.3 by referring in the proviso to ''such person's transactions or positions.'' The Commission views this as a clarifying edit, and does not intend a substantive difference in meaning with the choice of these terms.

[85] Bona fide hedge recognition is determined based on the particular circumstances of a position or transaction and is not conferred on the basis of the involved market participant alone. Accordingly, while a particular position may qualify as a bona fide hedge for a given market participant, another position held by that same participant may not. Similarly, if a participant holds positions that are recognized as bona fide hedges, and holds other positions that are speculative, only the speculative positions would be subject to position limits.

position *normally* represents a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel.[86] Prior to the enactment of the Dodd-Frank Act, the temporary substitute test in section 4a(c)(2)(A)(i) of the CEA also contained the word ''normally,'' so that the Commission's existing bona fide hedging definition mirrored the previous section 4a(c)(2)(A)(i) of the CEA prior to the Dodd-Frank Act. The word ''normally'' acted as a qualifier for the instances in which a position must be a temporary substitute for transactions or positions made at a later time in a physical marketing channel. However, the Dodd-Frank Act removed that qualifier by deleting the word ''normally'' from the temporary substitute test in CEA section 4a(c)(2)(A)(i).[87]

In a 1987 interpretation, the Commission stated that, among other things, the inclusion of the word ''normally'' in connection with the pre-Dodd-Frank-Act version of the temporary substitute language indicated that the bona fide hedging definition should not be construed to apply only to firms using futures to reduce their exposures to risks in the cash market.[88] Instead, the 1987 interpretation took the view that to qualify as a bona fide hedge, a transaction in the futures market did not necessarily need to be a temporary substitute for a later transaction in the cash market.[89] In other words, that interpretation took the view that a futures position could still qualify as a bona fide hedging position even if it was not in connection with the production, sale, or use of a physical commodity.

Commission staff has previously granted so-called ''risk management exemptions'' on such grounds. In connection with physical commodities, the phrase ''risk management exemption'' has historically been used by Commission staff to refer to non-enumerated bona fide hedge recognitions granted under § 1.47 to allow swap dealers and others to hold agricultural futures positions in excess of Federal position limits in order to offset their positions in commodity index swaps or related exposure.[90] Risk management exemptions were granted outside of the spot month, and the related swap exposure that was being offset (*i.e.,* hedged by the futures or options position entered into based on the risk management exemption) was typically opposite an institutional investor for which the swap was not a bona fide hedge.

(2) Summary of the 2020 NPRM—Temporary Substitute Test

As described above, the Dodd-Frank Act clearly and unambiguously removed the word ''normally'' from the temporary substitute test in CEA section 4a(c)(2)(A)(i), as amended by the Dodd-Frank Act. As such, in the 2020 NPRM, the Commission interpreted the Dodd-Frank Act's removal of the word ''normally'' as reflecting Congressional statutory direction that a bona fide hedging position in physical commodities must *always* (and not just ''normally'') be in connection with the production, sale, or use of a physical cash-market commodity.[91] The Commission interpreted this change to signal that the Commission should cease to recognize ''risk management'' positions as bona fide hedges for physical commodities, unless the positions satisfy the pass-through swap/swap offset requirements in section 4a(c)(2)(B) of the CEA, further discussed below.[92]

In order to implement that statutory change, the Commission: (1) Proposed a narrower bona fide hedging definition for physical commodities in proposed § 150.1 that did not include the word ''normally'' currently found in the temporary substitute regulatory language in paragraph (1) of the existing § 1.3 bona fide hedging definition; and (2) proposed to eliminate all previously-granted risk management exemptions that did not otherwise qualify for pass-through treatment.[93] Under the 2020 NPRM, any such previously-granted risk management exemption would generally no longer apply 365 days after publication of final position limits rules in the **Federal Register**.[94]

(3) Summary of the Commission Determination—Temporary Substitute Test

As proposed, the Final Rule eliminates the word ''normally'' from the Commission's temporary substitute test and eliminates the risk management exemption for contracts subject to Federal position limits. However, as described below, the Final Rule is extending the compliance date for existing risk management exemption holders.

(4) Comments—Temporary Substitute Test

Commenters were divided regarding the proposed elimination of the risk management exemptions. Some public interest groups and the agricultural industry supported the proposed removal of the word ''normally'' and/or the accompanying rescission of risk management exemptions.[95] These commenters argued that risk management positions are harmful to the market and can adversely impact price dynamics.[96]

Commenters from the financial industry, ICE, and MGEX opposed the proposed removal of ''normally'' and/or the proposed elimination of the risk management exemption.[97] These commenters contended that the elimination of the risk management

[86] 17 CFR 1.3. As noted earlier in this release, the currently-in-effect version of the Commission's bona fide hedging definition does not currently appear in the current Code of Federal Regulations. The closest to a ''current'' version of the definition is the 2010 version of § 1.3, which, while substantively current, still includes the ''(z)'' denomination that was removed in 2018. The Commission proposed to address the need to formally remove the incorrect version of the bona fide hedging definition as part of the 2020 NPRM. *See supra* n.74.

[87] 7 U.S.C. 6a(c)(2)(A)(i).

[88] *See* Clarification of Certain Aspects of the Hedging Definition, 52 FR 27195, 27196 (July 20, 1987).

[89] *Id.*

[90] As described below, due to differences in statutory language, the phrase ''risk management exemption'' often has a broader meaning in connection with excluded commodities than with physical commodities. *See infra* Section II.A.1.x. (discussing proposed pass-through language).

[91] 85 FR at 11596.

[92] 7 U.S.C. 6a(c)(2)(B).

[93] *See* final § 150.3(c). *See also infra* Section II.A.1.x.b. (discussing proposed pass-through language). Excluded commodities, as described in further detail below, are not subject to the statutory bona fide hedging definition. Accordingly, the statutory restrictions on risk management exemptions that apply to physical commodities subject to Federal position limits do not apply to excluded commodities.

[94] *See infra* Section II.A.1.iii.a(5) (discussing of revoking existing risk management exemptions).

[95] AMCOT at 1; Ecom at 1; White Gold at 1–2; Walcot at 2; East Cotton at 2; CMC at 11 (stating that the increased limits and allowances for pass-through exemptions will limit any potential loss of liquidity); NCFC at 7 (noting that it supports the elimination in light of the increased limits); NGFA at 3; LDC at 2; PMAA at 4; ACSA at 2, 4; IMC at 2; Mallory at 1; McMeekin at 1–2; Memtex at 2; Omnicotton at 2; NCC at 1; S Canale Cotton at 2; Texas Cotton at 2; SW Ag at 2; Jess Smith at 2; Choice Cotton at 1; Olam at 1–2; Better Markets at 4, 51–54 (agreeing with the proposed interpretation that the Dodd-Frank Act requires the change and stating that the elimination of the risk management exemption may mean very little in light of the increased limits); ACA at 2; Moody Compress at 2; Toyo at 2; and DECA at 1.

[96] See, *e.g.,* Mallory Alexander at 1; DECA at 1; Ecom at 2; Southern Cotton at 2; Canale Cotton at 2; ACA at 2; IMC at 2; Olam at 1–2; Moody Compress at 1; SW Ag at 2; East Cotton at 2; Toyo at 2; Jess Smith at 2; McMeekin at 1–2; Omnicotton at 2; Texas Cotton at 2; Walcot at 2; White Gold at 1–2; and PMAA at 3–4 (arguing that risk management positions have the potential to create significant volatility); Better Markets at 9, 17 (noting the distortive effects of risk management positions).

[97] ICE at 5–8 (noting that risk management positions are non-speculative and arguing that the pass-through provision is not an adequate substitute for such positions); FIA at 10, 21–24; ISDA at 6; PIMCO at 5–6; SIFMA AMG at 8; MGEX at 2.

exemption will harm the market, including by reducing liquidity,[98] and that even though Congress removed ''normally'' from the statute, Congress did not use the term ''always.'' [99] One commenter opposed to the ban claimed that the European Commission is considering revising MiFID II [100] to address a ''failure to include an appropriate hedge exemption for financial risks.'' [101]

Finally, several commenters noted that even if the Commission finalizes the ban as proposed, the Commission should: (i) Revoke the exemptions gradually so as to avoid disruption; [102] (ii) clarify that the Commission maintains the authority under CEA section 4a(a)(7) to grant risk management exemptions in the future; [103] and (iii) allow exchanges to grant risk management exemptions.[104]

(5) Discussion of Final Rule—Temporary Substitute Test

The Commission is eliminating the word ''normally'' from the Commission's temporary substitute test and eliminating the existing risk management exemption for contracts subject to Federal position limits as proposed. However, as described below, the Commission is extending the compliance date by which positions based on existing risk management exemptions must be reduced to levels that comply with the applicable Federal position limits. While the Commission appreciates commenter concerns regarding the elimination of the risk management exemption, the Commission interprets the Dodd-Frank Act's removal of the word ''normally'' from the CEA's statutory temporary substitute test as signaling Congressional intent to reverse the flexibility afforded by the presence of the word ''normally'' prior to the Dodd-Frank Act. As such, even were the Commission inclined to retain the status quo of risk management exemptions, the Commission's statutory interpretation prevents it from doing so.

Further, retaining such exemptions for swap intermediaries, without regard to the purpose of their counterparties' swaps, would not only be inconsistent with the post-Dodd-Frank Act version of the temporary substitute test, but would also be inconsistent with the statutory restrictions on pass-through swap offsets. In particular, the statutory pass-through provision requires that the swap position being offset qualify as a bona fide hedging position.[105] Many risk management exemptions have been used to offset swap positions that would not qualify as bona fide hedging positions.

In response to the comment regarding a potential expansion of MiFID II to accommodate activity akin to risk management exemptions, the Commission believes that the European Commission's stated posture does not appear to contemplate a blanket exemption for financial risks as suggested by the commenter. Instead, the European Commission's approach appears to be largely consistent with the narrower pass-through approach adopted by the Commission in this Final Rule.[106]

The Commission is, however, making several changes and clarifications to address commenter concerns:

First, the Commission is extending the compliance date by which risk management exemption holders must reduce their risk management exemption positions to comply with Federal position limits under the Final Rule to January 1, 2023.[107] This provides approximately two years beyond the Effective Date for the nine legacy agricultural contracts.[108] The Commission believes that this will provide sufficient time for existing positions to roll off and/or be replaced with positions that conform with the Federal position limits adopted in this Final Rule, without adversely affecting market liquidity.

Second, including pass-through swaps and pass-through swap offsets within the definition of a bona fide hedge will mitigate some of the potential impact resulting from the rescission of the risk management exemption. The Final Rule's pass-through provisions should help address certain of the hedging needs of persons seeking to offset the risk from swap books, allowing for sufficient liquidity in the marketplace for both bona fide hedgers and their counterparties.

Third, although the Commission will no longer recognize risk management positions as bona fide hedges under this Final Rule, the Commission maintains other authorities, including the authority under CEA section 4a(a)(7), to exempt risk management positions from Federal position limits.

Finally, consistent with existing industry practice, exchanges may continue to recognize risk management positions for contracts that are not subject to Federal position limits, including for excluded commodities.

b. Economically Appropriate Test

(1) Background—Economically Appropriate Test

The statutory and regulatory bona fide hedging definitions in section 4a(c)(2)(A)(ii) of the CEA and in existing § 1.3 of the Commission's regulations both provide that a bona fide hedging position must be economically

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[98] FIA at 23–24 (contending that the 2020 NPRM may harm pension funds and create a bifurcated liquidity pool since dealers may need to move their hedges from physically-settled to financially-settled contracts earlier than they would otherwise); ISDA at 6, 11; PIMCO at 5–6; and ICE at 5–6.

[99] ISDA at 6; FIA at 21–22; and ICE at 5, 8.

[100] According to the European Securities and Market Authority, ''MiFID is the Markets in Financial Instruments Directive (2004/39/EC). It has been applicable across the European Union since November 2007. It is a cornerstone of the EU's regulation of financial markets seeking to improve their competitiveness by creating a single market for investment services and activities and to ensure a high degree of harmonised protection for investors in financial instruments.'' MiFID sets out: conduct of business and organisational requirements for investment firms; authorisation requirements for regulated markets; regulatory reporting to avoid market abuse; trade transparency obligation for shares; and rules on the admission of financial instruments to trading.''

''On 20 October 2011, the European Commission adopted a legislative proposal for the revision of MiFID which took the form of a revised Directive and a new Regulation. After more than two years of debate, the Directive on Markets in Financial Instruments repealing Directive 2004/39/EC and the Regulation on Markets in Financial Instruments, commonly referred to as MiFID II and MiFIR, were adopted by the European Parliament and the Council of the European Union. They were published in the EU Official Journal on 12 June 2014.'' European Securities and Market Authority website at *https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir*.

[101] SIFMA AMG at 8.

[102] ISDA at 7.

[103] ICE at 6; FIA at 3, 22, 24; ISDA at 6–7; and IECA at 12.

[104] FIA at 3, 22; ISDA at 6–7; and ICE at 5–6.

[105] *See* 7 U.S.C. 6a(c)(2)(B)(i) (was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction). The pass-through swap offset language in the Final Rule's bona fide hedging definition is discussed in greater detail below.

[106] *See* MiFID II Review report on position limits and position management (April 1, 2020), available at *https://www.esma.europa.eu/sites/default/files/library/esma70-156-2311_mifid_ii_review_report_position_limits.pdf*. The exemption under consideration for financial counterparties appears to be in line with the Final Rule's pass-through provision, in that the ''exemption would apply to the positions held by that financial counterparty that are objectively measurable as reducing risks directly related to the commercial activities of the non-financial entities of the group . . . . this hedging exemption should not be considered as an additional exemption to the position limit regime but rather as a 'transfer' to the financial counterparty of the group of the hedging exemption otherwise available to the commercial entities of the group.'' *Id.* at 32–33.

[107] For clarity, a risk management exemption holder may enter into new positions based on, and in accordance with, its previously-granted risk management exemption, during this compliance period, until January 1, 2023.

[108] For further discussion of the Final Rule's compliance and effective dates, *see* Section I.D. Both existing risk management exemptions, as discussed herein, and swap positions, will be subject to the extended compliance data to January 1, 2023.

appropriate to the reduction of risks in the conduct and management of a commercial enterprise.[109] The Commission has, when defining bona fide hedging, historically focused on transactions that offset price risk.[110]

(2) Summary of the 2020 NPRM—Economically Appropriate Test

In the 2020 NPRM, the Commission proposed to amend the economically appropriate prong of the bona fide hedge definition with one clarification: Consistent with the Commission's longstanding practice regarding what types of risk may be offset by bona fide hedging positions in excess of Federal position limits,[111] the Commission made explicit in the proposed bona fide hedging definition that the word ''risks'' refers to, and is limited to, ''price risk.'' This proposed clarification did not reflect a change in policy, as the Commission has a longstanding policy that hedges of non-price risk alone cannot be recognized as bona fide hedges.[112]

As stated in the 2020 NPRM, the Commission clarified its view that risk must be limited to price risk for purposes of the economically appropriate test due to the difficulty that the Commission or exchanges may face in objectively evaluating whether a particular derivatives position is economically appropriate to the reduction of non-price risks. For example, the Commission or an exchange's staff can objectively evaluate whether a particular derivatives position is an economically appropriate hedge of a price risk arising from an underlying cash-market transaction, including by assessing the correlations between the risk and the derivatives position. It would be more difficult, if not impossible, to objectively determine whether an offset of non-price risk is economically appropriate for the underlying risk.

Finally, the Commission requested comment on whether price risk is attributable to a variety of factors, including political and weather risk, and could therefore allow hedging political, weather, or other risks, or whether price risk is something narrower in the application of bona fide hedging.[113]

(3) Summary of the Commission Determination—Economically Appropriate Test

The Commission is adopting the economically appropriate prong of the bona fide hedge definition as proposed. However, as discussed below, the Commission is clarifying in response to commenter requests that while the Commission is explicitly limiting ''risks'' to ''price risks'' as used in the economically appropriate test, the Commission recognizes that price risk can be informed and impacted by various other types of non-price risk.

(4) Comments—Economically Appropriate Test

The Commission received comments from market participants seeking greater clarity with respect to the Commission's proposed reference to ''price risk'' in the context of applying the ''economically appropriate'' test in the bona fide hedging definition. Many commenters stated that the economically appropriate test should include offsets of non-price risk.[114] Other commenters stated that a variety of non-price risk factors (i) actually affect price risk and therefore are objective,[115] or (ii) are simply another form of price risk and therefore should be permitted.[116]

For example, ADM stated that when market participants discuss ''risks'' such as political, weather, delivery, transportation, and more, they are discussing the impact these factors may have on the price.[117] Hence the risk being hedged is price risk as influenced by these factors.[118] Other commenters stated that market participants should have the flexibility to measure risk in the manner most suitable for their business.[119] In addition, commenters also stated they were not opposed to ''price risk'' so long as the Commission clarified that price risk is not static or an absolute objective measure, and consequently that the term ''price risks'' incorporates a commercial hedger's independent assessment of price risk.[120]

In contrast, Better Markets supported the 2020 NPRM's rationale to permit only ''price risk.'' [121] Better Markets also suggested that the Commission clarify that the term ''commercial enterprise'' refers to ''solely [a] transaction or position that would be directly and demonstrably risk reducing to 'cash or spot operations' for physical commodities underlying the contracts'' to be hedged.[122]

Finally, ICE, MGEX, and FIA requested that if the Commission adopts the proposed economically appropriate prong, the Commission should permit market participants to use the non-enumerated bona fide hedge process to receive recognition of bona fide hedges of non-price risk on a case-by-case basis.[123]

(5) Discussion of the Final Rule—The Bona Fide Hedging Definition's ''Economically Appropriate Test''

The Commission is adopting the economically appropriate prong of the bona fide hedging definition as proposed, codifying existing practice, as well as existing § 1.3's treatment of price risk, by making it explicit in the rule text that the word ''risks'' refers to, and is limited to, ''price risk.''

The Commission emphasizes that the Final Rule is not intended to represent a change to the Commission's existing interpretation of the economically appropriate prong of bona fide hedging, but rather is maintaining the application of the economically appropriate test in connection with bona fide hedges on the nine legacy agricultural contracts to the 16 new non-legacy core referenced futures contracts.

In promulgating existing § 1.3, the Commission explained that a bona fide hedging position must, among other things, ''be economically appropriate to risk reduction, such risks must arise from operation of a commercial

[109] 7 U.S.C. 6a(c)(2)(A)(ii) and 17 CFR 1.3.

[110] For example, in promulgating existing § 1.3, the Commission explained that a bona fide hedging position must, among other things, be economically appropriate to risk reduction, such risks must arise from operation of a commercial enterprise, and the *price* fluctuations of the futures contracts used in the transaction must be substantially related to fluctuations of the cash-market value of the assets, liabilities or services being hedged. Bona Fide Hedging Transactions or Positions, 42 FR 14832, 14833 (Mar. 16, 1977) (emphasis added). ''Value'' is generally understood to mean price times quantity. The Dodd-Frank Act added CEA section 4a(c)(2), which copied the economically appropriate test from the Commission's definition in § 1.3. *See also* 78 FR at 75702, 75703 (stating that the core of the Commission's approach to defining bona fide hedging over the years has focused on transactions that offset a recognized physical price risk).

[111] *See, e.g.,* 78 FR at 75709, 75710.

[112] *See supra* n.109 for further discussion on the Commission's longstanding policy regarding ''price'' risk.

[113] 85 FR at 11622.

[114] MGEX at 2; NGSA at 5–6; CHS at 3; NCFC at 2; FIA at 10–11; CMC at 3; LDC at 2; ICE at 4; IFUS at Exhibit 1 RFC (6).

[115] FIA at 10–11 (Stating that, ''[T]he Commission should recognize that the statutory definition of a bona fide hedging position encompasses the reduction of all risks that affect the value of a cash-market position, including time risk, location risk, quality risk, execution and logistics risk, counterparty credit risk, weather risk, sovereign risk, government policy risk (*e.g.,* an embargo), and any other risks that affect price. These are objective, rather than subjective, risks that commercial enterprises incur on a regular basis in connection with their businesses as producers, processors, merchants handling, and users of commodities that underlie the core referenced futures contracts'').

[116] ADM at 5.

[117] *Id.*

[118] ADM at 5.

[119] LDC at 2.

[120] CMC at 3.

[121] Better Markets at 52–53.

[122] Better Markets at 53.

[123] MGEX at 2; FIA at 11.

enterprise, and the *price* fluctuations of the futures contracts used in the transaction must be substantially related to fluctuations of the cash-market value of the assets, liabilities or services being hedged.'' [124] (emphasis added). Consistent with this longstanding policy of the Commission to recognize hedges of price risk of an underlying commodity position as bona fide hedges (and consistent with the Commission's existing application of bona fide hedging to the nine legacy agricultural contracts under the existing Federal position limit regulations), the Commission is also clarifying further below that price risk can be informed and impacted by various other types of risks.

As the Commission stated in the 2020 NPRM and continues to believe, for any given non-price risk, such as geopolitical turmoil, weather, or counterparty credit risks, there could be multiple commodities, directions, and contract months which a particular market participant may subjectively view as an economically appropriate offset for that non-price risk. Moreover, multiple market participants faced with the same non-price risk might take different views on which offset is the most effective.[125] A system of allowing for bona fide hedges based solely by reference to such non-price risks would be difficult to administer on a pragmatic and consistently fair basis.

Further, it also would be difficult to evaluate whether a particular commodity derivative contract would be the proper offset as a bona fide hedge, as defined in this Final Rule, to a potential non-price risk, or would remove exposure to the potential change in value to the market participant's cash positions resulting from the non-price risk. Thus, hedging *solely* to protect against changes in value of non-price risks would fall outside the category of a bona fide hedge which offsets the ''price risk'' of an underlying commodity cash position.

However, the Commission agrees with commenters who stated that market participants form independent economic assessments of how different possible events might create potential risk exposures for their business.[126] Such risks that create or impact the price risk of underlying cash commodities may include, but are not limited to, geopolitical turmoil, weather, or counterparty credit risks. The Commission recognizes that these risks can create price risks and understands that firms may manage these potential risks to their businesses differently and in the manner most suitable for their business. As noted above, by limiting the economically appropriate prong to price risk, the Commission is reiterating its historical practice, which has applied well to the legacy agricultural contracts for decades, to recognize hedges of price risk of an underlying commodity position as bona fide hedges while acknowledging that price risk may itself be impacted by non-price risks.

The foregoing discussion of price risk is limited to the question of whether a position in a referenced contract meets the economically appropriate test to satisfy the bona fide hedge requirements. Market participants may thus continue to manage non-price risks in a variety of ways, which may include participation in the futures markets or exposure to other financial products. In fact, market participants may decide to use futures contracts that are not subject to Federal position limits (*e.g.,* location basis contracts), if they determine such contracts will help them manage non-price risks faced by their businesses.[127] For example, a market participant seeking to manage risk, including non-price risk, with positions in contracts that are not referenced contracts, such as freight or weather derivatives, would not be subject to Federal speculative position limits and thus would not need to comply with the economically appropriate test in connection with such positions in non-referenced contracts.

To satisfy the economically appropriate test, a position must ultimately offset the price risk of an underlying cash commodity.[128] Non-price risk may also be a consideration in hedging decisions, but cannot be a substitute for price risk associated with the cash commodity underlying the derivatives position. The foregoing view precludes the Commission from adopting commenter suggestions to permit market participants to use the non-enumerated hedge process to receive recognition of hedges of non-price risk on a case-by-case basis because, while the Commission acknowledges that price risk can be informed and impacted by non-price risk, price risk is required to satisfy the economically appropriate test.

c. Change in Value Requirement

(1) Background—Change in Value Requirement

CEA section 4a(c)(2)(A)(iii) and existing § 1.3 include the ''change in value requirement,'' which provides that the bona fide hedging position must arise from the potential change in the value of: (I) Assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising; (II) liabilities that a person owns or anticipates incurring; or (III) services that a person provides, purchases, or anticipates providing or purchasing.[129]

(2) Summary of the 2020 NPRM—Change in Value Requirement

The Commission proposed to retain the substance of the change in value requirement in existing § 1.3, with some non-substantive technical modifications, including modifications to correct a typographical error.[130] Aside from the typographical error, the proposed § 150.1 change in value requirement mirrors the Dodd-Frank Act's change in value requirement in CEA section 4a(c)(2)(A)(iii).

(3) Summary of the Commission Determination—Change in Value Requirement

For the same reasons set out in the 2020 NPRM, the Commission is adopting the change in value

[124] Bona Fide Hedging Transactions or Positions, 42 FR 14832, 14833 (Mar. 16, 1977) (emphasis added). ''Value'' is generally understood to mean price times quantity. The Dodd-Frank Act added CEA section 4a(c)(2), which copied the economically appropriate test from the Commission's definition in § 1.3. *See also* 78 FR at 75702, 75703 (stating that the ''core of the Commission's approach to defining bona fide hedging over the years has focused on transactions that offset a recognized physical price risk'').

[125] 85 FR at 11606.

[126] CMC at 3.

[127] The enumerated cross-commodity hedge provision adopted herein and discussed below offers may also offer additional flexibility to those market participants using referenced contracts to manage risk, by allowing market participants to hedge price risk associated with a particular commodity using a derivative contract based on a different commodity, assuming all applicable requirements of the cross-commodity enumerated bona fide hedge are met.

[128] This view is consistent with the spirit of Better Market's comment suggesting a focus on reducing risks associated with a cash-market position in a physical commodity. *See* Better Markets at 53.

[129] 7 U.S.C. 6a(c)(2)(A)(iii), 17 CFR 1.3.

[130] The Commission proposed to replace the phrase ''liabilities which a person *owns,*'' which appears in the statute erroneously, with ''liabilities which a person *owes,*'' which the Commission believed was the intended wording (emphasis added). The Commission interpreted the word ''owns'' to be a typographical error. A person may owe on a liability, and may anticipate incurring a liability. If a person ''owns'' a liability, such as a debt instrument issued by another, then such person owns an asset. The fact that assets are included in CEA section 4a(c)(2)(A)(iii)(I) further reinforces the Commission's interpretation that the reference to ''owns'' means ''owes.'' The Commission also proposed several other non-substantive modifications in sentence structure to improve clarity.

requirement of the bona fide hedge definition as proposed.

(4) Comments—Change in Value Requirement

No specific comments on the change in value requirement were received.

d. Incidental Test and Orderly Trading Requirement

(1) Background—Incidental Test and Orderly Trading Requirement

Two general requirements contained in the existing § 1.3 definition of bona fide hedging position include: (I) The incidental test and (II) the orderly trading requirement. For a position to be recognized as a bona fide hedging position, the incidental test requires that the purpose is to offset price risks incidental to commercial cash, spot, or forward operations.

Under the orderly trading requirement, such position is established and liquidated in an orderly manner in accordance with sound commercial practices. Notably, Congress in the Dodd-Frank Act did not include the incidental test or the orderly trading requirement in the statutory bona fide hedging definition in CEA section 4a(c)(2).[131]

(2) Summary of the 2020 NPRM—Incidental Test and Orderly Trading Requirement

While the Commission proposed to maintain the substance of the three core elements of the existing bona fide hedging definition described above, with some modifications, the Commission also proposed to eliminate two elements contained in the existing § 1.3 definition: The incidental test and orderly trading requirement that currently appear in paragraph (1)(iii) of the § 1.3 bona fide hedging definition.[132]

(3) Summary of the Commission Determination—Incidental Test and Orderly Trading Requirement

The Commission is eliminating the incidental test and orderly trading requirement from the bona fide hedge definition as proposed.

(4) Comments—Incidental Test and Orderly Trading Requirement

NGSA supported elimination of the incidental test and orderly trading requirement, claiming that the changes will facilitate hedging,[133] while IATP and Better Markets opposed the removal of these provisions, contending that the provisions are important for preventing market disruption.[134]

(5) Discussion of the Final Rule—Incidental Test and Orderly Trading Requirement

The Commission is eliminating the incidental test and orderly trading requirement from the bona fide hedge definition as proposed. As noted above, neither the incidental test nor orderly trading requirement is part of the CEA's current statutory definition of bona fide hedge. The Commission views the incidental test as redundant because the Commission proposed to maintain both (1) the change in value requirement (as noted above, the reference to ''value'' in the change in value requirement is generally understood to mean price per unit times quantity of units) as well as (2) the economically appropriate test (which includes the concept of the offset of price risks in the conduct and management of, *i.e.,* incidental to, a commercial enterprise).

In response to IATP and Better Markets, the Commission does not view the orderly trading requirement as needed to prevent market disruption. The statutory bona fide hedging definition does not include an orderly trading requirement,[135] and the meaning of ''orderly trading'' is unclear in the context of the OTC swap market and in the context of permitted off-exchange transactions, such as exchange for physicals. The elimination of the orderly trading requirement does not diminish an exchange's obligation to prohibit any disruptive trading practices, including a case where an exchange believes that a bona fide hedge position may result in disorderly trading. Further, in eliminating the orderly trading requirement from the definition in the regulations, the Commission is not amending or modifying interpretations of any other related requirements, including any of the anti-disruptive trading prohibitions in CEA section 4c(a)(5),[136] or any other statutory or regulatory provisions.

Taken together, the retention of the updated temporary substitute test, economically appropriate test, and change in value requirement, coupled with the elimination of the incidental test and orderly trading requirement, should reduce uncertainty by eliminating provisions that do not appear in the statute, and by clarifying the language of the remaining provisions. By reducing uncertainty surrounding some parts of the bona fide hedging definition for physical commodities, the Commission anticipates that, as described in greater detail elsewhere in this release, it would be easier going forward for the Commission, exchanges, and market participants to address whether novel trading practices or strategies may qualify as bona fide hedges.

iv. Treatment of Unfixed Price Transactions Under the Final Rule

a. Background and Summary of Commission Determination—Treatment of Unfixed Price Transactions

The Commission has a long history of recognizing fixed-price commitments as the basis for a bona fide hedge.[137] While the existing bona fide hedging definition in § 1.3 includes one enumerated hedge that explicitly mentions ''unfixed'' prices,[138] the availability of this hedge is limited to circumstances where a market participant has both an unfixed-price purchase *and* an unfixed-price sale on hand, precluding a market participant with only an unfixed-price purchase *or* an unfixed-price sale from qualifying for this particular enumerated hedge. Further, the extent to which the other existing enumerated hedges apply to unfixed-price commitments is ambiguous from the plain reading of the text of the existing bona fide hedging definition.

However, Commission staff have previously considered the extent to which market participants with unfixed-price commitments may qualify for an enumerated hedge. Commission staff issued interpretive letter 12–07 in 2012 (''Staff Letter No. 12–07'') in response to a narrow question submitted by a market participant regarding qualifying for the existing enumerated unfilled anticipated requirements bona fide hedge[139] while entering into ''unfixed-

[131] 7 U.S.C. 6a(c)(2).

[132] 17 CFR 1.3.

[133] NGSA at 4.

[134] IATP at 14–15; Better Markets at 53.

[135] The orderly trading requirement was added as a part of the regulatory definition of bona fide hedging in 1975; *see* Hedging Definition, Reports, and Conforming Amendments, 40 FR 11560 (Mar. 12, 1975). Prior to 1974, the orderly trading requirement was found in the statutory definition of bona fide hedging position; changes to the CEA in 1974 removed the statutory definition from CEA section 4a(3).

[136] 7 U.S.C. 6c(a)(5).

[137] *See, e.g.,* paragraphs (2)(i)(A) and (2)(ii)(A) of existing § 1.3.

[138] *See* paragraph (2)(iii) of existing § 1.3 (Offsetting sales and purchases for future delivery on a contract market which do not exceed in quantity that amount of the same cash commodity which has been bought and sold at unfixed prices basis different delivery months of the contract market)

[139] Paragraph (2)(ii)(C) of existing § 1.3 provides in relevant part that the bona fide hedging definition includes purchases which do not exceed in quantity Twelve months' unfilled anticipated requirements of the same cash commodity for processing, manufacturing, or feeding by the same person.

price transactions.'' [140] In that interpretive letter, staff clarified that a commercial entity may qualify for the existing enumerated bona fide hedge for unfilled anticipated requirements even if the commercial entity has entered into long-term, unfixed-price supply or requirements contracts because, as staff explained, the unfixed-price purchase contract does not ''fill'' the commercial entity's anticipated requirements.[141] As explained in Staff Letter No. 12–07, the price risk of such ''unfilled'' anticipated requirements is not offset by the unfixed-price forward contract because the price risk remains with the commercial entity, even though the entity has contractually assured a supply of the commodity.[142] Instead, the price risk continues until the unfixed-price contract's price is fixed.[143] Once the price is fixed on the supply contract, the commercial entity no longer has price risk, and its derivative position, to the extent the position is above an applicable position limit, and unless the market participant qualifies for another exemption (as discussed below), must be liquidated in an orderly manner in accordance with sound commercial practices.[144]

As discussed below, the Commission is affirming this narrow interpretation for the Final Rule—that commercial entities that enter into unfixed-price transactions may continue to qualify for the enumerated bona fide hedge for unfilled anticipated requirements—and the Commission is adopting this rationale to also apply to: (1) The existing enumerated bona fide hedge for unsold anticipated production; [145] and (2) the new enumerated bona fide hedge for anticipated merchandising.[146] In other words, under this Final Rule, a commercial market participant in the physical marketing channel that enters into an unfixed-price transaction may qualify for one of these enumerated anticipatory bona fide hedges, as long as the commercial market participant otherwise satisfies all applicable requirements for such anticipatory bona fide hedge.

For this section of the release, the Commission will refer to the enumerated bona fide hedges for anticipated unfilled requirements, anticipated unsold production, and anticipated merchandising, collectively, as the ''anticipatory bona fide hedges.'' Additionally, by using the term ''unfixed-price transaction,'' the Commission means a forward contract (*i.e.,* a firm commitment) at an open price or at a price to be determined at a later date (for example, by reference to an index based on the settlement price of a corresponding futures contract).

The Commission discusses the 2020 NPRM's general treatment of unfixed price transactions below, followed by a summary of comments and the Commission's determination on the issue of unfixed-price transactions generally. A more detailed discussion of each specific enumerated hedge, including the three anticipatory bona fide hedges, appears further below.

b. Summary of the 2020 NPRM—Treatment of Unfixed Price Transactions

Like the bona fide hedging definition in existing § 1.3, the proposed bona fide hedging definition in § 150.1 of the 2020 NPRM included one enumerated hedge addressing unfixed-price transactions, which required offsetting unfixed-price purchase *and* sale transactions.[147] Aside from that one enumerated bona fide hedge, the other proposed bona fide hedges did not specify whether a market participant with an unfixed-price transaction could qualify for a bona fide hedge exemption, including any of the proposed anticipatory bona fide hedges.

However, the 2020 NPRM did preliminarily and indirectly address previous queries on the matter of unfixed-price transactions. In particular, the 2020 NPRM addressed a petition for exemptive relief submitted in response to the 2011 Final Rule. In that petition, the Working Group of Commercial Energy Firms (which has since reconstituted itself as the Commercial Energy Working Group, or ''CEWG'') requested exemptive relief for transactions that are described by 10 examples set forth therein as bona fide hedging transactions (''BFH Petition'').[148]

In the 2020 NPRM, the Commission preliminarily determined that commodity derivative positions described in two examples related to unfixed-price transactions did not fit within any of the proposed enumerated hedges. Specifically, the Commission preliminarily determined that the positions described in examples #3 (unpriced physical purchase or sale commitments) and #7 (scenario 2) (use of physical delivery referenced contracts to hedge physical transactions using calendar month average pricing) of the BFH Petition did not fit within any of the proposed enumerated bona fide hedges, but that market participants could apply for a non-enumerated exemption.[149]

The Commission requested comment on the extent to which the proposed enumerated bona fide hedges should encompass the types of positions discussed in examples #3 (unpriced physical purchase or sale commitments) and #7 (scenario 2) (use of physical delivery reference contracts to hedge physical transactions using calendar month averaging pricing) of the CEWG's BFH Petition.[150]

c. Comments—Treatment of Unfixed Price Transactions

In response to the 2020 NPRM, many commenters requested the Commission either clarify or make explicit that the proposed bona fide hedge definition would apply to commodity derivatives contracts used to hedge exposure to price risk arising from unfixed-price transactions.[151]

[140] CFTC Staff Letter 12–07, issued August 16, 2012, *https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm*, title search ''12–07.''

[141] CFTC Staff Letter 12–07 at 1.

[142] CFTC Staff Letter 12–07 at 1–2. In the 2016 Reproposal, the Commission affirmed staff's interpretation articulated in Staff Letter No. 12–07. *See* 81 FR at 96750.

[143] CFTC Staff Letter 12–07 at 2.

[144] *Id.* at 2–3.

[145] For further discussion regarding the enumerated bona fide hedge for ''unsold anticipated production,'' *see* Section II.A.1.vi.d.

[146] For further discussion regarding the new enumerated bona fide hedge for ''anticipated merchandising,'' *see* Section II.A.1.vi.f.

[147] *See* proposed paragraph (a)(2) of Appendix A to part 150. Like the existing enumerated hedge in paragraph (2)(iii) of § 1.3, this proposed enumerated hedge was limited to circumstances where a market participant has both an unfixed-price purchase *and* an unfixed-price sale in hand. This specific proposed enumerated bona fide hedge, along with all other proposed enumerated hedges, is described in detail further below.

[148] The Working Group BFH Petition is available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgbfhpetition012012.pdf.* In the 2013 Proposal, the Commission provided that the transactions contemplated under the working group's examples Nos. 1, 2, 6, 7 (scenario 1), and 8 would be permitted under the proposed definition of bona fide hedging. In the 2020 NPRM, the Commission preliminarily determined that transactions described in four additional CEWG examples would comply with the proposed expanded bona fide hedging definition in the 2020 NPRM: examples #4 (Binding, Irrevocable Bids or Offers), #5 (Timing of Hedging Physical Transactions), #9 (Holding a cross-commodity hedge using a physical delivery contract into the spot month) and #10 (Holding a cross-commodity hedge using a physical delivery contract to meet unfilled anticipated requirements).

[149] 85 FR at 11612.

[150] 85 FR at 11622.

[151] *See, e.g.,* Ecom at 1; ACA at 2; CEWG at 22–24; Chevron at 11; CME Group at 8–9; DECA at 2; East Cotton at 2; Gerald Marshall at 2; IFUS at 5–7; IMC at 2; Jess Smith at 2; LDC at 2; Mallory Alexander at 2; McMeekin at 2; Memtex at 2; Moody Compress at 2; NCC at 1; NGFA at 7; Olam at 2; Omnicotton at 2; Canale Cotton at 2; Shell at 7; Southern Cotton at 2; Suncor at 7; SW Ag at 2; Toyo

Continued

Several commenters provided various examples in support of their requests that the Commission recognize that unfixed price transactions may serve as the basis for an enumerated bona fide hedge position for purposes of Federal position limits.[152]

Comments on the treatment of unfixed price transactions often were submitted in connection with discussions on the scope of the proposed enumerated bona fide hedge for anticipated merchandising. As discussed further below, under the Final Rule's enumerated anticipated merchandising bona fide hedge section, many commenters requested the Commission clarify whether the proposed enumerated hedge for anticipated merchandising could be used to manage price risk arising from unfixed-price physical commodity transactions.

With regards to CEWG's BFH Petition example #3 (unpriced physical purchase or sale commitments), many commenters disagreed with the Commission's preliminary determination in the 2020 NPRM that this type of transaction would not qualify for an enumerated bona fide hedge. Generally, commenters expressed the view that unfixed-price transactions for physical commodities are a common and standard market practice. The CEWG indicated that unfixed physical purchase or sale commitments are routinely conducted in numerous markets and commodities on a daily basis.[153]

Similar to the BFH Petition's example #3 (unpriced physical purchase or sale commitments), ACSA provided examples intended to demonstrate that merchants are exposed to calendar spread and supply price risk because they typically fulfill sales contracts by selling a commodity for future delivery in advance of purchasing the commodity needed to fulfill the sale.[154] ACSA, along with other commenters,[155] stated that unfixed-price transactions for the purchase or sale of the physical commodities are common, where a market participant buys the commodity at a price that is based on (*i.e.,* is ''indexed'' to) the settlement price of the nearby (or spot) futures month contract and later sells the commodity at a price that is indexed to the deferred month futures contract. ACSA and other commenters indicated that merchants do this to ''effectively bridge the gap between timing mismatches of supply and demand in the global marketplace.''[156]

Related to the BFH Petition example #7 (scenario 2) (use of physical delivery reference contracts to hedge physical transactions using calendar month averaging pricing ''CMA''), commenters requested that the Commission clarify that hedges of underlying physical transactions that utilize CMA pricing structures fall within the enumerated bona fide hedge for anticipated merchandising.[157] Chevron requested the Commission clarify that commercial firms that price commercial transactions to purchase or sell physical crude oil or natural gas using a CMA pricing structure (whether they are solely merchants or conduct merchant activities as part of an integrated energy company), should receive bona fide hedge treatment for their commodity derivative contract positions that offset the risks arising from those CMA priced purchases or sales.[158]

Similarly, other commenters asked for clarification regarding whether the existing enumerated bona fide hedge for unfilled anticipated requirement extends to scenarios that involve unfixed-price contracts that many electric generators enter into to address their anticipated supply requirements.[159] These commenters asked for clarification that unfixed-price purchase commitments do not ''fill'' an anticipated requirement such that the market participant would be able to still qualify for the enumerated unfilled anticipated requirement bona fide hedge.[160]

d. Discussion of Final Rule—Treatment of Unfixed Price Transactions

As discussed above, the Commission is affirming and broadening the application of the interpretation articulated in Staff Letter No. 12–07. As a result, commercial market participants in the physical marketing channel that enter into unfixed price transactions may qualify for bona fide hedge treatment under the enumerated bona fide hedges for anticipatory merchandising, anticipated unsold production, or anticipated unfilled requirements because, as discussed below, unfixed price transactions do not give rise to outright price risk and do not otherwise fix an outright price.[161]

Consistent with Staff Letter No. 12–07, commercial market participants in the physical marketing channel that enter into unfixed-price transactions may continue to qualify for the enumerated bona fide hedge for unfilled anticipated requirements for those unfixed price transactions. Further, the Commission is broadening this rationale to additionally include the existing enumerated bona fide hedge for ''unsold anticipated production''[162] and the new enumerated bona fide hedge for anticipated merchandising.[163] A commercial market participant that enters into an unfixed-price transaction may qualify for one of these enumerated anticipatory bona fide hedges as long as the commercial entity otherwise satisfies all requirements for such anticipatory bona fide hedge, including demonstrating its anticipated need in the physical marketing channel related to either its unsold production, unfilled requirements, and/or merchandising, as applicable.[164]

Under this Final Rule, the Commission is clarifying that a commercial market participant may still qualify for an enumerated anticipatory bona fide hedge for an anticipated need, based on a good-faith expectation of that need, even if the market participant has entered into an unfixed-price transaction, since the Commission does not deem the unfixed-price transaction to ''fill'' or ''address'' the anticipated need. This rationale is predicated on the fact that an unfixed-price commitment does not offset the price risk associated with an anticipated need (*i.e.,*

at 2; Texas Cotton at 2; Walcot at 2; White Gold at 2.

[152] CMC at 4; FIA at 16; ICE at 4–5; ACSA at 6–7; ADM at 3; CME Group at 8–9; CEWG at 19–21.

[153] CEWG at 20 (also providing a similar example as it submitted in the original petition which included Example #3 (unpriced physical purchase and sale commitments)).

[154] ACSA at 12–14; Several commenters concurred with ACSA regarding exposure to calendar spread. Mallory Alexander at 2; DECA at 2; CMC at 4; IMC at 2; Olam at 2; SW Ag at 2; White Gold at 2; Walcot at 2.

[155] ACSA at 4–7; CMC at 4; Mallory Alexander at 2; DECA at 2; IMC at 2; Olam at 2; SW Ag at 2; White Gold at 2; Walcot at 2.

[156] ACSA at 5.

[157] MGEX at 2; IMC at 2; Mallory Alexander at 2; Walcot at 2; White Gold at 2; Olam at 2; LDC at 1; Canale at 2; Moody Compress at 1; Gerald Marshall at 2; SW Ag at 2; DECA at 2; Chevron at 12; Suncor at 11; CEWG at 21.

[158] Chevron at 11.

[159] EPSA at 5; IECA at 8.

[160] *Id.*

[161] As a result, based on this rationale, a commercial market participant that has an unfixed-price commitment is treated the same as a commercial market participant that has no unfixed-price commitment for purposes of determining whether one qualifies for these enumerated anticipatory bona fide hedges.

[162] For further discussion regarding the enumerated bona fide hedge for ''unsold anticipated production,'' *see* Section II.A.1.vi.d.

[163] For further discussion regarding the new enumerated bona fide hedge for ''anticipated merchandising,'' *see* Section II.A.1.vi.f.

[164] As such, merely entering into an unfixed-price transaction is not alone sufficient to demonstrate compliance with one of the enumerated anticipatory bona fide hedges. The specific requirements associated with each enumerated bona fide hedge, including each anticipatory bona fide hedge, are described in detail further below.

anticipated unsold production, anticipated unfilled requirements, and/or anticipated merchandising, as applicable). This is because unfixed-price transactions do not give rise to outright price risk and therefore do not alter the outright price risks faced by a commercial market participant, even though the market participant has contractually assured either a supply of the commodity (in the case of anticipated unfilled requirements), the sale of its output (in the case of anticipated unsold production), or the purchase or sale of the commodity to be merchandised (in the case of anticipated merchandising).[165]

In other words, a trader with an unfixed-price commitment still has price risk related to its anticipated need until the price is fixed. Once the price has become fixed, the market participant may no longer avail itself of the enumerated anticipatory bona fide hedge, but may potentially avail itself of another enumerated bona fide hedge, (such as the bona fide hedges for fixed-price purchase contracts or for fixed-price sales contracts, as applicable), provided all applicable requirements of such other enumerated bona fide hedges are satisfied.

Under the Final Rule, a commercial market participant must continue to be able to demonstrate an anticipated need related to unsold production, unfilled requirements, and/or merchandising.

Accordingly, the Commission determines that the commercial market participant engaged in unfixed-price transactions in the BFH Petition's example #3 (unpriced physical purchase or sale commitments) and example #7 (scenario 2) (use of physical delivery referenced contracts to hedge physical transactions using calendar month average pricing) can qualify for one of the enumerated anticipatory bona fide hedges under the Final Rule to the extent the market participant otherwise complies with the applicable conditions of the relevant enumerated anticipatory bona fide hedge in connection with the market participant's commercial activities.

For clarity, the Commission also underscores that under the Commission's existing portfolio hedging policy, market participants, including vertically-integrated firms (*i.e.,* those firms that may qualify as more than one of a producer; processor, manufacturer, or utility; and/or merchandiser), may continue to manage their price risks by utilizing more than one enumerated bona fide hedge (including more than one anticipatory bona fide hedge).

The Commission recognizes that there are many ways in which market participants both structure their organizations and engage in commercial hedging practices. As such, market participants may manage the price risk from their various commercial activities by utilizing multiple enumerated bona fide hedge exemptions in the manner that is most suitable to their particular circumstances. Nevertheless, for illustrative purposes, the Commission provides a general example of how market participants may utilize the enumerated anticipatory bona fide hedges in connection with their unfixed price transactions:

For example, Producer X has the physical capacity to produce 100,000 barrels of physical WTI crude oil on an annual basis. Producer X agrees to sell 80,000 barrels of WTI crude oil to Merchandiser Y via a floating/unfixed-price contract in which the delivery will be priced at the NYMEX March 2020 WTI crude oil futures final settlement price. Producer X still does not have a buyer for its remaining 20,000 barrels, but anticipates selling all of its production, as it has in previous years. Under this scenario, Producer X may utilize the enumerated unsold anticipated production enumerated hedge to offset the price risk from its unsold production, which includes both the 80,000 barrels of oil sold to Merchandiser Y at an unfixed price, as well as the unsold 20,000 barrels.[166] On the other hand, Merchandiser Y may utilize the enumerated hedge for anticipated merchandising to hedge its anticipated merchandising transactions, which include the 80,000 barrels it purchased from Producer X at an unfixed price. Because Merchandiser Y has a history of merchandising more than 80,000 barrels a year, and it anticipates merchandising more than 80,000 barrels in the next twelve months, Merchandiser Y's anticipated merchandising hedge may include the 80,000 barrels it purchased from Producer X at an unfixed price and its remaining anticipated twelve-months' merchandising. Separately, assuming Merchandiser Y also has crude oil it purchased at a fixed price in a storage tank, Merchandiser Y may also utilize the enumerated hedge for inventory and cash-commodity fixed-price purchase contracts to hedge the price risk from those fixed price purchases of crude oil.

In response to commenters requesting that the Commission create a new enumerated bona fide hedge for unfixed-price transactions, the Commission does not believe that this is necessary because, as described above, commercial market participants may qualify for the enumerated anticipatory bona fide hedges while also entering into unfixed-price transactions. Further, the Commission believes that it is not suitable to create a new enumerated bona fide hedge expressly covering all unfixed price transactions to accomplish the same since there is an inherent difficulty in evaluating the propriety of a hedge of an unfixed price obligation with a fixed-price futures contract as there is basis risk until the unfixed price obligation is fixed. Given differences among markets, creating a new enumerated bona fide hedge for any unfixed price transaction could, under certain circumstances, harm market integrity, enable potential market manipulation, and/or allow excessive speculation by potentially affording bona fide hedging treatment for speculative transactions.

For example, assume a market participant enters into an unfixed-price sales contract (*e.g.,* priced at a fixed differential to a deferred month futures contract), and immediately enters into a calendar month spread to reduce the risk of the fixed basis moving adversely. It may not be economically appropriate to recognize as bona fide a long futures position in the spot (or nearby) month and a short futures position in a deferred calendar month matching the market participant's cash delivery obligation, in the event the spot (or nearby) month price is higher than the deferred contract month price (referred to as backwardation, and characteristic of a spot cash market with supply shortages), because such a calendar month futures spread would lock in a loss. A position locking in a loss generally is not economically appropriate to the reduction of risk, as it increases risk by generating a loss, and such a transaction may be indicative of an attempt—or at the very least provides inappropriate incentives—to manipulate the spot (or nearby) futures price.[167]

Finally, the Commission emphasizes that to the extent that a market participant does not qualify for an enumerated anticipatory bona fide hedge in connection with an unfixed-price transaction, the market participant

[165] Consistent with the existing Federal position limits framework, under the Final Rule, commercial market participants may not qualify for any anticipatory bona fide hedge merely to offset risks associated with non-commercial (*i.e.,* financial) activities.

[166] In the case where Producer X fixes the price of its sale before delivery, while it no longer holds an anticipatory hedge, Producer X may qualify for the enumerated hedge for fixed price sales, assuming all applicable requirements for that hedge are satisfied.

[167] *See* 81 FR at 96750.

could still avail itself of the process under §§ 150.3 and 150.9 for requesting approval of non-enumerated bona fide hedges.

v. The Enumerated Bona Fide Hedge Exemptions, Generally

a. Background—Bona Fide Hedge Exemptions, Generally

As discussed earlier in this release, the list of bona fide hedges explicitly contained in paragraph (2) of the existing bona fide hedging definition in § 1.3 of the Commission's regulations lists (or ''enumerates'') seven bona fide hedges, which are generally referred to as the ''enumerated bona fide hedges,'' in four general categories. These four existing categories of enumerated hedges include: (1) Sales of futures contracts to hedge (i) ownership or fixed-price cash commodity purchases and (ii) unsold anticipated production; (2) purchases of futures contracts to hedge (i) fixed-price cash commodity sales and (ii) unfilled anticipated requirements; (3) offsetting sales and purchases of futures contracts to hedge offsetting unfixed-price cash commodity sales and purchases; and (4) cross-commodity hedges.[168]

The list of enumerated bona fide hedges found in paragraph (2) of the existing bona fide hedging definition was developed at a time when only agricultural commodities were subject to Federal position limits, and has not been updated since 1987.[169] The Commission believes, as discussed further below, that such list is too narrow to reflect common commercial hedging practices, including for metal and energy contracts. Numerous market and regulatory developments have taken place since 1987, including, among other things, increased futures trading in the metals and energy markets, the development of the swaps markets, and the shift in trading from pits to electronic platforms. In addition, the Commodity Futures Modernization Act of 2000 [170] and the Dodd-Frank Act introduced various regulatory reforms, including the enactment of position limits core principles.[171] The Commission thus proposed in the 2020 NPRM to update its bona fide hedging definition to better conform to the current state of the law and to better reflect market developments over time.

b. Summary of the 2020 NPRM—Bona Fide Hedge Exemptions, Generally

So as not to reduce any of the clarity provided by the existing list of enumerated bona fide hedges, the Commission proposed to maintain the existing enumerated bona fide hedges, with some modifications, and to expand this list.

The existing definition of ''bona fide hedging transactions and positions'' enumerates the following hedging transactions:

a. Hedges of inventory and cash commodity fixed-price purchase contracts;

b. hedges of cash commodity fixed-price sales

c. hedges of the cash commodity's cash products and byproducts;

d. hedges of offsetting unfixed price cash commodity sales and purchases

e. hedges of unsold anticipated production;

f. hedges of unfilled anticipated requirements; and

g. cross-commodity hedges.

The following additional hedging practices are not enumerated in the existing regulation, but were included in the 2020 NPRM as additional enumerated bona fide hedges:

a. Hedges by agents;

b. short hedges of anticipated mineral royalties;

c. hedges of anticipated services;

d. offsets of commodity trade option; and

e. hedges of anticipated merchandising.

The Commission also proposed the elimination, for purposes of Federal position limits, of both the Five-Day Rule and the twelve-month restriction. However, under the 2020 NPRM, exchanges would be able to establish their own five-day rule and/or twelve-month restriction, as applicable for any or all of their respective referenced contracts.

c. Commission Determination—Bona Fide Hedge Exemptions, Generally

First, the Commission is adopting the proposed expanded list of enumerated bona fide hedges, with the modifications described, as applicable, in the discussions of the relevant bona fide hedges below. Second, the Commission is adopting, as proposed, the elimination of both the existing Five-Day Rule and the twelve-month restriction.[172] The comments received, and the Commission's corresponding responses, in connection with these changes are discussed further below in the corresponding section discussing the applicable enumerated bona fide hedge.

With respect to the treatment of the enumerated bona fide hedges under the Final Rule, the Commission notes that positions in referenced contracts subject to Federal position limits that meet any of the enumerated bona fide hedges will, for purposes of Federal position limits, be deemed to meet the bona fide hedging definition in CEA section 4a(c)(2)(A), as well as the Commission's bona fide hedging definition in § 150.1 under the Final Rule. As a result, enumerated bona fide hedges are self-effectuating for purposes of Federal position limits, provided the market participant separately requests an exemption from the applicable exchange-set limit established pursuant to § 150.5(a).[173]

The enumerated hedges are each described below, followed by a discussion of the Five-Day Rule. When first proposed, the Commission viewed the enumerated bona fide hedges as conforming to the general definition of bona fide hedging ''without further consideration as to the particulars of the case.'' [174] Similarly, the list of enumerated bona fide hedges under the Final Rule reflects categories of bona fide hedges for which the Commission has determined, based on experience over time, that no case-by-case determination or review of additional details by the Commission is needed to determine that the position or transaction is a bona fide hedge. This Final Rule does not foreclose the recognition of other hedging practices as bona fide hedges, as discussed below.

While the enumerated bona fide hedges adopted herein are self-effectuating for purposes of Federal position limits,[175] the Commission and the exchanges will continue to exercise close oversight over such positions to confirm that market participants' claimed exemptions are consistent with their cash-market activity. In particular, because all contracts subject to Federal position limits are also subject to exchange-set limits, all traders seeking to exceed Federal position limits must request an exemption from the relevant exchange for purposes of the exchange

[168] 17 CFR 1.3.

[169] *See* Revision of Federal Speculative Position Limits, 52 FR 38914 (Oct. 20, 1987).

[170] Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000).

[171] *See* 7 U.S.C. 7(d)(5) and 7 U.S.C. 7b–3(f)(6).

[172] As discussed further below, the Final Rule eliminates the existing twelve-month restriction with respect to the anticipatory unsold production and the anticipated unfilled requirements bona fide hedges. However, the new anticipated merchandising bona fide hedge would be subject to its own twelve-month restriction.

[173] For further discussion of the exchange exemption process, *see* Section II.D.3.i.b.

[174] Bona Fide Hedging Transactions or Positions, 42 FR 14832 (Mar. 16, 1977).

[175] *See infra* Section II.C. (discussing § 150.3) and Section II.G. (discussing § 150.9).

position limit, regardless of whether the position falls within one of the enumerated hedges. In other words, enumerated bona fide hedge exemptions that are self-effectuating for purposes of Federal position limits are not self-effectuating for purposes of exchange-set position limits.

Exchanges have well-established programs for granting exemptions, including, in some cases, experience granting exemptions for anticipatory merchandising for certain traders in markets not currently subject to Federal position limits. As discussed in greater detail below, § 150.5 as adopted herein helps ensure that such programs conform to standards established by the Commission.[176] The Commission expects exchanges will continue to be thoughtful and deliberate in granting exemptions, including anticipatory exemptions. The Commission predicates this expectation on its decades of experience working together with the relevant exchanges and observations generally of the applicable exchange-traded futures markets.

The Commission and the exchanges also have a variety of other tools designed to help prevent misuse of self-effectuating bona fide hedge exemptions. For example, market participants who apply to an exchange as required pursuant to § 150.5 under the Final Rule are subject to the Commission's false statements authority, which carries substantial penalties under both the CEA and Federal criminal statutes. Similarly, the Commission currently employs—and will continue to use under the Final Rule—surveillance tools, special call authority, rule enforcement reviews, and other formal and informal avenues for obtaining additional information from exchanges and market participants in order to distinguish between true bona fide hedging needs and speculative trading masquerading as a bona fide hedge.

While positions that fall within the enumerated bona fide hedges, each discussed in further detail below, are the type of positions that comply with the bona fide hedging definition, the Commission recognizes that there may be other positions or hedging strategies that are not ''enumerated'' that similarly could satisfy the bona fide hedge definition.[177] These ''non-enumerated'' bona fide hedges may be granted today under existing §§ 1.47 and 1.48, and the Commission can continue to recognize non-enumerated bona fide hedges under the Final Rule. For further discussion of the recognition of non-enumerated bona fide hedges, *see infra* Sections II.C. and II.G.

With the exception of risk management positions previously recognized as bona fide hedges, and assuming all regulatory requirements continue to be satisfied, market participants' existing bona fide hedging recognitions under existing Federal position limits are grandfathered upon the Final Rule's Effective Date (*i.e.,* bona fide hedge exemptions that are currently recognized for purposes of Federal position limits, other than risk management positions, will continue to be recognized under the Final Rule).

Last, before describing each individual enumerated hedge, the Commission also notes that it is adopting certain non-substantive, technical changes, and such changes are intended only to provide clarifications. For example, the Commission is making a technical change to the bona fide hedging definition by adopting the term in the singular tense in order to conform to the phrasing in CEA section 4a(c)(2).[178] The Commission is also re-ordering the enumerated bona fide hedges to place related enumerated bona fide hedges closer together.

vi. Enumerated Bona Fide Hedge Exemptions for Physical Commodities

This Final Rule adopts the list of enumerated bona fide hedge exemptions as proposed in the 2020 NPRM, with certain amendments discussed below.[179]

a. Hedges of Inventory and Cash Commodity Fixed-Price Purchase Contracts

(1) Background—Inventory and Cash Commodity Fixed-Price Purchase Contracts

Inventory and fixed-price cash commodity purchase contracts have long served as the basis for a bona fide hedging position.[180] This bona fide hedge is enumerated in paragraph (2)(i)(A) of the existing bona fide hedging definition in § 1.3, and recognizes as a bona fide hedge sales of any commodity for future delivery on a contract market which do not exceed in quantity ownership (*i.e.,* inventory) or fixed-price purchase of the same commodity by the same person.

Since 2011, the Commission has included hedges of inventory and cash commodity fixed-price purchase contracts in each of its position limits rulemakings, with minor proposed modifications to improve clarity.[181]

(2) Summary of the 2020 NPRM—Inventory and Cash Commodity Fixed-Price Purchase Contracts

This proposed enumerated bona fide hedge recognized that a commercial enterprise is exposed to price risk if it has obtained inventory in the normal course of business or has entered into a fixed-price spot or forward purchase contract calling for delivery in the physical marketing channel of a cash-market commodity (or a combination of the two), and has not offset that price risk exposure (*e.g.,* that the market price of the inventory could decrease). In connection with the proposed enumerated hedge, any such inventory, or a fixed-price purchase contract, must be on hand, as opposed to a non-fixed purchase contract or an anticipated purchase.

An appropriate hedge to offset the price risk arising from inventory or a fixed-price purchase contract under the 2020 NPRM would be to establish a short position in a commodity derivative contract. The Commission also stated in the 2020 NPRM that an exchange may require such short position holders to demonstrate the ability to deliver against the short

[176] *See infra* Section II.D. For example, § 150.5 requires, among other things, that: Exemption applications filed with an exchange include sufficient information to enable the exchange and the Commission to determine whether the exchange may grant the exemption, including an indication of whether the position qualifies as an enumerated hedge for purposes of Federal limits and a description of the applicant's activity in the underlying cash markets; and the exchange provides the Commission with a monthly report showing the disposition of all exemption applications, including cash-market information justifying the exemption.

[177] *See infra* Section II.G. (discussing § 150.9).

[178] The existing definition in § 1.3 of the Commission's regulations is in the plural: ''bona fide hedging transactions and positions.'' The 2020 NPRM's proposed definition was similarly plural.

[179] Appendix A to part 150 lists the following enumerated bona fide hedges: (a)(1) Hedges of Inventory and Cash Commodity Fixed-Price Purchase Contracts; (a)(2) Hedges of Cash Commodity Fixed-Price Sales Contracts; (a)(3) Hedges of Offsetting Unfixed Price Cash Commodity Sales and Purchases; (a)(4) Hedges of Unsold Anticipated Production; (a)(5) Hedges of Unfilled Anticipated Requirements; (a)(6) Hedges of Anticipated Merchandising; (a)(7) Hedges by Agents; (a)(8) Short Hedges of Anticipated Mineral Royalties; (a)(9) Hedges of Anticipated Services; (a)(10) Offsets of Commodity Trade Options; (a)(11) Cross-Commodity Hedges. As previously mentioned, the Commission has also reorganized the order of the list of enumerated hedges. The Final Rule reorders Appendix A so that the bona fide hedges are listed by hedges of purchases, sales, anticipated activities, or other new types of hedges.

[180] *See, e.g.,* 7 U.S.C. 6(a)(3) (1970). That statutory definition of bona fide hedging included sales of, or short positions in, any commodity for future delivery on or subject to the rules of any contract market made or held by such person to the extent that such sales or short positions are offset in quantity by the ownership or purchase of the same cash commodity by the same person.

[181] 81 FR at 96964; 78 FR at 75713; 76 FR at 11609.

position in order to demonstrate a legitimate purpose for holding a position deep into the spot month.[182]

(3) Summary of the Commission Determination—Inventory and Cash Commodity Fixed-Price Purchase Contracts

The Commission is adopting the enumerated bona fide hedge of inventory and cash commodity fixed-price purchase contracts as proposed.

(4) Comments—Inventory and Cash Commodity Fixed-Price Purchase Contracts

Aside from ASR, which expressed support for this enumerated hedge, the Commission did not receive any other specific comments on this enumerated hedge.[183]

b. Hedges of Cash Commodity Fixed-Price Sales Contracts

(1) Background—Cash Commodity Fixed-Price Sales Contracts

Fixed-price cash commodity sales have long served as the basis for a bona fide hedging position.[184] This bona fide hedge is enumerated in paragraphs (2)(ii)(A) and (B) of the existing bona fide hedging definition in § 1.3. This enumerated bona fide hedge recognizes as a bona fide hedging transaction or position hedges against purchases of any commodity for future delivery on a contract market which do not exceed in quantity: (A) The fixed price sale of the same cash commodity by the same person; and (B) the quantity equivalent of fixed-price sales of the cash products and by-products of such commodity by the same person. Since 2011, the Commission has included hedges of cash commodity fixed-price sales contracts in its position limits rulemakings, with no substantive modifications.[185]

(2) Summary of the 2020 NPRM—Cash Commodity Fixed-Price Sales Contracts

This proposed enumerated bona fide hedge made minor modifications to the existing bona fide hedge, and recognized that a commercial enterprise is exposed to price risk if it has entered into a spot or forward fixed-price sales contract calling for delivery in the physical marketing channel of a cash-market commodity, and has not offset that price risk exposure (*i.e.,* that the market price of a commodity might be higher than the price of its fixed-price sales contract for that commodity). Under the 2020 NPRM, an appropriate hedge of a fixed-price sales contract would be to establish a long position in a commodity derivative contract to offset such price risk.[186]

(3) Summary of the Commission Determination—Cash Commodity Fixed-Price Sales Contracts

The Commission is adopting the enumerated hedge for hedges of cash commodity fixed-price sales contracts as proposed.

(4) Comments—Cash Commodity Fixed-Price Sales Contracts

Aside from ASR, which expressed support for this enumerated hedge, the Commission did not receive any other specific comments on this enumerated hedge.[187]

c. Hedges of Offsetting Unfixed Price Cash Commodity Sales and Purchases

(1) Background—Offsetting Unfixed Price Cash Commodity Sales and Purchases

Hedges of offsetting unfixed price cash commodity sales and purchases is currently enumerated in paragraph (2)(iii) of the existing bona fide hedging definition in § 1.3 and is subject to the Five-Day Rule. This enumerated hedge is the only existing enumerated hedge that expressly recognizes hedging the price risk arising from cash commodity unfixed-price transactions.

This enumerated bona fide hedge allows a market participant to use commodity derivatives in excess of Federal position limits to offset an unfixed-price cash commodity purchase coupled with an unfixed-price cash commodity sale. Specifically, this enumerated bona fide hedge allows for ''offsetting sales and purchases'' for future delivery on a contract market which do not exceed in quantity that amount of the same cash commodity which has been bought and sold by the same person at unfixed prices basis different delivery months of the contract market.

While not part of the original regulatory bona fide hedge definition, the Commission adopted this enumerated bona fide hedge in 1987 to ''remove any doubt'' that certain cotton and soybean crush inter-month spreads were covered under the Commission's bona fide hedge definition.[188] Since 2011, the Commission has included this enumerated bona fide hedge in each of its position limits rulemakings.[189]

(2) Summary of the 2020 NPRM—Offsetting Unfixed Price Cash Commodity Sales and Purchases

The Commission proposed to maintain this bona fide hedge, with a few modifications.

The 2020 NPRM proposed to expand the existing bona fide hedge, which currently requires the offsetting purchase and sale to be at basis to different delivery months of the same commodity derivative contract, to additionally permit hedges of offsetting unfixed sales and unfixed purchases for different commodity derivative contracts in the same commodity (*e.g.,* Brent/WTI), regardless of whether the contracts are in the same delivery month. This proposed change would permit the cash commodity to be bought and sold at unfixed prices at a basis to different commodity derivative contracts in the same commodity, even if the commodity derivative contracts were in the same calendar month (*i.e.,* buy Brent in January; sell WTI in January).[190] The Commission proposed this change to allow a commercial enterprise to enter into the described derivatives transactions to reduce the risk arising from either (or both) a location differential or a time differential in unfixed-price purchase and sale contracts in the same cash commodity.[191]

[182] 85 FR at 11609–11610. For example, it would not appear to be economically appropriate to hold a short position in the spot month of a commodity derivative contract against fixed-price purchase contracts that provide for deferred delivery in comparison to the delivery period for the spot month commodity derivative contract. This is because the commodity under the cash contract would not be available for delivery on the commodity derivative contract.

[183] ASR at 2.

[184] *See, e.g.,* 7 U.S.C. 6a(3) (1970). That statutory definition of bona fide hedging includes purchases of, or long positions in, any commodity for future delivery on or subject to the rules of any contract market made or held by such person to the extent that such purchases or long positions are offset by sales of the same cash commodity by the same person.

[185] 81 FR at 96964; 78 FR at 75824; 76 FR at 71689.

[186] 85 FR at 11610.

[187] ASR at 2.

[188] The Commission stated when it proposed this enumerated bona fide hedge, in particular, a cotton merchant may contract to purchase and sell cotton in the cash market in relation to the futures price in different delivery months for cotton, *i.e.,* a basis purchase and a basis sale. Prior to the time when the price is fixed for each leg of such a cash position, the merchant is subject to a variation in the two futures contracts utilized for price basing. This variation can be offset by purchasing the future on which the sales were based and selling the future on which the purchases were based. Revision of Federal Speculative Position Limits, 51 FR 31648, 31650 (Sept. 4, 1986).

[189] 81 FR at 96964; 78 FR at 75714; 76 FR at 71689.

[190] 85 FR at 11608.

[191] *Id.* In the case of reducing the risk of a location differential, and where each of the underlying transactions in separate derivative contracts may be in the same contract month, a position in a basis contract would not be subject to position limits, as

To be eligible for this enumerated hedge, both an unfixed-price cash commodity purchase ''and'' an offsetting unfixed-price cash commodity sale would have to be in hand, because having both the unfixed-price sale and purchase in hand would allow for an objective evaluation of the hedge.[192]

(3) Summary of the Commission Determination—Offsetting Unfixed Price Cash Commodity Sales and Purchases

The Commission is adopting the enumerated bona fide hedge for offsetting unfixed price cash commodity sales and purchases as proposed.

(4) Comments—Offsetting Unfixed Price Cash Commodity Sales and Purchases

There were minimal comments on the proposed amendments to this hedge. IFUS explicitly supported the allowance of hedges against cash positions in the same delivery month.[193] CMC and ACSA requested that the Commission modify the language of this enumerated bona fide hedge to include ''offsetting sales *or* purchases.''[194] CMC and FIA stated that because merchants often sell commodities well in advance of purchasing them, such merchants are exposed to the exact same calendar spread price risk as merchants that have executed both unfixed price legs of a transaction, because any futures market calendar spread convergence or divergence will ''affect both scenarios in exactly the same manner.''[195] These commenters contended that changing the language of the enumerated hedge from ''*and*'' to ''*or*'' would allow merchants to hedge against this exposure.[196]

In addition, because this is the only existing enumerated hedge that expressly recognizes hedging for unfixed price transactions, several commenters cited to this hedge when requesting that the Commission explicitly endorse that commercial transactions with unfixed-prices may serve as the basis for, and satisfy, the bona fide hedging definition.[197]

(5) Discussion of Final Rule—Offsetting Unfixed Price Cash Commodity Sales and Purchases

The Commission is adopting the enumerated bona fide hedge for offsetting unfixed price cash commodity sales and purchases as proposed. The Commission considered the comments requesting the Commission to change this bona fide hedge's language from referring to offsetting unfixed-price purchase ''*and*'' sale transactions (which requires both an unfixed purchase price transaction and an unfixed sale price transaction) to instead refer to unfixed-price purchase ''*or*'' sales transactions (which would require only either a single unfixed-price purchase transaction *or* an unfixed-price sale transaction) to facilitate hedging calendar spread price risk for those market participants that have executed only one leg of an unfixed-price physical transaction (*i.e.,* only a physical purchase or a physical sale).

The Commission continues to believe that the enumerated bona fide hedge for offsetting unfixed price cash commodity sales and purchases should continue to require both an unfixed-price cash commodity purchase and an offsetting unfixed-price cash commodity sale. For this particular bona fide hedge, absent either the unfixed-price purchase leg or the unfixed-price sale leg (or absent both legs), it would be less clear, and require a facts and circumstances analysis, to determine how the transaction could be classified as a bona fide hedge, that is, a transaction that reduces price risk.[198]

Under the Final Rule, a single-sided unfixed price physical transaction (*i.e.,* a physical transaction involving an unfixed price purchase or an unfixed price sale, but not both) cannot be offset with derivatives in excess of position limits using this particular enumerated bona fide hedge. However, a market participant with an unfixed price purchase in the absence of an unfixed-price sale, or vice versa, could potentially qualify for one or more of the enumerated anticipatory bona fide hedges.[199] Additionally, depending on the facts and circumstances, a single-sided unfixed price contract could potentially be the basis for a non-enumerated bona fide hedge.

While the Commission acknowledges concerns from commenters that market participants that have executed only one leg of a physical transaction (*i.e.,* only an unfixed-price purchase or an unfixed-price sale) may need to hedge calendar spread price risk, the Commission believes the Final Rule offers several avenues for hedging such risks.[200] For example, under the offsetting unfixed price cash commodity sales and purchases enumerated bona fide hedge, upon fixing the price of, or taking delivery on, the purchase contract, the owner of the cash commodity no longer has offsetting unfixed priced transactions, but may continue to hold the short derivative leg of the spread as a hedge against that fixed-price purchase or as inventory under the enumerated hedge for fixed price transactions.

Alternatively, under this Final Rule, if the market participant fixes the price the sales contract first, he or she may continue to hold the long derivative leg of the spread by qualifying for bona fide hedge treatment for that long position under another enumerated bona fide hedge. For example, a market participant who otherwise meets all applicable requirements of one of the anticipatory bona fide hedges may qualify for such hedge(s) regardless of whether the market participant holds an unfixed-price purchase transaction.

d. Hedges of Unsold Anticipated Production

(1) Background—Unsold Anticipated Production

Unsold anticipated production has long served as the basis for an enumerated bona fide hedging position.[201] This bona fide hedge is currently enumerated in paragraph (2)(i)(B) of the bona fide hedging definition in existing § 1.3, and is subject to the Five-Day Rule. This

discussed in connection with paragraph (3) of the proposed definition of ''referenced contract.''

[192] For example, in the case of a calendar spread, having both the unfixed-price sale and purchase in hand would set the timeframe for the calendar month spread being used as the hedge.

[193] IFUS at 4.

[194] CMC at 4; ACSA at 6.

[195] CMC at 4; FIA at 16.

[196] *Id.*

[197] The Commission's determination on the treatment of unfixed-price transactions under this Final Rule is in Section II.A.1.iv.

[198] The contemplated derivative positions will offset the risk that the difference in the expected delivery prices of the two unfixed-price cash contracts in the same commodity will change between the time the hedging transaction is entered and the time of fixing of the prices on the purchase and sales cash contracts. Therefore, the contemplated derivative positions are economically appropriate to the reduction of risk.

[199] Specifically, as discussed above, because the Commission does not view an unfixed-price commitment as filling, or satisfying, an anticipated need, market participants with unfixed-price commitments may qualify for an enumerated anticipatory bona fide hedge, provided the market participant meets all applicable requirements and conditions. *See* Section II.A.1.iv.

[200] The Final Rule also expands the ''spread transaction'' definition, so a market participant with an unfixed price purchase or sale may also qualify for a calendar spread exemption, for example, with one leg in the spot month. For further discussion of the Final Rule's treatment of spread transactions, *see* Section II.A.20.

[201] *See* 7 U.S.C. 6a(3)(A) (1940). That statutory definition of bona fide hedging, enacted in 1936, included the amount of such commodity such person is raising, or in good faith intends or expects to raise, within the next twelve months, on land (in the United States or its Territories) which such person owns or leases.

existing enumerated bona fide hedge includes hedges against the sales of any commodity for future delivery on a contract market which does not exceed in quantity twelve months' unsold anticipated production of the same commodity by the same person.

The bona fide hedge of unsold anticipated production is one of two existing enumerated anticipatory bona fide hedges currently included in § 1.3, the other being unfilled anticipated requirements (discussed further below). The unsold anticipated production bona fide hedge allows a market participant who anticipates production, but who has not yet produced anything, to enter into a short derivatives position in excess of Federal position limits to hedge the price risk arising from that anticipated production. Since 2011, the Commission has included hedges of unsold anticipated production in each of its position limits rulemakings, with some modifications.[202] The regulatory text for this existing enumerated bona fide hedge is silent about whether it applies to unsold anticipated production that is contracted to be sold under an unfixed-price transaction.

(2) Summary of the 2020 NPRM—Unsold Anticipated Production

The Commission proposed to maintain the existing enumerated bona fide hedge of unsold anticipated production, with modifications as follows. First, the Commission proposed to remove the twelve-month restriction.[203] Second, consistent with the treatment for the other anticipatory bona fide hedges under the 2020 NPRM, the Commission proposed to eliminate the existing restrictions during the last five days of trading (*i.e.,* eliminate the ''Five-Day Rule'').[204]

(3) Summary of the Commission Determination—Unsold Anticipated Production

The Commission is adopting the enumerated bona fide hedge of unsold anticipated production as proposed.

(4) Comments—Unsold Anticipated Production

Several commenters, including ASR, ADM, and ICE, supported eliminating the twelve-month restriction.[205] ASR, for example, noted that the lifecycle of sugarcane extends beyond a twelve-month period.[206]

Conversely, Better Markets and IATP opposed the elimination of the twelve-month restriction.[207] IATP stated that commercial market participants such as storage facilities should instead use insurance policies to manage their risks.[208] Further, IATP stated that if the Commission extends the duration up to 24 months, the Commission should retain discretion to require market participants to demonstrate a production level proportionate to the amount in excess of the Federal position limit throughout the duration of the bona fide hedge exemption.[209]

(5) Discussion of Final Rule—Unsold Anticipated Production

The Commission is adopting the enumerated bona fide hedge of unsold anticipated production as proposed. This enumerated bona fide hedge allows a market participant who anticipates production, but who has not yet produced anything, to enter into a short derivatives position in excess of Federal position limits to hedge the anticipated unsold production.[210]

The Commission clarifies, as discussed above under Section II.A.1.iv., that the enumerated bona fide hedge for unsold production is available to a market participant who satisfies all applicable requirements regardless of whether the market participant has entered into an unfixed-price sales transaction in connection with its anticipated unsold production. However, acquiring an unfixed-price sales contract alone is not a basis for qualifying for this bona fide hedge. Rather, under the Final Rule, entering into an unfixed-price sales transaction will not prevent a market participant from qualifying for the unsold anticipated production bona fide hedge.

As the Commission explains above, an unfixed-price sales commitment does not address the bona fide hedging need related to anticipated unsold production because the market participant's price risk to its anticipated production has not been fixed (*i.e.,* the unfixed-price sales contract may fall below the cost of production). In other words, a producer with an unfixed-price sales commitment for its production still has an anticipated need related to its price risk until the price of the commitment is fixed. However, once the market participant enters into a fixed-price sales contract, the market participant no longer has price risk that needs to be hedged (*i.e.,* its short futures contract is no longer necessary as a hedge for its anticipated production).

Accordingly, the market participant that enters into the fixed-price transaction no longer has an anticipated need to hedge the price risk associated with its unsold production (*i.e.,* the anticipated production is deemed to be ''sold'' by fixed-price sales transaction) and would not qualify for this anticipated unsold production bona fide hedge.

Consequently, if the market participant no longer qualifies for the unsold anticipated production bona fide hedging recognition (*e.g.,* it has entered into a fixed-price sales contract), its derivative position, to the extent the position is above an applicable position limit, must be reduced in an orderly manner in accordance with sound commercial practices. However, if the market participant entered into a fixed-price transaction, while it could not continue to qualify for the unsold anticipated production bona fide hedge, the market participant may be able to qualify for the enumerated bona fide hedge for cash commodity fixed-price sales contracts, assuming all applicable requirements are met.[211]

While the Commission acknowledges the comments from Better Markets and IATP opposing the removal of the twelve-month restriction, the Commission believes that this twelve-month restriction may be unsuitable in connection with additional core referenced futures contracts with the underlying agricultural and energy commodities that would be subject to Federal position limits for the first time under this Final Rule since these non-legacy commodities may have longer growth and/or production cycles than the nine legacy agricultural contracts. The existing twelve-month restriction may thus be unnecessarily short in comparison to the expected life of investment in production facilities. While this enumerated bona fide hedge for unsold production does not have an associated twelve-month restriction under the Final Rule, the Commission notes that because all bona fide hedges must be economically appropriate to the

[202] 81 FR at 96964; 78 FR at 75714; 76 FR at 71689.

[203] 85 FR at 11608.

[204] For further discussion of the Five-Day rule, *see* Section II.A.1.viii, Elimination of Federal Restriction Prohibiting Holding a Bona Fide Hedge Exemption During Last Five Trading Days, the ''Five-Day Rule,'' below.

[205] ASR at 2; ADM at 2; ICE at 2; IECA at 2; and IFUS at 2.

[206] ASR at 2.

[207] IATP at 15–17; Better Markets at 57–58.

[208] IATP at 15–17.

[209] *Id.*

[210] Once a market participant finishes its production, the market participant will no longer qualify for this enumerated bona fide hedge since its production is no longer anticipatory. Instead, its completed production is now part of its inventory. However, the enumerated bona fide hedge for inventory and cash commodity fixed-price purchase contracts (discussed below) would become available to the market participant.

[211] For further discussion of the enumerated bona fide hedge for cash commodity fixed-price sales contracts, *see* Section II.A.1.vi.b.

reduction of price risk pursuant to the CEA, a market participant may only qualify for this enumerated bona fide hedge for anticipated unsold production to the extent the market participant has a good faith anticipation of legitimate anticipated unsold production giving rise to such price risk.

Further, additional provisions finalized herein under the Final Rule will help ensure that all bona fide hedges, including bona fide hedges of unsold anticipated requirements, comport with the CEA and the Commission's regulations, and are objectively verifiable and free from abuse.[212]

e. Hedges of Unfilled Anticipated Requirements

(1) Background—Unfilled Anticipated Requirements

The existing bona fide hedge for unfilled anticipated requirements is currently enumerated in paragraph (2)(ii)(C) of the existing bona fide hedging definition in § 1.3. This bona fide hedge includes hedges against purchases of any commodity for future delivery on a contract market which do not exceed in quantity twelve months' unfilled anticipated requirements of the same cash commodity for processing, manufacturing, or feeding by the same person.

Consistent with the existing enumerated bona fide hedge for anticipated unsold production, as discussed above, the existing bona fide hedge for unfilled anticipated requirements is similarly subject to the twelve-month restriction as well as a less-restrictive version of the ''Five-Day Rule.'' With respect to the Five-Day Rule, under existing § 1.3, the unfilled anticipated requirements bona fide hedge provides that the size of a market participant's position held ''in the five last trading days'' must not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month.[213]

However, the regulatory text in existing § 1.3 is silent about whether the bona fide hedge applies to unfilled anticipated requirements that are contracted to be supplied under an unfixed-price transaction or whether such unfixed-price supply transaction would ''fill'' the anticipated requirements.

As discussed above, staff previously has addressed this question through Staff Letter No. 12–07, in which staff clarified that a commercial entity may qualify for the existing enumerated bona fide hedge for unfilled anticipated requirements even if the commercial entity has entered into long-term, unfixed-price supply or requirements contracts because, as staff explained, the unfixed-price purchase contract does not ''fill'' the commercial entity's anticipated requirements.[214] As explained in Staff Letter No. 12–07, the price risk of such ''unfilled'' anticipated requirements is not offset by the unfixed-price forward contract because the price risk remains with the commercial entity, even though the entity has contractually assured a supply of the commodity. Staff Letter No. 12–07 had the practical effect of affirming that market participants with firm commitments at unfixed prices may still be able to avail themselves of this enumerated anticipatory hedge for unfilled requirements.

(2) Summary of the 2020 NPRM—Unfilled Anticipated Requirements

The Commission proposed several amendments to the unfilled anticipated requirements bona fide hedge. First, the Commission proposed to remove the twelve-month restriction because the Commission recognized that market participants may have a legitimate commercial need to hedge unfilled anticipated requirements for a period longer than twelve months.[215]

Second, the Commission proposed to remove from the regulatory text the agricultural-specific term ''feeding,'' and to replace that word with a reference to ''use by that person.''

Third, recognizing that utilities are not the entities who ''use'' the commodity, the Commission also proposed to add as a permissible hedge the unfilled anticipated requirements for the contract's underlying cash commodity for the resale by a utility to meet the anticipated demand of its customers. This proposed provision is analogous to the existing unfilled anticipated requirements provision ''for processing, manufacturing or use by the same person[.]'' [216] Under this proposed new provision, however, the commodity is not for use by the same person—that is, the utility—but rather the commodity is for anticipated use by the utility to fulfill its obligation to serve retail customers.

Finally, consistent with the treatment for the other anticipatory bona fide hedges under the 2020 NPRM, the Commission proposed to eliminate the existing restrictions during the last five last days of trading.

(3) Summary of the Commission Determination—Unfilled Anticipated Requirements

The Commission is adopting the unfilled anticipated requirements enumerated bona fide hedge as proposed.

(4) Comments—Unfilled Anticipated Requirements

Commenters supported continuing to include this bona fide hedge as part of the Commission's amended suite of enumerated anticipatory bona fide hedges.[217] As described below, commenters also requested the Commission clarify certain aspects of the proposed version.

(i) Elimination of Requirement to Hedge Only Twelve Months' Quantity of Unfilled Anticipated Requirements

Only a small group of commenters directly commented on the elimination of the twelve-month restriction. ICE, IFUS, IECA, AGA, ADM and NOPA supported eliminating the twelve-month restriction,[218] with ADM stating that there may be times this anticipatory hedge is needed for ''commercial purposes beyond twelve-months.'' [219] In contrast, Better Markets opposed the removal of the restriction, stating that such removal would make the hedge less reasonably verifiable and open the hedge to potential abuse.[220]

(a) Discussion of Final Rule—Twelve-Month Restriction

After considering public comments, the Commission has determined that the commercial need to hedge unfilled anticipated requirements for a period longer than twelve months, along with the Commission's experience in overseeing exemptions [221] under this

[212] *See infra* §§ 150.5 and 150.9 (reporting and recordkeeping obligations); Appendix B to part 150.

[213] This is essentially a less-restrictive version of the five-day rule, allowing a participant to hold a position during the end of the spot period if economically appropriate, but only up to two months' worth of anticipated requirements. The two-month quantity limitation has long-appeared in existing § 1.3 as a measure to prevent the sourcing of massive quantities of the underlying in a short period. 17 CFR 1.3.

[214] CFTC Letter No. 12–07, Interpretation, Request for guidance regarding meaning of ''unfilled anticipated requirements'' for purposes of bona fide hedging under the Commission's position limits rules (Aug. 16, 2012).

[215] *See, e.g.,* 85 FR at 11610.

[216] 17 CFR 1.3.

[217] *e.g.,* AGA at 6–7; ADM at 2; CEWG at 4; EEI and EPSA jointly at 5; IECA at 2; NOPA at 2; NGSA at 3.

[218] AGA at 6–7, ADM at 2, NOPA at 2, IFUS at 2, ICE at 2, and IECA at 2.

[219] ADM at 2.

[220] Better Markets at 58–59.

[221] The Commission and its predecessor agency, the Commodity Exchange Authority, has decades of

Continued

enumerated bona fide hedge, suggest in favor of eliminating the twelve-month restriction. While the Commission acknowledges the comments from Better Markets opposing the removal of the twelve-month restriction, the Commission notes that, a twelve-month limitation in connection with this particular enumerated bona fide hedge may be unsuitable in connection with commodities other than the nine legacy agricultural commodities. For example, a processor or utility relying on the unfilled anticipated requirements bona fide hedge has a physical limit on processing, or energy generation, respectively, which should generally result in relatively predictable levels of activity that will not vary much year to year. Further, additional provisions finalized herein will help ensure that all bona fide hedges, including hedges of unfilled anticipated requirements, comport with the CEA and the Commission's regulations, and are reasonably verifiable and free from abuse.

For example, under § 150.5(a)(2)(ii)(A), finalized herein, all market participants seeking a bona fide hedge exemption for referenced contracts subject to Federal position limits, including those market participants with enumerated bona fide hedges that are self-effectuating for purposes of Federal position limits, must still file an application to the exchange requesting an exemption from the applicable exchange-set position limits prior to exceeding the exchange-set limits. The application for an exemption from exchange-set limits must include information the exchange needs to determine, and the Commission can use that information to independently determine, whether the facts and circumstances support the exchange granting such an exemption. The market participant must include a description of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position for which the application is submitted, including, but not limited to, information regarding the offsetting cash positions.[222] The exchange is required to take into account whether the exemption would result in positions that would not be in accord with sound commercial practices and whether the position would exceed an amount that may be established and liquidated in an orderly fashion.[223] Accordingly, if hedging more than twelve months' quantity of unfilled anticipated requirements would not be in accord with sound commercial practices, or would exceed an amount that may be established and liquidated in an orderly fashion, the exchange would be prohibited from granting the exemption.

Even in the absence of a Federal twelve-month restriction, when administering exchange-set limits, exchanges may, as they do today, implement a variety of restrictions and limitations on position size to maintain orderly markets and to fulfill their regulatory obligations. As described in further detail below, the Commission is finalizing guidance in paragraph (b) of Appendix B to part 150 to help exchanges determine when any such restrictions during the spot month might be appropriate, and when such restrictions may not be needed. For example, consistent with the guidance in Appendix B to part 150, paragraph (b), an exchange may consider adopting rules to require that during the lesser of the last five days of trading (or such time period for the spot month), such positions must not exceed the person's unfilled anticipated requirements of the underlying cash commodity for that month and for the next succeeding month.[224] Depending on the specific facts and circumstances, and particular market dynamics, any such quantity limitation may prevent the use of long futures to source large quantities of the underlying cash commodity. The Commission may be able to determine that an exchange's adoption of a two-month limitation would allow for an amount of activity that is economically appropriate and in line with common commercial hedging practices, without jeopardizing any statutory objectives.

(ii) Scope of Unfilled Anticipated Requirements and Unfixed-Price Transactions

Commenters questioned the extent to which anticipated requirements may be considered to be ''filled'' by unfixed-price purchase supply contracts under the proposed enumerated bona fide hedge for unfilled anticipated requirements. COPE, IECA, EPSA and EEI requested clarification on whether this enumerated hedge covers anticipated requirements ''filled'' by an unfixed-price purchase contract common to many electric generators.[225]

IECA recommended the Commission should either (i) adopt a broad definition of the word ''unfilled'' that would include anticipated requirements that are ''filled'' by unfixed-price transactions, or (ii) expand this bona fide hedge to include both ''unfilled'' and ''unpriced'' [226] anticipated requirements.[227]

AGA also requested clarification [228] regarding the 2020 NPRM's statement that this bona fide hedge would recognize a position where a utility is ''required or encouraged'' by its public utility commission to hedge.[229] AGA noted that while the ''required or encouraged'' language is not in the proposed regulatory text, clarification of the scope for the exemption would result in more certainty for those utilities in states where the public utility commission may not directly address or require hedging activities, but instead may allow or permit hedging for the potential benefits to customers.[230]

(a) Discussion of Final Rule—Scope of Unfilled Anticipated Requirements

Regarding the requests for clarification on the scope of the term ''unfilled'' in this enumerated hedge, the Commission clarifies that anticipated ''unfilled'' requirements are not ''filled'' by unfixed-price transactions. Accordingly, a market participant with a purchase or sale of a physical commodity, entered into at an unfixed price, may continue to avail itself of this anticipatory hedge even though the participant has entered into a firm, albeit unfixed-price, commitment, and provided all applicable requirements are satisfied.[231]

As discussed above under Section II.A.1.iv., the Commission adopts the interpretation of Staff Letter No. 12–07.[232] That is, commercial entities that

expertise in granting bona fide exemptions. See 21 FR 6913 (Sep 13, 1956).

[222] 150.5(a)(2)(ii)(A).

[223] 150.5(a)(2)(ii)(G).

[224] This is essentially a less-restrictive version of the Five-Day rule, allowing a participant to hold a position during the end of the spot period if economically appropriate, but only up to two months' worth of anticipated requirements. The two-month quantity limitation has long-appeared in existing § 1.3 as a measure to prevent the sourcing of massive quantities of the underlying in a short time period. 17 CFR 1.3.

[225] COPE at 6; IECA at 7–8; EPSA and EEI jointly at 5.

[226] The Commission recognizes that market participants may utilize different nomenclature to refer to unfixed-price contracts. For example, some commenters may refer to these contracts as ''unpriced'' contracts, while others may refer to these physical contracts as being at an unfixed spot index price. *See* FIA at 17, 31; COPE at 6.

[227] IECA at 7–8.

[228] AGA at 6–7.

[229] *See* 7 U.S.C. 6a(c)(2)(A)(iii); 85 FR at 11610 (''This would recognize a bona fide hedging position where a utility is required or encouraged by its public utility commission to hedge'').

[230] AGA at 6–7.

[231] The Commission clarifies that unfixed-price contracts include physical fuel agreements for power production for security of supply that are priced at an unfixed spot index price.

[232] CFTC Staff Letter No. 12–07.

enter into unfixed-price transactions may continue to qualify for the enumerated bona fide hedge for unfilled anticipated requirements as long as the commercial entity otherwise satisfies the criteria for this hedge. This rationale is predicated on the fact that an unfixed-price purchase commitment does not fill an anticipated requirement in that the market participant's price risk to the input has not been fixed.

The Commission continues to believe that unfilled anticipated requirements are those anticipated inputs that are estimated in good faith and that have not been filled. As such, an anticipated requirement may be filled by fixed-price purchase commitments, holdings of commodity inventory, or unsold anticipated production of the market participant.[233] Unfixed-price transactions, however, do not fill an anticipated requirement.

Under this anticipatory hedge, once the price is fixed on a supply contract, the market participant holding the anticipatory hedge position must, to the extent the position is above an applicable Federal position limit, liquidate the position in an orderly manner in accordance with sound commercial practices. Nevertheless, subject to the specific facts and circumstances, the market participant at that point may have established the basis for a different bona fide hedge exemption to offset the price risk arising from its fixed price exposure.

Finally, the Commission agrees with the commenters' request for clarification that a utility qualifies for the unfilled anticipated requirements enumerated hedge even if the utility is not ''required or encouraged'' by its public utility commission to hedge.

*f. Hedges of Anticipated Merchandising*

(1) Background—Anticipated Merchandising

The existing bona fide hedge definition in § 1.3 includes enumerated bona fide hedges that recognize offsets of certain anticipated activities,[234] but does not currently include an enumerated bona fide hedge for anticipated merchandising. While the Commission's 2011 Final Rule included an enumerated hedge for anticipated merchandising, it was a narrow hedge focused on the leasing of storage capacity,[235] and that rulemaking was ultimately vacated.

(2) Summary of the 2020 NPRM—Anticipated Merchandising

The Commission proposed a new enumerated bona fide hedge for anticipated merchandising. The proposed anticipated merchandising hedge recognized long or short positions in commodity derivative contracts that offset the anticipated change in value of the underlying commodity that a person anticipates purchasing or selling.[236]

While the proposed enumerated anticipated merchandising bona fide hedge would operate as a self-effectuating bona fide hedge, the proposed bona fide hedge was subject to the following conditions: (1) The position offsets the anticipated change in value of the underlying commodity that a person anticipates purchasing or selling; (2) the position does not exceed in quantity twelve months' of current or anticipated purchase or sale requirements of the same cash commodity that is anticipated to be purchased or sold; (3) the person holding the position is a merchant handling the underlying commodity that is subject to the anticipated merchandising hedge; (4) that such merchant is entering into the position solely for purposes related to its merchandising business; and (5) the person has a demonstrated history of buying and selling the underlying commodity for its merchandising business.[237]

(3) Summary of the Commission Determination—Anticipated Merchandising

The Commission is adopting the anticipated merchandising enumerated hedge as proposed, and makes certain clarifications below to respond to specific questions from commenters summarized below.

The Commission recognizes that anticipated merchandising is a hedging practice commonly used by some commodity market participants, and that merchandisers play an important role in the physical supply chain. The Commission also recognizes that the derivative transactions utilized by commercial participants to manage such merchandising activity are beneficial to price discovery.

(4) Comments—Anticipated Merchandising

(i) Generally

A majority of commenters strongly supported the addition of an enumerated bona fide hedge for anticipatory merchandising.[238] In particular, market participants from the energy industry strongly supported the inclusion of this enumerated hedge, subject to certain clarifications described in detail further below.[239] On the other hand, Better Markets indicated that the enumerated anticipatory bona fide hedges generally, and particularly the enumerated hedge for anticipatory merchandising, pose a regulatory avoidance risk.[240] Better Markets expressed concern that market participants could attempt to claim an underlying risk is anticipated in a cash commodity in order to justify positions in referenced contracts that exceed Federal position limits.[241]

In addition to expressing support for the inclusion of this enumerated bona fide hedge, most commenters also requested clarity or guidance on the scope of the proposed anticipated merchandising bona fide hedge. For example, CMC stated that the Commission must be clear with the exchanges and the end-user community about what activity is included in the enumerated anticipated merchandising bona fide hedge.[242] Similarly, Cargill and NGFA supported the addition of the enumerated anticipated merchandising bona fide hedge, but urged the Commission to provide more clarity on how the enumerated bona fide hedge would be applied.[243] Cargill and NGFA also requested that the Commission address language that appeared in footnote 105 of the 2020 NPRM,[244]

[233] 81 FR at 96752.

[234] *See, e.g.,* §§ 1.3(z)(2)(i)(B) (unsold anticipated production) and 1.3(z)(2)(ii)(C) (unfilled anticipated requirements).

[235] The 2011 Final Rule was the first time the Commission recognized that in some circumstances, a market participant that owns or leases an asset in the form of storage capacity could establish positions to reduce the risk associated with returns anticipated from owning or leasing that capacity. In those narrow circumstances, the Commission found that those transactions satisfied the statutory definition of a bona fide hedging transaction.

[236] 85 FR at 11727.

[237] *Id.*

[238] AGA at 1, 8; AFR at 2; Cargill at 4–6; NGSA at 2, 4; CMC at 4–5, 7–8; ADM at 3; NCFC at 2–4; Chevron at 2, 5; Suncor at 3, 5; IFUS at 2 (Exhibit 1 RFC 4); ICEA at 2; NGFA at 4, 7; CCI at 7–9; ASR at 2; FIA at 16; CEWG at 14.

[239] AGA at 8; AFR at 2; Cargill at 5–6; NGSA at 4; CMC at 5, 7; ADM at 3; NCFC at 3–4; Chevron at 5; Suncor at 5; IFUS at Exhibit 1 RFC 4; ICEA at 2; NGFA at 7; CCI at 7–9.

[240] Better Markets at 3, 59–60 (stating that ''. . . an identical conceptual avoidance risk continues to exist across all of these anticipatory hedges—namely, that firms may claim an underlying risk is anticipated in order to justify positions well over the speculative limits in Referenced Contracts'').

[241] *Id.*

[242] CMC at 5 (stating that n.105 of the 2020 NPRM casts a significant shadow of uncertainty and that if the Commission believes limits are necessary, it must be clear with the exchanges and the end-user community about what activities are enumerated).

[243] Cargill at 5–6; NGFA at 7.

[244] 85 FR at 11612. Footnote 105 from the 2020 NPRM provided: ''Similarly, other examples of anticipatory merchandising that have been

Continued

which implied that certain storage hedges and hedges of assets owned or anticipated to be owned would be evaluated through the non-enumerated bona fide hedge process, rather than as a self-effectuating enumerated anticipated merchandising bona fide hedge.[245]

(ii) Requirements for Anticipated Merchandising

(a) Requirement to Hedge Only Twelve Months' Worth of Anticipated Requirements

Although many public comments addressed the new anticipated merchandising bona fide hedge, only a few commenters opposed the proposed requirement to limit this hedge to only twelve months' worth of current or anticipated purchase or sale requirements of the same cash commodity that is anticipated to be purchased or sold. FIA opposed the twelve-month restriction, stating that CEA section 4a(c)(2) does not tie the validity of a bona fide hedge to the duration of the commercial requirement being hedged.[246] FIA also provided an example pointing out that market participants often need hedges of anticipated purchases or sales longer than twelve months, such as when a merchant has a reasonable expectation of anticipated sales beyond a twelve-month quantity.[247]

Similarly, ADM stated that anticipatory merchandising transactions should be considered similar to ''hedges of anticipated requirements'' and therefore not subject to the twelve-month restriction.[248]

(b) Discussion of Final Rule—Twelve-Month Restriction

After considering the comments on the requirement to hedge only twelve months' worth of anticipated requirements, the Commission is adopting the twelve-month restriction as proposed. The Commission continues to believe that, as stated in the 2020 NPRM, this requirement is intended to ensure that merchants are hedging their legitimate anticipated merchandising exposure to the value change of the underlying commodity, while calibrating the anticipated need within a reasonable timeframe and subject to the limitations in physical commodity markets, such as annual production or processing capacity.[249] A twelve-month restriction for anticipated merchandising is suitable in connection with contracts that are based on anticipated activity on yet-to-be established cash positions due to the uncertainty of forecasting such activity and, all else being equal, the increased risk of excessive speculation on the price of a commodity the longer the time period before the actual need arises.

Regarding FIA's comment opposing the twelve-month restriction based on FIA's interpretation of CEA section 4a(c)(2), the Commission is comfortable that hedging twelve months' or less of current or anticipated purchase or sale requirements of the same cash commodity that is anticipated to be purchased or sold is consistent with the CEA section 4a(c)(2)(A)(ii) requirement that bona fide hedges be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise.[250] However, hedging more than twelve months' anticipated purchase or sale requirements could in some cases be inconsistent with that statutory requirement. Accordingly, bona fide hedges involving more than twelve months' worth of anticipated requirements for anticipated merchandising are best evaluated on a case-by-case basis under the non-enumerated process adopted herein. The Commission understands that commercial firms may seek to manage the price risk of more than twelve months' anticipated merchandising activities; where such situations arise, the Commission believes a non-enumerated bona fide hedge could be appropriate.

The Commission also considered comments that stated that the Commission should treat the proposed anticipated merchandising bona fide hedge similar to the other anticipatory bona fide hedges adopted herein (*i.e.,* the enumerated bona fide hedges for unsold anticipated production and unfilled anticipated requirements), which are no longer subject to the twelve-month restriction.[251] However, the Commission believes that the enumerated bona fide hedge for anticipated merchandising, which is a new enumerated bona fide hedge, is distinguishable from the enumerated bona fide hedges for unsold anticipated production and unfilled anticipated requirements, which both have been part of the Federal position limits framework for decades.

In particular, the Commission has determined that a twelve-month restriction is unnecessary for bona fide hedges of unfilled anticipated requirements and unsold anticipated production in part because anticipated production and requirements, unlike merchandising, are linked and subject to inherent physical limits. For example, a processor has a physical limit on production capacity to support claims of anticipated unsold production. Likewise, a manufacturer, processor or utility has a physical limit on manufacturing, processing, or energy generation, respectively, for similar reasons to tie any claim of anticipated requirements. In each case, anticipated production or requirements generally should result in relatively predictable levels of activity that will not vary much year to year. In contrast, the amount a given market participant could claim to anticipate merchandising is potentially unlimited and less connected to physical production capacity.[252]

(iii) Request for Clarification—Meaning of ''Merchant''

Comments from energy market participants requested that the Commission clarify the meaning of the term ''merchant'' as such term is used in the regulatory text of the proposed anticipated merchandising hedge.[253] Specifically, market participants from the energy industry expressed concern about whether the Commission would construe the term ''merchant'' such that only entities that are solely merchants, and not engaged in other business activities, would qualify for the anticipated merchandising bona fide hedge.[254] These commenters explained that large energy companies with

described to the Commission in response to request for comment on proposed rulemakings on position limits (*i.e.,* the storage hedge and hedges of assets owned or anticipated to be owned) would be the type of transactions that market participants may seek through one of the proposed processes for requesting a non-enumerated bona fide hedge recognition.''

[245] Cargill at 5–6; NGFA at 7.

[246] FIA at 16–17.

[247] *Id.*

[248] ADM at 3. The 2020 Proposal would remove the existing 12-month restriction applicable to the existing enumerated hedge for unfilled anticipated requirements. *See* 85 FR at 11610.

[249] 85 FR at 11611.

[250] *See* 7 U.S.C. 6a(c)(2)(A)(ii).

[251] ADM at 3.

[252] To verify market participants' bona fide hedging needs, the Final Rule's recordkeeping requirements require persons availing themselves of enumerated bona fide hedge recognitions to maintain complete books and records concerning all relevant information on their anticipated requirements, production, and merchandising activities. *See* 17 CFR 150.3(d)(1). Furthermore, the Commission notes that as part of the exemption application process under final § 150.5, persons seeking exemptions from exchange-set position limits are required to include a description of its activities in the cash markets and swap markets for the commodity underlying the position for which the application is submitted.

[253] CMC at 5; Shell at 8; Chevron at 5–6; Suncor at 5–6; CEWG at 15–16.

[254] Shell at 8; Chevron at 5–6; Suncor at 5–6; CEWG at 15–16.

vertically integrated corporate structures typically have several legal entities that perform individual business functions, including merchandising.[255] As such, these commenters requested the Commission clarify that integrated energy companies routinely engaged in merchandising activities, as well as other activities such as production, processing, marketing and power generation, may utilize the enumerated hedge for anticipated merchandising in addition to other bona fide hedges.[256]

(a) Discussion of Final Rule—Meaning of ''Merchant''

The Commission is adopting the term ''merchant'' in the final anticipated merchandising bona fide hedge as proposed, but clarifies here the intended meaning of that term.

In particular, the Commission is clarifying that the term ''merchant'' in the anticipated merchandising enumerated bona fide hedge is not limited to those entities exclusively engaged in the business of merchandising. Instead, the term ''merchant'' may include physical commodity market participants that, in addition to offering or entering into transactions solely for purposes related to their merchandising business, may otherwise also be a producer, processor, or commercial user of the commodity that underlies the anticipated merchandising transaction.

The Commission's use of the term ''merchant'' is intended to capture commercial market participants who participate in the physical commodity market, and does not exclude such participants simply because they have a vertically integrated corporate structure. That is, energy, agricultural, or metal companies in the physical commodity market with vertically-integrated or complex corporate structures are not excluded as merchants, so long as they otherwise satisfy all applicable requirements related to the anticipated merchandising bona fide hedge.

The condition requiring the person to be a merchant to qualify for this enumerated hedge is consistent with the Commission's longstanding practice of providing commercial market participants relief from certain regulatory requirements as a way of reducing regulatory compliance obligations that would otherwise burden a commercial market participant's physical commodity business.

The Commission has taken a similar approach under the trade option exemption by exempting the physically delivered commodity options purchased by commercial users of the commodities underlying the options. Under the trade option relief, the Commission recognized that commercial market participants needed relief by generally exempting qualifying commodity options from the swap requirements of the CEA and the Commission's regulations.[257] Unlike in the trade option requirements, there is no requirement under the anticipated merchandising enumerated bona fide hedge that both counterparties qualify as merchants. The anticipated merchandising enumerated bona fide hedge, however, is intended to generally benefit the same type of market participants as the trade option exemption, that is, commercial market participants who participate in the physical commodity market for the underlying commodity being merchandised. As such, the text of the anticipated merchandising enumerated bona fide hedge excludes a party who is not entering into the anticipated merchandising activity solely for commercial purposes related to its merchandising business, but instead, to speculate on the price of the underlying commodity. For example, non-commercial market participants who employ various arbitrage strategies, including sometimes trading arbitrage positions in cash commodity markets to speculate on the price of the underlying commodity, and those market participants with highly leveraged derivatives portfolios of non-physical commodities, would not qualify as merchants.

Finally, the Commission has determined that it is not necessary to amend the regulatory text's reference to merchant to expressly include producers or processors. As clarified above, a producer and a processor may qualify for the anticipated merchandising bona fide hedge as a merchant if a part of their business involves merchandising. Furthermore, such entities that are also producers or processors may otherwise rely on the enumerated anticipated unsold anticipated production or unfilled anticipated requirements bona fide hedges, where applicable. Thus, the Commission is providing these market participants with ample flexibility to manage the price risks arising from their anticipated merchandising activity using an expanded suite of anticipatory bona fide hedges.

(iv) Requirement for a History of Merchandising

The Commission did not receive any specific comments on the proposed requirement to demonstrate a history of merchandising activity.

(a) Discussion of Final Rule—History of Merchandising Requirement

The Commission is adopting the requirement to demonstrate a history of merchandising as proposed.

Such demonstrated history must include a history of making and taking delivery of the underlying commodity, and a demonstrated ability to store and move the underlying commodity.[258] A merchandiser that lacks the requisite history of anticipated merchandising activity could still potentially receive bona fide hedge recognition under the non-enumerated process, so long as the merchandiser can otherwise demonstrate compliance with the bona fide hedging definition and other applicable requirements, including demonstrating activities in the physical marketing channel, including, for example, arrangements to take or make delivery of the underlying commodity.[259]

(v) Scope of Anticipated Merchandising Activity

In response to comments from the exchanges and market participants, the Commission is providing further clarity on the scope of the enumerated anticipated merchandising bona fide hedge. The Commission discusses below certain non-exclusive types of activities that are covered by the enumerated anticipated merchandising bona fide hedge.

(a) Request for Clarification—Unfixed-Price Contracts and Enumerated Anticipated Merchandising Hedge

Commenters requested clarification on whether the enumerated bona fide hedge for anticipated merchandising may be used to manage price risk arising from unfixed-price physical commodity transactions. Specifically, several commenters requested clarification on whether a firm may use the anticipated merchandising bona fide hedge to manage the risk associated with a single-sided unfixed purchase or sale at a moment when the same firm does not have an offsetting sale or purchase.[260] In

[255] *Id.*

[256] *Id.*

[257] Trade Options, Final Rule, 81 FR 14966 (March 21, 2016).

[258] 85 FR at 11611.

[259] *Id.*

[260] NCFC at 3–4; CMC at 4; IFUS at 4–5; NGSA at 6 (requesting the Commission unambiguously recognize hedges of index-price risk (not just fixed-price risk), noting that exchanges currently recognize these types of hedges).

addition to commercial market participants, ICE and CME Group also requested that the Commission recognize single-sided hedges of unfixed-price purchases or sales. Similar to energy market participants, ICE noted that pricing physical energy commodity transactions at unfixed prices is a common pricing mechanism in the energy markets.[261] CME Group provided a hypothetical example of a single-side floating or unfixed-price purchase or sale to demonstrate that derivatives positions entered into to effectuate that single-sided unfixed-price purchase or sale would reduce the price risk arising for each counterparty.[262]

Some commenters requested the Commission clarify that market participants can utilize the enumerated anticipatory merchandising hedge to manage the price risks arising from unfixed-price transactions.[263]

Other commenters suggested the Commission could create a new enumerated bona fide hedge category solely to recognize hedges of unfixed-price transactions.[264]

(*1*) Discussion of Final Rule—Unfixed-Price Contracts and Enumerated Anticipated Merchandising Hedge

As discussed above under Section II.A.1.iv., the Commission is clarifying that market participants that enter into unfixed-price transactions may still be able to qualify for the enumerated bona fide hedge for anticipated merchandising. In other words, a commercial entity that enters into an unfixed-price transaction may qualify for an anticipated merchandising bona fide hedge as long as the market participant satisfies the other requirements, discussed above and below, of the final anticipated merchandising bona fide hedge (*e.g.,* qualifies as a merchant, demonstrates a history of merchandising and satisfies the twelve-month restriction). This rationale is predicated on the fact that an unfixed-price transaction does not address a merchant's anticipated merchandising need in that the merchant's price risk to the merchandise has not been fixed. Accordingly, a merchant may use the anticipated merchandising hedge to manage the risk associated with a single sided unfixed purchase or sale at a moment when the same firm does not have an offsetting sale or purchase. The Commission's treatment of unfixed-price transactions is discussed in more detail in Section II.A.1.iv.[265]

While the Commission understands market participants' desire for a standalone exemption for unfixed-price transactions, the Commission finds that such an exemption is unnecessary. The Commission notes that the modified and expanded suite of enumerated bona fide hedges, including enumerated anticipatory bona fide hedges, adequately facilitates the hedging needs of qualified commercial market participants.

Finally, the Commission believes that the enumerated anticipated merchandising bona fide hedge provides for ample flexibility for hedging. Similar to the enumerated unfilled anticipated requirements and unsold production bona fide hedges, this bona fide hedge may be used even when the merchant simply anticipates purchasing or selling the commodity, and even when the merchant may have yet to enter into an unfixed-price transaction, as long as the merchant has a good faith belief that it will enter into the anticipated merchandising transaction.

(b) Analysis of Examples Preliminarily Recognized as Hedges of Anticipated Merchandising in the 2020 NPRM

As discussed earlier in this release, in the 2020 NPRM, the Commission addressed several requests that had been submitted in CEWG's BFH Petition in response to the 2011 Final Rule, to obtain exemptive relief for several transactions described by CEWG as bona fide hedging positions. In the 2020 NPRM, the Commission preliminarily determined that two CEWG BFH Petition examples complied with the proposed hedge of anticipated merchandising: Example #4 (Binding, Irrevocable Bids or Offers); and example #5 (Timing of Hedging Physical Transactions).[266]

On the other hand, as discussed in Section II.A.1.iv., the Commission preliminarily determined in the 2020 NPRM that the positions described in the CEWG's BFH Petition examples #3 (unpriced physical purchase *or* sale commitments) and #7 (scenario 2) (use of physical delivery referenced contracts to hedge physical transactions using calendar month average pricing) did not satisfy any of the proposed enumerated hedges.[267]

(*1*) Comments—Examples Preliminarily Recognized as Hedges of Anticipated Merchandising in the 2020 NPRM

The Commission received comments supporting the Commission's preliminary determination in the 2020 NPRM that CEWG's BFH Petition example #4 (Binding, Irrevocable Bids or Offers)[268] and example #5 (Timing of Hedging Physical Transactions) are permitted under the 2020 NPRM's proposed enumerated hedge for anticipated merchandising.[269] The public comments related to examples #3 and #7 (scenario 2) are discussed in the preamble at Section II.A.1.iv., addressing the treatment of unfixed price transactions.

(*2*) Discussion of Final Rule—Examples Preliminarily Recognized as Hedges of Anticipated Merchandising in the 2020 NPRM

The Commission has considered the public's response to its preliminary determination that several of the CEWG BFH Petition examples fit within the 2020 NPRM. The Commission determines in this Final Rule that BFH Petition example #4 (Binding, Irrevocable Bids or Offers) and example #5 (Timing of Hedging Physical Transactions) comply with the enumerated hedge for anticipated merchandising, so long as all applicable conditions are met.

In accordance with the Commission's treatment of unfixed-price transactions under this Final Rule, discussed in Section II.A.1.iv., the Commission has determined that BFH Petition examples #3 and #7 (scenario 2) are also permitted under the Final Rule, so long as the position or transaction complies with the applicable conditions of the enumerated anticipatory hedge.

(c) Anticipated Merchandising Includes Hedges of Anticipated Storage and Assets Owned or Anticipated To Be Owned

Several commenters requested the Commission clarify the scope of the proposed anticipated merchandising bona fide hedge in light of the Commission's observation in footnote 105 of the 2020 NPRM.[270] That footnote stated that certain hedges of storage and

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[261] ICE at 4.

[262] CME Group at 8.

[263] CEWG at 19; CMC at 8; Shell at 7–8; ACSA at 6; ICE at 5; CME Group at 8; Ecom at 1; Southern Cotton at 2; Canale Cotton at 2; Moody Compress at 1; IMC at 2; Mallory Alexander at 2; ACA at 2; East Cotton at 2; Jess Smith at 2; Olam at 2; McMeekin at 2; Memtex at 2; Omnicotton at 2; Toyo at 2; Texas Cotton at 2; NCC at 1; Walcot at 2; White Gold at 2.

[264] ACSA at 6–7; NCC at 2.

[265] *See* Section II.A.1.iv, addressing the treatment of unfixed price transactions.

[266] 85 FR at 11611.

[267] 85 FR at 11611–11612.

[268] FIA at 16. FIA supported the Commission's preliminary determination that Examples #4 (Binding, Irrevocable Bids or Offers) and #5 (Timing of Hedging Physical Transactions) fit within the newly proposed anticipatory merchandising hedge.

[269] CEWG at 19.

[270] Cargill at 5; CMC at 5; NGFA at 7.

hedges of assets owned or anticipated to be owned would not be within the scope of the proposed anticipated merchandising enumerated bona fide hedge.[271] However, the plain language of the proposed anticipatory merchandising bona fide hedge appeared to be broad enough to cover such activity. Commenters were thus unsure whether the proposed enumerated anticipated merchandising hedge would apply to storage transactions and to hedges of assets owned or anticipated to be owned.

Most commenters from the energy industry requested the Commission allow for anticipated storage positions to be considered as falling within the enumerated hedge exemption for anticipated merchandising, contending that such hedges are recognized as bona fide hedge exemptions by the exchanges.[272] Chevron and Castleton requested that the Final Rule clarify that hedges of storage may qualify for the enumerated bona fide hedge for anticipated merchandising if applicable conditions are met.[273]

In the alternative, Chevron requested the Commission identify and clarify that storage hedges of this nature qualify for another enumerated exemption, notably the enumerated bona fide hedge for unfilled anticipated requirements.[274] Citadel similarly requested recognition of offsetting positions related to anticipated changes in the value of the underlying commodity to be stored in facilities on lease, and up to the full storage capacity on lease, rather than only the currently utilized level of leased capacity.[275] Citadel argued that storage facilities owned, but not those leased, by the merchant would be covered by the proposed anticipated merchandising enumerated bona fide hedge, and that such different treatment depending on whether the facility was owned or leased did not make sense.[276]

(*1*) Discussion of Final Rule—Anticipated Merchandising Includes Hedges of Anticipated Storage and Assets Owned or Anticipated To Be Owned

In response to public comments, the Commission determines that both hedges of storage and hedges of assets owned or anticipated to be owned can potentially qualify for the enumerated hedge for anticipated merchandising if the applicable conditions are met.

In footnote 105 of the 2020 NPRM, the Commission observed that market participants could use the non-enumerated process (rather than a self-effectuating enumerated hedge) to receive bona fide hedge recognition for storage hedges and hedges of assets owned or anticipated to be owned.[277] This observation was predicated on the Commission's recognition that different commodities have different storage roles, manners, and procedures. For example, the use of some storage facilities is not exclusive to a specific commodity and not all storage is necessarily tied to anticipated merchandising activity. As such, the Commission believed that an analysis of facts and circumstances under the non-enumerated bona fide hedge process would facilitate a determination on whether to recognize hedges of storage or assets owned or anticipated to be owned under the proposed enumerated anticipated merchandising hedge.

The Commission has considered comments with respect to the appropriate treatment of storage transactions and hedges of assets owned or anticipated to be owned under the Commission's anticipated merchandising enumerated hedge. The Commission agrees that commercial market participants may utilize storage hedges or hedges of assets owned or anticipated to be owned as risk reducing practices.[278] The Commission believes that such risk reducing hedges may be recognized as anticipated merchandising bona fide hedges, if all the applicable conditions of the anticipated merchandising hedge are satisfied. The Commission clarifies that commercial market participants in the physical marketing channel that utilize storage hedges or hedges of assets owned or anticipated to be owned may continue to qualify for the anticipated merchandising enumerated bona fide hedge, whether the commercial market participant owns or leases the storage or asset, so long as the all other applicable requirements for the bona fide hedge are satisfied.

g. Hedges by Agents

(1) Background—Hedges by Agents

Existing § 1.3(z)(3) includes certain hedges by agents as an example of a potential non-enumerated bona fide hedge.[279] Since 2011, the Commission has included an enumerated hedge for hedges by agents in each of its position limits rulemakings.[280]

Under the existing non-enumerated hedge process, the Commission has recognized non-enumerated bona fide hedges for parties acting as agents who had the responsibility to trade cash commodities on behalf of another party for which such positions qualified as bona fide hedging positions. Such agents could obtain bona fide hedge treatment to offset, on a long or short basis, the risks arising from those underlying cash positions. For example, this hedge has been recognized in circumstances where a party traded or managed a farmer's, producer's, or a government entity's inventory in the party's capacity as agent. In such circumstances, the agent providing services in the physical marketing channel, such as a commercial firm, did not take ownership of the commodity and was eligible as an agent for an exemption to hedge the risks associated with such cash positions.

(2) Summary of the 2020 NPRM—Hedges by Agents

The Commission proposed to include hedges by agents as an enumerated hedge. The proposed hedge would grant an enumerated hedge to an agent who (1) did not own or was not contracted to sell or purchase the offsetting cash commodity at a fixed price, (2) was responsible for merchandising the cash positions being offset, and (3) had a

[271] 85 FR at 11612 n.105.

[272] NGSA at 7; CHS at 4 (requesting to include a winter storage hedge in the list of enumerated hedges); FIA at 16, 31 (requesting to include a storage hedge as a separate enumerated BFH); Shell at 7–8 (stating that assets used for the transport and storage of energy are a critical part of the energy value chain, including fuel storage tanks and pipeline assets as examples where time spreads or location basis spreads are used to lock-in the values of the assets. This commenter stated that with respect to such infrastructure assets, the Commission should clarify that the use of the hedges of anticipated storage or other physical assets is the type of risk activity that falls within the enumerated BFH for anticipated merchandising); Chevron at 9–11 (requesting that a final rule clarify that hedges of storage may qualify for the enumerated BFH for anticipated merchandising if applicable conditions are met. In the alternative, Chevron requests the Commission identify and clarify that storage hedges of this nature qualify for another enumerated exemption, notably the enumerated BFH for unfilled anticipated requirements); Suncor at 9–10 (requesting that a final rule clarify that hedges of storage may qualify for the enumerated BFH for anticipated merchandising if applicable conditions are met); CCI at 7–9; and CEWG at 16–19 (requesting that the Commission clarify that the enumerated BFH for anticipatory merchandising applies to hedges of storage).

[273] Chevron at 5; CCI at 8–9.

[274] Chevron at 11.

[275] Citadel at 9.

[276] *Id.*

[277] 85 FR at 11612.

[278] CEWG at 16.

[279] 17 CFR 1.3(z)(3) (''Such transactions and positions may include, but are not limited to, purchases or sales for future delivery on any contract market by an agent who does not own or who has not contracted to sell or purchase the offsetting cash commodity at a fixed price, provided That the person is responsible for the merchandising of the cash position which is being offset.'').

[280] 81 FR at 96964; 78 FR at 75714; 76 FR at 71689.

contractual agreement with the person who (i) owned the commodity or (ii) held cash-market positions being offset.

The proposed hedge of agents would substantively adopt the Commission's existing practice under the non-enumerated process in existing § 1.3(z)(3).[281] The Commission, however, proposed to include hedges of agents in the list of enumerated hedges because it preliminarily determined this was a common hedging practice and that positions which satisfy the requirements of this enumerated hedge conformed to the general definition of bona fide hedging without further consideration as to the particulars of the case.[282]

(3) Summary of the Commission Determination—Hedges by Agents

The Commission is adopting the enumerated bona fide hedge for hedges by agents as proposed.

(4) Comments—Hedges by Agents

The Commission received several comments supporting recognition of the hedge by agents, particularly as included in an expanded list of enumerated hedges.[283] ASR identified hedges of agents as a type of hedge that is of particular importance to them because it is used daily within its business.[284] The Commission did not receive any comments opposed to the enumerated hedge for hedges by agents.

(5) Discussion of Final Rule—Hedges by Agents

The Commission recognizes that agents provide important services in the physical marketing channel across different commodity markets. For example, in the agricultural sector, this enumerated hedge will accommodate a common hedging practice in the cotton industry. This hedge will be particularly useful in connection with cotton equities purchased by a cotton merchant from a producer, which is commonly done under the U.S. Department of Agriculture's loan program to facilitate marketing tools for cotton producers.

Another example of when the enumerated hedge by agents adopted herein will apply is for those agents who are in the business of merchandising (selling) the cash grain owned by multiple warehouse operators and forwarding the merchandising revenues back to the warehouse operators less the agent's fees. Such agents that satisfy the requirements of this enumerated hedge, such as not owning any cash commodity but being responsible for merchandising the cash grain positions of the warehouse operators pursuant to contractual agreements, will be able to hedge the price risks arising from their merchandising activity under those agreements as a bona fide hedge by agents.

h. Short Hedges of Anticipated Mineral Royalties

(1) Background—Anticipated Mineral Royalties

The Commission's existing bona fide hedging definition does not include an enumerated hedge for anticipated mineral royalties. Since 2011, the Commission has, however, included such a bona fide hedge in each of its position limits rulemakings.[285] While the Commission's 2011 Final Rule initially recognized the hedging of anticipated royalties generally, each proposal since then, including the latest 2020 NPRM, has proposed that this exemption apply to: (i) Short positions (ii) that arise from production (iii) in the context of mineral extraction.

(2) Summary of the 2020 NPRM—Anticipated Mineral Royalties

The Commission proposed a new enumerated bona fide hedge for short hedges of anticipated mineral royalties that are not currently enumerated in existing § 1.3. The proposed provision would permit an owner of rights to a future mineral royalty to lock in the price of anticipated mineral production by entering into a short position in a commodity derivative contract to offset the anticipated change in value of the mineral royalty rights that were owned by that person and arose out of the production of a mineral commodity (*e.g.,* oil and gas).[286] The owner of the rights to the future mineral royalty could be a producer, or, for example, could also be a bank that holds the relevant royalty rights and that is financing, for example, a drilling well operation for a producer. The Commission preliminarily believed that this represents a common hedging practice, and that positions that satisfied the requirements of this enumerated bona fide hedge conformed to the general definition of bona fide hedging without further consideration as to the particulars of the case.[287]

The Commission proposed to limit this enumerated bona fide hedge only to *mineral* royalties, noting that while royalties have been paid for use of land in agricultural production, the Commission did not receive any evidence of a need for a bona fide hedge recognition from owners of *agricultural* production royalties.[288] The Commission requested comment on whether and why such an exemption might be needed for owners of agricultural production or other royalties.[289]

(3) Summary of the Commission Determination—Anticipated Mineral Royalties

For the reasons discussed in the NPRM, the Commission is adopting the enumerated hedge for anticipated mineral royalties as proposed.

(4) Comments—Anticipated Mineral Royalties

The Commission did not receive any comments either opposing the addition of an enumerated bona fide hedge for anticipated mineral royalties or requesting modifications to the hedge as proposed. Further, no commenters requested extending the enumerated hedge to other types of royalties other than mineral royalties. Several commenters expressed support for the new enumerated hedge.[290]

i. Hedges of Anticipated Services

(1) Background—Anticipated Services

The Commission's existing bona fide hedging definition does not include an enumerated hedge of anticipated services. Since 2011, however, the

[281] For example, the Commission proposed to replace the phrase ''offsetting cash commodity'' with ''contract's underlying cash commodity'' to use language that is consistent with the other proposed enumerated hedges.

[282] 85 FR at 11610.

[283] FIA at 16; IECA at 2; and ASR at 2.

[284] ASR at 2.

[285] 81 FR at 96964; 78 FR at 75715; 76 FR at 71689. In the 2011 Final Rule, the Commission recognized anticipatory royalty transactions as a bona fide hedge, provided the following conditions were met: (1) The royalty or services contract arose out of the production, manufacturing, processing, use, or transportation of the commodity underlying the Referenced Contract; (2) The hedge's value was ''substantially related'' to anticipated receipts or payments from a royalty or services contract; and (3) No such position was maintained in any physical-delivery Referenced Contract during the last five days of trading of the Core Referenced Futures Contract in an agricultural or metal commodity or during the spot month for other physical-delivery contracts.

[286] 85 FR at 11608–11609. A short position fixes the price of the anticipated receipts, removing exposure to change in value of the person's share of the production revenue. A person who has issued a royalty, in contrast, has, by definition, agreed to make a payment in exchange for value received or to be received (*e.g.,* the right to extract a mineral). Upon extraction of a mineral and sale at the prevailing cash-market price, the issuer of a royalty remits part of the proceeds in satisfaction of the royalty agreement. The issuer of a royalty, therefore, does not have price risk arising from that royalty agreement.

[287] 85 FR at 11609.

[288] *Id.*

[289] *Id.*

[290] FIA at 16; IECA at 2.

Commission has included an enumerated bona fide hedge exemption for hedges of anticipated services in each of its position limits rulemakings.[291]

Further, in 1977, the Commission noted that the existence of futures markets for both source and product commodities, such as soybeans, soybean oil, and soybean meal, affords business firms increased opportunities to hedge the value of services.[292]

(2) Summary of the 2020 NPRM—Anticipated Services

The Commission proposed a new enumerated bona fide hedge for anticipated services, not currently enumerated in existing § 1.3. The proposed provision would recognize as a bona fide hedge a long or short derivative contract position used to hedge the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services arising out of the production, manufacturing, processing, use, or transportation of the commodity underlying the commodity derivative contract.[293]

(3) Summary of the Commission Determination—Anticipated Services

The Commission is adopting the enumerated bona fide hedge for anticipated services as proposed.

(4) Comments—Anticipated Services

The Commission received four comments on the proposed enumerated anticipated services bona fide hedge. ASR and FIA expressed support for its inclusion as a new enumerated bona fide hedge.[294] In contrast, IATP and Better Markets urged the Commission to exclude this hedge from the list of enumerated bona fide hedges.[295] IATP stated that the anticipated services bona fide hedge is ''presumably connected to hedges of anticipated production'' and that, as a result, it views the enumerated hedge as ''more vulnerable to deliverable supply estimate disruption.'' [296] IATP also contended that, absent a stronger argument for inclusion of this enumerated bona fide hedge aside from ''such exemptions are granted by exchanges,'' the proposed bona fide hedge of anticipated services merits greater Commission review before being included as an enumerated bona fide hedge.[297] Better Markets stated that the definition was too vague, and that absent a time limitation, the hedge could be used as a loophole for speculation.[298]

(5) Discussion of the Final Rule—Anticipated Services

The Commission is adopting the enumerated bona fide hedge for anticipated services as proposed.

In response to IATP, the Commission believes that hedging of anticipated services may be useful to commercial market participants in a variety of commonly-occurring scenarios. For example, one scenario may be when a contract for services involves the production of a commodity such as a risk service agreement to drill an oil well between two companies where the risk service agreement between the parties provides that a portion of the revenue receipts to one of the counterparties depends on the value of the oil produced. To reduce the risk of lower anticipated revenues resulting from an anticipated lower price of oil, the company may enter into a short position in the NYMEX Light Sweet Crude Oil referenced contract.

Under this enumerated bona fide hedge of services, such a short position fixes the price at the entry price to the commodity derivative contract. For any decrease in price of the commodity that is the subject of the executed contract for services, the expected receipts from the contract for services would decline in value, but the short commodity derivative contract position would increase in value—offsetting the price risk from the expected receipts under contract for services.

On the other hand, this enumerated hedge of anticipated services may also be utilized when a contract for services involves a contract where one of the counterparties is responsible for the cost of the commodity used to provide the service. Such a scenario may occur when a city contracts with a firm to provide waste management services. The contract requires that the trucks used to transport the solid waste use natural gas as a power source. According to the contract, the city would pay for the cost of the natural gas used to transport the solid waste by the waste disposal company. In the event that natural gas prices rise, the city's waste transport expenses would rise. To mitigate this risk, the city establishes a long position in the NYMEX natural gas referenced contract that is equivalent to the expected use of natural gas over the life of the service contract.

In this case, the long position fixes the exit price of the commodity derivative contract. For any increase in the commodity that is the subject of the executed contract for services, the payment due or expected to be due would increase in value, but the long commodity derivative contract would decrease in value—offsetting the price risk from the payments under the contract for services. Under both of these examples, the transactions meet the general requirements for a bona fide hedging transaction and the specific provisions for hedges of anticipated services.

Regarding comments contending that deliverable supply estimates are more vulnerable to disruption under this hedge, the Commission does not believe that bona fide hedges for anticipated services will impact actual deliverable supplies. This is because this bona fide hedge allows a market participant to hedge the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services, and is not an alternative means of procuring or selling the underlying commodity.

In addition, the Commission will continue to have sufficient access to position and cash-market data to verify all exemptions granted. The reporting and recordkeeping obligations under §§ 150.5 and 150.9 will require exchanges to submit justifications, amendments, and other necessary information to the Commission on a monthly basis. As such, exchanges and the Commission will have visibility into the amount of demand there is for a commodity in the spot month via the delivery notices. In the rare event that an exchange observes an imbalance, it has the ability under its rules to require the trader to reduce its positions.

Finally, the Commission notes that a time limitation is unnecessary because, among other things, when administering exchange-set limits, under the Final Rule, exchanges may rely on the Commission's guidance in Appendix B to part 150 to protect price convergence and ensure an orderly spot period. Under the guidance in Appendix B adopted herein, an exchange may adopt rules to impose a restriction on holding a position in a physically delivered referenced contract during the lesser of either the last five days of trading or the time period for the spot month in order to limit such positions to only those that are economically appropriate for that person's specific anticipated or real needs.

[291] 81 FR at 96810; 78 FR at 75715. *See* 76 FR at 71646.

[292] 42 FR 14832, 14833 (Mar. 16, 1977).

[293] 85 FR at 11609.

[294] ASR at 2; FIA at 16.

[295] IATP at 17; Better Markets at 58.

[296] IATP at 17.

[297] *Id.*

[298] Better Markets at 58.

j. Offsets of Commodity Trade Options

(1) Background—Offsets of Commodity Trade Options

Commodity trade options are not subject to Federal position limits under existing regulations.[299] Generally, a commodity trade option is a physically-delivered commodity option purchased by commercial users of the commodities underlying the options. In the 2016 trade options final rule, the Commission stated that Federal position limits should not apply to trade options.[300] Further, in that trade options final rule, the Commission indicated it would address the applicability of position limits to trade options in the context of any final rulemaking on position limits.[301]

(2) Summary of the 2020 NPRM—Offsets of Commodity Trade Options

The Commission proposed a new enumerated hedge for offsets of commodity trade options not currently enumerated in § 1.3. Under the 2020 NPRM, a qualifying commodity trade option under § 32.3 [302] would be treated as a cash position, on a futures-equivalent basis,[303] and serve as the basis for a bona fide hedge position.

[299] *See* 17 CFR 32.3(c).

[300] Trade Options, 81 FR at 14966, 14971 (Mar. 21, 2016). Under the trade options final rule, trade options are generally exempted from the rules otherwise applicable to swaps, subject to the conditions enumerated in § 32.3. For example, trade options do not factor into the determination of whether a market participant is an SD or MSP; trade options are exempt from the rules on mandatory clearing; and trade options are exempt from the rules related to real-time reporting of swaps transactions.

[301] *Id.*

[302] 17 CFR 32.3. In order to qualify for the trade option exemption, § 32.3 requires, among other things, that: (1) The offeror is either (i) an eligible contract participant, as defined in section 1a(18) of the Act, or (ii) offering or entering into the commodity trade option solely for purposes related to its business as a ''producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the'' trade option; and (2) the offeree is offered or entering into the commodity trade option solely for purposes related to its business as ''a producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the commodity'' trade option.

[303] It may not be possible to compute a futures-equivalent basis for a trade option that does not have a fixed strike price. As discussed in the Section II.A.1.iv., under the Commission's existing portfolio hedging policy, market participants may manage their price risks by utilizing more than one enumerated bona fide hedge (including a commodity trade option hedge and other anticipatory bona fide hedges, if necessary based on the market participant's applicable facts and circumstances). For example, a commodity trade option with a fixed strike price may be converted to a futures-equivalent basis, and, on that futures-equivalent basis, deemed a cash commodity sale contract, in the case of a short call option or long put option, or a cash commodity purchase contract, in the case of a long call option or short put option.

Treating qualifying commodity trade options as cash positions, either as a cash commodity purchase or sales contract, would allow the Commission to extend the existing enumerated hedge exemptions for cash positions to the offsets of commodity trade options. That is, the offsets of qualifying commodity trade options would be treated like the enumerated hedges for cash commodity fixed-price purchase contracts or hedges of cash commodity fixed-price sales contracts.[304]

(3) Summary of the Commission Determination—Offsets of Commodity Trade Options

The Commission continues to believe that Federal position limits should not apply to trade options. Thus, the Commission is adopting the enumerated bona fide hedge for offsets of commodity trade options as proposed, with a few clarifying, non-substantive technical edits in the regulatory text.

(4) Comments—Offsets of Commodity Trade Options

The Commission did not receive any comments opposing the addition of an enumerated hedge for offsets of commodity trade options. The Commission received comments generally supporting the bona fide hedge for offsets of commodity trade options, particularly as included in an expanded list of enumerated bona fide hedges.[305] NGSA stated that defining bona fide hedging in a way that recognizes that trade options, adjusted on a futures-equivalent basis, constitute cash commodity purchase or sale contracts that underlie bona fide hedge positions should ''facilitate hedging rather than restrict it.'' [306]

k. Cross-Commodity Hedges

(1) Background—Cross-Commodity Hedges

The Commission has long recognized cross-commodity bona fide hedging under paragraph (2)(iv) of the bona fide hedging definition in existing § 1.3, which has allowed cross-commodity bona fide hedging in connection with all of the enumerated bona fide hedges included in the existing bona fide hedge definition.[307]

The existing enumerated cross-commodity bona fide hedge recognizes that risk from some cash commodity price exposures can be practically and effectively managed through commodity derivative contracts on a related commodity. As such, positions in any of the existing enumerated bona fide hedges may be offset by a cash position held in a different commodity than the commodity underlying the futures contract.

[304] 85 FR at 11610.

[305] IECA at 1; CCI at 2; CEWG at 4; Chevron at 3; Suncor at 3; FIA at 16; and NGSA at 4.

[306] NGSA at 4.

[307] 42 FR 14832, 14834 (March 16, 1977).

The existing cross-commodity enumerated hedge, however, is subject to two conditions. First, the fluctuations in value of the position in the futures contract must be ''substantially related'' to the fluctuations in value of the actual or anticipated cash position. Second, under the cross-commodity enumerated bona fide hedge exemption, a position may not be held in excess of the Federal position limit during the last five trading days for that futures contract.

Cross-commodity hedging also allows market participants to hedge the price exposure arising from the products and byproducts of a commodity where there is no futures contract for those products or byproducts, but there is a futures contract for the source commodity of those products or byproducts. Since 2011, the Commission has included an enumerated cross-commodity bona fide hedge in each of its position limits rulemakings.[308]

(2) Summary of the 2020 NPRM—Cross-Commodity Hedges

The Commission proposed to include cross-commodity hedges as an enumerated bona fide hedge, and to expand the application of this bona fide hedge such that it could be used to establish compliance with: (1) Each of the proposed enumerated bona fide hedges listed in Appendix A to part 150 except for unfilled anticipated requirements and anticipated merchandising, which were excluded from the regulatory text of the cross-commodity enumerated hedge; [309] and (2) the proposed pass-through provisions under paragraph (2) of the proposed bona fide hedging definition discussed further below; provided, in each case, that the position satisfied each element of the relevant enumerated bona fide hedge.[310] In addition, the

[308] 81 FR at 96752–96753; 78 FR at 75716; 76 FR at 71689.

[309] Specifically, the 2020 NPRM allowed for cross-commodity hedging for any of the following proposed enumerated hedges: (i) Hedges of unsold anticipated production, (ii) hedges of offsetting unfixed-price cash commodity sales and purchases, (iii) hedges of anticipated mineral royalties, (iv) hedges of anticipated services, (v) hedges of inventory and cash commodity fixed-price purchase contracts, (vi) hedges of cash commodity fixed-price sales contracts, (vii) hedges by agents, and (viii) offsets of commodity trade options.

[310] 85 FR at 11609. For example, an airline that wishes to hedge the price of jet fuel may enter into a swap with a swap dealer. In order to remain flat, the swap dealer may offset that swap with a futures

Commission also proposed to eliminate the Five-Day Rule in connection with the proposed cross-commodity bona fide hedge (*i.e.,* the 2020 NPRM eliminated the restriction from holding a position in excess of the Federal position limit under the enumerated cross-commodity bona fide hedge during the last five days of trading).

The proposed cross-commodity enumerated bona fide hedge was conditioned on the existence of a ''substantial relationship'' between the commodity derivative contract and the related cash commodity position. Specifically, the fluctuations in value of the position in the commodity derivative contract, that is, of the underlying cash commodity of that derivative contract, were required to be ''substantially related'' [311] to the fluctuations in value of the actual or anticipated cash commodity position or pass-through swap.[312] This was intended to be a qualitative analysis, rather than quantitative.

For example, the 2020 NPRM stated that there is a substantial relationship between grain sorghum, which is used as a food grain for humans or as animal feedstock, and the corn referenced contracts. Because there is not a futures contract for grain sorghum grown in the United States listed on a U.S. DCM,[313] corn represents a substantially related commodity to grain sorghum in the United States.[314] The 2020 NPRM noted that, in contrast, there did not appear to be a reasonable commercial relationship between a physical commodity, say copper, and a broad-based stock price index, such as the S&P 500 Index, because these commodities were not reasonable substitutes for each other in that they had very different pricing drivers.[315] That is, the price of a physical commodity is based on supply and demand, whereas the stock price index is based on various individual stock prices for different companies.[316]

The 2020 NPRM also preliminarily determined that CEWG BFH Petition example #9 (Holding a cross-commodity hedge using a physical delivery contract into the spot month) and example #10 (Holding a cross-commodity hedge using a physical delivery contract to meet unfilled anticipated requirements) were permitted as cross-commodity enumerated hedges.[317]

(3) Summary of the Commission Determination—Cross-Commodity Hedges

The Commission is finalizing the cross-commodity enumerated bona fide hedge largely as proposed, with amendments to expand the ability to use cross-commodity hedges.

(4) Comments—Cross-Commodity Hedges

Commenters generally supported the proposed cross-commodity enumerated bona fide hedge, and a few commenters explicitly supported the Commission's decision not to propose a quantitative test requirement for the proposed enumerated cross-commodity bona fide hedge.[318]

Better Markets stated that it views some cross-commodity hedges as ''appropriate, normal, and legitimate market practices,'' but claimed that there is a potential for abuse if the bona fide hedge exemption requires less than a ''demonstrable price relationship'' between the two commodities.[319] ICE recommended that the Commission include a non-exclusive list of commonly-used cross-commodity hedges that satisfy the ''substantially related'' requirement, which ICE believes should include the natural gas core referenced futures contract and its linked referenced contracts as bona fide hedges of electricity price exposure, and vice versa.[320]

The majority of energy market participants commented on a separate item: That the express language of proposed paragraph (a)(5) of Appendix B to part 150, which sets forth the proposed cross-commodity bona fide hedge, inappropriately failed to cover bona fide hedges for unfilled anticipated requirements and anticipated merchandising.[321] Chevron, Suncor, CCI, and the CEWG requested that the Commission revise the proposed cross-commodity enumerated bona fide hedge to specifically clarify that enumerated bona fide hedges for unfilled anticipated requirements and anticipated merchandising may be utilized as cross-commodity bona fide hedges in energy markets.[322] IECA also requested that the cross-commodity enumerated hedge include bona fide hedges of anticipated requirements, which would capture bona fide hedges of anticipated requirements commonly used by many electric utilities that enter into heat-rate transactions.[323]

Suncor and Chevron highlighted an internal inconsistency in the 2020 NPRM. These commenters pointed out that while the 2020 NPRM preliminarily determined that CEWG BFH Petition Example #10 (Holding a cross-commodity hedge using a physical delivery contract to meet unfilled anticipated requirements) satisfies the proposed cross-commodity hedge, the proposed cross-commodity hedge excluded unfilled anticipated requirements.[324]

(5) Discussion of Final Rule—Cross-Commodity Hedges

The Commission is finalizing the cross-commodity enumerated bona fide hedge largely as proposed, with amendments to expand the ability to use cross-commodity hedges. Specifically, the Commission is amending the express language of the cross-commodity enumerated hedge in Appendix B to include the enumerated hedges of unfilled anticipated requirements and hedges of anticipated merchandising so that the cross-commodity provision applies to all enumerated hedges adopted herein. The 2020 NPRM excluded the enumerated bona fide hedges for unfilled anticipated requirements and for anticipated merchandising from the cross-commodity provision. As a result, any internal inconsistency related to example #10 has been resolved.

Separately, as stated in the 2020 NPRM, the Commission reaffirms that the requirement that the value fluctuations of the commodity derivatives contract used to hedge and the value fluctuations of the commodity

position, for example, in ULSD. Subsequently, the airline may also offset the swap exposure using ULSD futures. In this example, under the pass-through swap language of proposed § 150.1, the airline would be acting as a bona fide hedging swap counterparty and the swap dealer would be acting as a pass-through swap counterparty. In this example, provided each element of the enumerated hedge in paragraph (a)(5) of Appendix A, the pass-through swap provision in § 150.1, and all other regulatory requirements are satisfied, the airline and swap dealer could each exceed limits in ULSD futures to offset their respective swap exposures to jet fuel. *See infra* Section II.A.1.c.v. (discussion of proposed pass-through language).

[311] *See* 85 FR at 11726–11727.

[312] 85 FR at 11609.

[313] This remains true at the publication of this rulemaking.

[314] 85 FR at 11609. Grain sorghum was previously listed for trading on the Kansas City Board of Trade and Chicago Mercantile Exchange, but because of liquidity issues, grain buyers continued to use the more liquid corn futures contract, which suggests that the basis risk between corn futures and cash sorghum could be successfully managed with the corn futures contract.

[315] 85 FR at 11609.

[316] *Id.*

[317] 85 FR at 11611.

[318] ADM at 2; NGSA at 3–4; NOPA at 2; and ICE at 7. Prior position limits proposals included a quantitative test, whereas the 2020 NPRM included a qualitative ''substantially related'' requirement.

[319] Better Markets at 58.

[320] ICE at 7.

[321] Chevron at 8–9; Suncor at 6–8; NOPA 2; CCI at 5–9; CEWG at 10–14; NGSA at 4; ICE at 2, 4; Shell at 7–8; ADM at 2; and IECA at 8.

[322] Chevron at 8; Suncor at 8; NOPA at 2; CCI at 5–7; CEWG at 10–14; NGSA at 4; and IECA at 8.

[323] IECA at 7–8.

[324] Chevron at 7; Suncor at 7.

cash position being hedged must be ''substantially related'' is an important factor in determining whether a cross-commodity hedge satisfies the requirements to be a bona fide hedge. Accordingly, the Commission believes that the ''substantially related'' requirement sufficiently ties derivative and cash positions between two different, but comparable, commodities that have a reasonable commercial relationship as a result of their ability to serve as reasonable substitutes for each other, due to, for example, similar pricing drivers.

The Commission agrees with commenters who stated that market participants use cross-commodity hedging to manage their price risk, particularly when a cash commodity is not necessarily deliverable under the terms of any derivative contract or the cash-market transactions are not in the same commodity underlying the futures contract. For example, an airline that uses a predictable volume of jet fuel every month may cross hedge its anticipated jet fuel requirements with the ultralow sulfur diesel (''ULSD'') heating oil commodity derivative contract because there are no physically-settled jet fuel commodity derivative contracts available. The value fluctuations in jet fuel are substantially related to the value fluctuations in the ULSD ''HO'' futures contract.

The Commission believes that a determination of whether commodities are ''substantially related'' for purposes of the cross-commodity bona fide hedge depends on a facts and circumstances analysis and that the relationship between the two is not static, as it may change over time depending on market factors. Accordingly, the Commission's position is not to publish a list of cross-commodity hedges satisfying the ''substantially related'' requirement at this time.

vii. Location and Regulatory Treatment of the Enumerated Bona Fide Hedges

a. Background—Location and Regulatory Treatment of the Enumerated Bona Fide Hedges

As noted above, the existing enumerated bona fide hedges are explicitly incorporated in the regulatory bona fide hedging definition in § 1.3 of the Commission's regulations.

b. Summary of the 2020 NPRM—Location and Regulatory Treatment of the Enumerated Bona Fide Hedges

In the 2020 NPRM, the Commission proposed to move the expanded list of the enumerated bona fide hedges from the bona fide hedging definition in regulation § 1.3 to the proposed acceptable practices in Appendix A to part 150. The Commission stated that the list of enumerated bona fide hedges should appear as acceptable practices in an appendix, rather than as regulations in the regulatory bona fide hedging definition, because each enumerated bona fide hedge represents just one way, but not the only way, to satisfy the proposed bona fide hedging definition and § 150.3(a)(1).[325] The Commission requested comment on whether the list of enumerated hedges should be included in the regulatory text or in an appendix as acceptable practices.[326]

c. Summary of the Commission Determination—Location and Regulatory Treatment of the Enumerated Bona Fide Hedges

The Commission has determined to incorporate the enumerated bona fide hedges as part of the regulatory text. While the Final Rule will maintain the enumerated bona fide hedges in Appendix A to part 150, Appendix A will be incorporated into final § 150.3, and therefore under the Final Rule the enumerated bona fide hedges in Appendix A will be deemed to be part of the regulatory text rather than treated as acceptable practices.

d. Comments—Location and Regulatory Treatment of the Enumerated Bona Fide Hedges

FIA and MGEX supported moving the list of enumerated bona fide hedges to the rule text.[327] FIA stated that ''including the list in the regulatory text would provide market participants greater regulatory certainty by making it clear that it could not be amended absent notice and comment rulemaking.'' [328]

On the other hand, CMC and the Joint Associations (*i.e.,* EEI and EPSA) preferred keeping the enumerated hedges in Appendix A to part 150. CMC stated its understanding that an amendment to either Appendix A or the rule text would require the same formal rulemaking procedures.[329] The Joint Associations based their support of Appendix A because it allows for ''for flexibility'' in their view.[330]

[325] As discussed below, proposed § 150.3(a)(1) would allow a person to exceed position limits for bona fide hedging transactions or positions, as defined in proposed § 150.1.

[326] 85 FR at 11622.

[327] MGEX at 2; FIA at 15–16.

[328] FIA at 16.

[329] CMC at 6.

[330] EEI/EPSA at 5.

e. Discussion of Final Rule—Location and Regulatory Treatment of the Enumerated Bona Fide Hedges

Under the Final Rule, the enumerated bona fide hedges are incorporated as part of the regulatory text. While the Final Rule will maintain the enumerated bona fide hedges in Appendix A to part 150, Appendix A will be incorporated in final § 150.3 as positions that are deemed to be bona fide hedges that are self-effectuating for purposes of Federal position limits. In other words, while the Final Rule will maintain the enumerated bona fide hedges in Appendix A, Appendix A will be deemed to be part of the regulatory text rather than treated as acceptable practices as the Commission proposed in the 2020 NPRM.

The Commission agrees that including the enumerated bona fide hedges as part of the regulations, rather than as acceptable practices, provides market participants with greater regulatory certainty. To reflect that Appendix A to part 150 is part of the regulatory text, the Commission is amending the introductory language to the Appendix to remove any references to acceptable practices.

In addition, while not a substantive change, the Commission has also re-ordered the list of enumerated hedges. The Final Rule reorders Appendix A so that the bona fide hedges are listed by hedges of purchases, sales, anticipated activities, or other new types of hedges. Finally, the cross-commodity hedge, which applies to all the enumerated hedges in the appendix, is listed last.

viii. Elimination of Federal Restriction Prohibiting Holding a Bona Fide Hedge Exemption During Last Five Trading Days, the ''Five-Day Rule;'' Proposed Guidance in Appendix B, Paragraph (b)

a. Background—Elimination of the ''Five-Day Rule;'' Proposed Guidance in Appendix B, Paragraph (b)

Some of the existing enumerated bona fide hedge exemptions in § 1.3 include a restriction on the market participant holding a commodity derivative contract position in excess of Federal position limits during the last five days of trading (generally referred to as the ''Five-Day Rule''). The restriction limits the applicability of exemptions during the last five days of trading because for many agricultural commodity derivative contracts, those last five days of trading coincide with the physical-delivery process. The practical effect of the Five-Day Rule is a winnowing of the universe of market participants who maintain large positions throughout the last five days of trading to only those market participants who actually intend to make or take delivery at the end of the spot period. Narrowing the universe of market participants in this way helps ensure an orderly trading environment and maintains the integrity of the physical-delivery process for those market participants who rely on price convergence between the cash and futures markets during the last days of trading.

When the Commission adopted the Five-Day Rule, it believed that, as a general matter, there was little commercial need to maintain a large position that exceeds position limits during or through the last five days of trading.[331]

b. Summary of the 2020 NPRM—Elimination of the ''Five-Day Rule;'' Proposed Guidance in Appendix B, Paragraph (b)

The Commission proposed to eliminate the restriction on holding a bona fide hedge exemption during the last five days of trading from all the enumerated hedges to which such five-day rule restriction applies under existing § 1.3.[332] Instead, under proposed § 150.5(a)(2)(ii)(D), exchanges could apply a restriction against holding positions under a bona fide hedge in excess of limits during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, or otherwise limit the size of such position. The exchanges would thus have the ability and discretion, but not an obligation, to apply a five-day rule or similar restriction to exemptions on any contracts subject to Federal position limits, regardless of whether such contracts have been subject to Federal position limits before.

The 2020 NPRM also included guidance for exchanges on factors to consider when applying a restriction against holding physically delivered futures contracts into the spot month. The proposed guidance set forth in Appendix B, paragraph (b) provided that a position held during the spot period may still qualify as a bona fide hedging position, provided that: (1) The position complies with the bona fide hedging transaction or position definition; and (2) there is an economically appropriate need to maintain such position in excess of Federal speculative position limits during the spot period, and that need relates to the purchase or sale of a cash commodity.[333]

In addition, the guidance provided several factors the exchange should weigh when evaluating whether a person wishing to exceed Federal position limits should be able to do so during the spot period. For example, whether the person: (1) Intends to make or take delivery during that period; (2) provided materials to the exchange supporting the waiver of the Five-Day Rule; (3) demonstrated supporting cash-market exposure in-hand that is verified by the exchange; (4) demonstrated that, for short positions, the delivery is feasible, meaning that the person has the ability to deliver against the short position;[334] and (5) demonstrated that, for long positions, the delivery is feasible, meaning that the person has the ability to take delivery at levels that are economically appropriate.[335]

c. Summary of the Commission Determination—Elimination of the ''Five-Day Rule;'' Proposed Guidance in Appendix B, Paragraph (b)

The Commission is finalizing the proposal to eliminate the restriction on holding a bona fide hedge exemption during the last five days of trading from all the enumerated hedges to which such Five-Day Rule restriction applies under existing § 1.3. Additionally, the Commission has carefully considered the various comments regarding the proposed guidance in Appendix B, paragraph (b) and has determined to finalize the guidance, subject to several amendments and clarifications.

The Commission discusses and addresses comments on the proposed elimination of the Five-Day Rule immediately below, followed by a discussion of comments on the proposed guidance further below.

d. Comments—Elimination of the ''Five-Day Rule;'' Proposed Guidance in Appendix B, Paragraph (b)

(1) Elimination of the ''Five-Day Rule''

Several public interest commenters opposed the elimination of the Five-Day Rule.[336] IATP viewed allowing the exchanges to impose a five-day rule or similar restriction as relegating the Commission's function to merely monitoring ''DCM decisions and their consequences for market participants and the public after the fact.''[337] Conversely, commercial market participants and exchanges generally supported the proposal to eliminate the Five-Day Rule and instead afford the exchanges the discretion whether to impose restrictions on holding physically-delivered contracts.[338]

(i) Discussion of the Final Rule—Elimination of the ''Five-Day Rule''

The Commission is finalizing the proposal to eliminate the restriction on holding a bona fide hedge exemption during the last five days of trading from all the enumerated hedges to which such Five-Day Rule restriction applies under existing § 1.3.

In place of the ''Five-Day Rule,'' the Commission is finalizing proposed § 150.5(a)(2)(ii)(D), which provides that an exchange may grant exemptions, subject to terms, conditions, or restrictions against holding large positions in physically delivered futures contracts, as a bona fide hedge in excess of limits during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, or otherwise limit the size of such position under that exemption.

For the legacy agricultural contracts, the Five-Day Rule has been an important way to help ensure that futures and cash-market prices converge. Price convergence helps protect the integrity of the price discovery function and facilitates an orderly delivery process, which overlaps with the last days of trading. As stated in the 2020 NPRM, however, a strict five-day rule may be inappropriate and unnecessary, as the Commission expands its Federal position limits beyond the nine legacy agricultural contracts.[339]

[331] Definition of Bona Fide Hedging and Related Reporting Requirements, 42 FR 42748, 42750 (Aug. 24, 1977).

[332] The existing enumerated hedges limited by the Five-Day rule are as follows: Unsold anticipated production, unfilled anticipated requirements, offsetting sales and purchases, and cross-commodity hedges.

[333] For example, an economically appropriate need for soybeans would mean obtaining soybeans from a reasonable source (considering the marketplace) that is the least expensive, at or near the location required for the purchaser, and that such sourcing does not cause market disruptions or prices to spike.

[334] That is, the person has inventory on-hand in a deliverable location and in a condition in which the commodity can be used upon delivery and that it represents the best sale for that inventory.

[335] That is, the delivery comports with the person's demonstrated need for the commodity, and the contract is the cheapest source for that commodity.

[336] IATP at 17–18; Better Markets at 61 (contending that if the CFTC does eliminate the Five-Day rule, it should at least formalize the proposed guidance in the rule text).

[337] IATP at 18.

[338] ADM at 3; Cargill at 8; CCI at 2, 9; CEWG at 4, 24; Chevron at 3, 9; CMC at 5; CME Group at 9; ICE at 2, 8; IFUS at 2; FIA at 3; NGFA at 9; NGSA at 2; Shell at 3; Suncor at 3, 12.

[339] 85 FR at 11612.

In particular, while the Commission continues to believe that the justifications described above for the existing Five-Day Rule remain valid for contracts subject to Federal position limits, the exchanges—subject to Commission oversight—are better positioned to decide whether to apply a restriction, such as the Five-Day Rule, in connection with exemptions to their own exchange-set limits, or whether to apply other tools that may be equally effective. This Final Rule affords exchanges with the discretion to apply, and when appropriate, grant exemptions subject to terms, conditions or limitations like the Five-Day Rule (or similar restrictions) for purposes of their own exchange-set limits. Allowing for such discretion when granting exemptions will afford exchanges flexibility to quickly impose, modify, or waive any such limitation as circumstances dictate. While a strict Five-Day Rule may be inappropriate in certain circumstances, including when applied to energy contracts that typically have a shorter spot period than agricultural contracts,[340] the flexible approach adopted herein may allow for the development and implementation of additional solutions other than a Five-Day Rule that protect convergence, while minimizing the impact on market participants.

This approach allows exchanges to design and tailor a variety of limitations to protect convergence during the spot period. For example, in certain circumstances, a smaller quantity restriction, rather than a complete restriction on holding positions in excess of limits during the spot period, may be effective at protecting convergence. Similarly, exchanges currently utilize other tools to achieve similar policy goals, such as by requiring market participants to ''step down'' the levels of their exemptions as they approach the spot period, or by establishing exchange-set speculative position limits that include a similar step-down feature. Since § 150.5(a) as adopted herein would require that any exchange-set limits for contracts subject to Federal position limits must be less than or equal to the Federal limit, any exchange application of the Five-Day Rule, or a similar restriction, would have the same effect as if administered by the Commission for purposes of Federal speculative position limits, but could be administered by the exchange in a more tailored and efficient manner.

In response to commenters who stated this approach would relegate the Commission's functions to merely monitoring the DCMs' decisions after the fact, the Commission points out that regardless of whether there is a Federal Five-Day Rule, the Commission will continue to exercise oversight over exchanges before, during, and after exchange action relating to position limits. For example, all exchange rules, including those establishing/modifying exchange-set position limits, accountability levels, step downs, and five-day rules and similar restrictions, must be submitted to the Commission in advance pursuant to part 40 of the Commission's regulations.

Additionally, any exemption granted by an exchange from its own position limits must meet standards established by the Commission in § 150.5(a)(ii)(C) of this Final Rule, including considering whether the requested exemption would result in positions that would not be in accord with sound commercial practices and/or would exceed an amount that may be established and liquidated in an orderly fashion. Further, any waiver of an exchange five-day rule or similar restriction should consider the Appendix B guidance adopted herein. Additionally, the Commission will continue to leverage its own market surveillance and oversight functions to ensure that exchanges continue to comply with their legal obligations, including with respect to Core Principles 2, 3, 4, and 5, among others.[341] Finally, under § 150.3(b)(6) finalized herein, the Commission continues to have the authority to revoke any bona fide hedge exemption.

(2) Proposed Guidance in Appendix B, Paragraph (b)

There were several comments on the proposed guidance in Appendix B, paragraph (b) regarding the circumstances when an exchange may grant waivers from any exchange-set five-day rule or similar restriction. A few commenters requested that the Commission eliminate the proposed guidance altogether.[342] IFUS stated that the proposed guidance is unnecessary and should be removed, contending that the guidance ''reflects many of the considerations currently taken by [e]xchange staff when reviewing exemptions and spot month positions.'' [343] CME Group expressed a similar view, stating that in lieu of the proposed guidance, ''the Commission should allow exchanges to continue to rely on their established market surveillance expertise and regular interactions to make decisions around exemptions.'' [344]

Most commercial market participants and Better Markets,[345] however, did not request to eliminate the proposed guidance in Appendix B, paragraph (b), but instead requested certain changes or clarifications. These commenters focused on whether the guidance: (i) Only applies to physically-settled contracts expressly designated by an exchange as subject to a five-day rule or similar restriction; [346] and (ii) is too prescriptive by imposing new documentation requirements on exchanges.[347] CME Group requested clarification on whether the proposed guidance applies to all exemptions or only those exemptions previously subject to a five-day rule.[348] Several energy market participants requested the Commission expressly clarify that the restrictions or guidance do not apply to markets for energy commodity derivatives.[349] Alternatively, these energy market participants stated that if the Commission declined to include in a final rule an express prohibition on the application of the Five-Day Rule to energy commodity derivative contracts, the Commission should clarify that an exchange is not bound to apply the waiver guidance to any physically-settled referenced contract that has not been expressly designated as subject to the Five-Day Rule.[350]

(i) Discussion of Final Rule—Appendix B, Paragraph (b)

The Commission has carefully considered the various comments regarding the guidance in Appendix B, paragraph (b) and has determined to finalize the guidance, subject to several amendments and clarifications, discussed below.

The Commission is not persuaded by requests to eliminate the guidance based on arguments that exchanges have current market surveillance practices or procedures to review the appropriateness of an exemption during the relevant referenced contract's spot period. The Commission continues to believe that the justifications described above for the existing Five-Day Rule

[340] Energy contracts typically have a three-day spot period, whereas the spot period for agricultural contracts is typically two weeks.

[341] 7 U.S.C. 7B–3(f)(4)(B); 7 U.S.C. 7B–3(f)(2); 7 U.S.C. 7B–3(f)(3); 7 U.S.C. 7B–3(f)(5).

[342] CMC at 5; CME Group at 9; IFUS at 10.

[343] IFUS at 3.

[344] CME Group at 9.

[345] Better Markets supported the proposed guidance. Better Markets at 46–48.

[346] Chevron at 13–14; Suncor at 13–14; CCI at 9–10; CEWG at 25–26.

[347] CME Group at 9.

[348] *Id.*

[349] Chevron at 13.

[350] Chevron at 13; Suncor at 14; CCI at 9–10; CEWG at 25–26.

remain valid. The Commission has determined, however, that with an expanded list of contracts subject to Federal position limits, it is best to provide the exchanges additional discretion when granting exemptions to protect their markets using tools other than a Five-Day Rule, and to supplement that discretion with guidance highlighting the importance of the spot month to ensure price convergence and an orderly delivery process.

For certain referenced contract markets, rather than imposing a complete restriction on holding positions in excess of limits during the spot period, an exchange may, when appropriate, grant an exemption which allows exceeding the position limit by a small increment. Such approach would be an effective way of protecting convergence while still maintaining orderly trading. Similarly, exchanges currently utilize other tools in administering their position limits. For example, CME and CBOT establish certain exchange-set speculative position limits that include a ''step down'' feature so that the permitted position limit level is lower each day as the contract nears its last trading days. Further, when granting position limit exemptions, exchanges may grant such exemptions subject to a ''step down'' level restriction as well. The Commission expects that exchanges would closely scrutinize any participant who requests recognition during the last five days of the spot period or in the time period for the spot month.

The Commission clarifies that any exchange, for the purposes of exchange-set position limits, that elects to grant an exemption subject to terms, conditions, or limitations, that restrict the size of a position during the time period for the spot month of a physically-settled contract under § 150.5(a)(2)(ii)(H) may do so on any referenced contract subject to Federal position limits under the Final Rule, not just the nine legacy agricultural contracts. As such, the Commission clarifies for the avoidance of doubt that exemptions in energy contracts may be subject to an exchange's restriction aimed to monitor the spot period for that energy contract.

Since price convergence and an orderly trading environment serve as a deterrent or mitigate certain types of market manipulation schemes such as corners and squeezes, the guidance is intended to include a non-exclusive list of considerations the Commission expects the exchanges to consider when determining whether to allow a position in excess of limits throughout the spot month.

Regarding various comments contending that the proposed guidance was too prescriptive, the Commission reiterates the appendix is not intended to be used as a mandatory checklist. Further, the Commission is finalizing various amendments to Appendix B, paragraph b, to respond to commenters' requests.

First, the Commission is amending the introductory paragraph of the guidance to clarify that under § 150.5(a)(2)(ii)(H) as finalized herein, exchanges may impose restrictions on bona fide hedge exemptions in the spot month. This discretion does not require any express designation by the exchange.

Second, the Commission is modifying the proposed guidance to clarify that the guidance may be used when considering either an enumerated or non-enumerated bona fide hedge exemption. Third, the Commission clarifies here that the guidance imposes no additional reporting requirements on market participants as the factors described in the guidance apply simply to the exchanges' evaluation of the specific contract market when considering whether an exemption shall be granted subject to any condition or limitation in the spot month. Fourth, the Commission is eliminating the proposed factor which would have required a market participant to provide materials to the exchange supporting a classification of the position as a bona fide hedge. The Commission notes that the exchange application requirements already require market participants to provide relevant cash-market information. In addition, the Commission is amending language throughout the guidance to clarify that exchanges have flexibility when considering applying the guidance. For example, the Commission is removing proposed language that would have required the exchange to verify the market participant's cash-market exposure. The Commission is comfortable removing this language because the cash-market information is already required as part of the exemption application process described elsewhere in this release.[351] Finally, the Commission is making technical edits to clarify that any delivery under a physical delivery contract is economically appropriate and the ''most economical'' source for that commodity.

[351] *See* Sections II.D. and II.G.

ix. Guidance on Measuring Risk

a. Background—Measuring Risk

In prior proposals, the Commission discussed the issue of whether to recognize as bona fide both ''gross hedging'' and ''net hedging.'' [352] While the Commission has previously expressed a willingness to consider gross hedging in certain limited circumstances, such proposals reflected the Commission's longstanding preference for net hedging.[353] That preference, although not stated explicitly in prior releases, has been underpinned by a concern that unfettered recognition of gross hedging could potentially allow for the cherry picking of positions in a manner that subverts the position limits rules.[354]

b. Summary of the 2020 NPRM—Measuring Risk

The Commission recognized in the 2020 NPRM that additional flexibility to hedge on a gross basis may be warranted given that there are myriad ways in which organizations, particularly those not currently subject to Federal position limits, are structured and engage in commercial hedging practices.[355] For example, in the energy space, it is common for market participants to use multi-line business strategies where risks are managed by trading desk or business line rather than on a global basis. Accordingly, in an effort to clarify its view on this issue, the Commission proposed guidance on gross hedging positions in paragraph (a) to Appendix B.

The proposed guidance provided flexibility for a person to measure risk either on a net or gross basis, provided that: (A) The manner in which the person measures risk is consistent over time and follows the person's regular, historical practice (meaning the person

[352] 81 FR at 96747–96747.

[353] *See* 81 FR at 96747 (stating that gross hedging was economically appropriate in circumstances where ''net cash positions do not necessarily measure total risk exposure due to differences in the timing of cash commitments, the location of stocks, and differences in grades or the types of cash commodity.'') *See also* Bona Fide Hedging Transactions or Positions, 42 FR at 14832, 14834 (Mar. 16, 1977) and Definition of Bona Fide Hedging and Related Reporting Requirements, 42 FR 42748, 42750 (Aug. 24, 1977).

[354] For example, using gross hedging, a market participant could potentially point to a large long cash position as justification for a bona fide hedge, even though the participant, or an entity with which the participant is required to aggregate, has an equally large short cash position. The presence of such offsetting cash positions would result in the participant having no net price risk to hedge. Instead, the participant created price risk exposure to the commodity by establishing the derivative position.

[355] *See* 85 FR at 11613.

is not switching between net hedging and gross hedging on a selective basis simply to justify an increase in the size of the person's derivatives positions); (B) the person is not measuring risk on a gross basis to evade the limits set forth in proposed § 150.2 and/or the aggregation rules currently set forth in § 150.4; (C) the person is able to demonstrate (A) and (B) above to the Commission and/or an exchange upon request; and (D) an exchange that recognizes a particular gross hedging position as a bona fide hedge pursuant to proposed § 150.9 documents the justifications for doing so and maintains records of such justifications in accordance with proposed § 150.9(d).

c. Summary of the Commission Determination—Measuring Risk

The Commission is adopting the proposed guidance with modifications and clarifications to address commenter concerns.

d. Comments—Measuring Risk

While Better Markets expressed concern that gross hedging could be used to conduct an ''end-run'' around position limits,[356] many other commenters expressed support for flexibility to hedge on a net or gross basis.[357] Multiple commenters who expressed support for such flexibility also requested discrete changes to the proposed guidance and/or associated preamble, including: (i) Elimination of the requirement that exchanges document their justifications when allowing gross hedging; [358] (ii) clarification that gross hedging is permissible for both enumerated and non-enumerated hedges; [359] and (iii) clarification that market participants do not need to develop procedures setting forth when gross vs. net hedging is appropriate.[360] Finally, IFUS requested that the Commission eliminate the proposed guidance on the grounds that the guidance reflects considerations currently taken by exchange staff when reviewing exemptions.[361]

e. Discussion of Final Rule—Measuring Risk

The Commission continues to believe that the guidance on gross hedging is important because it will allow market participants to measure risk in the manner most suited to their particular circumstances, while preventing the use of gross hedging to subvert the Federal position limits regime.[362]

First, the Commission is eliminating proposed prong (D) of the guidance, which provided that an exchange that recognizes a gross position as a non-enumerated bona fide hedge pursuant to § 150.9 documents the justifications for doing so. Prong (D) is unnecessary given that the Commission and exchanges have other tools for accessing such information. In particular, prong (C) of the guidance allows the Commission and exchanges to request, on an as-needed basis, information about the manner in which market participants are measuring risk.[363] To ensure the Commission and exchanges have access to sufficient information in light of the removal of prong (D), the Commission is expanding prong (C) to require that a person also demonstrate, upon request by the Commission or an exchange, justifications for measuring risk on a gross basis. Additionally, the proposed prong (D) reference to the non-enumerated process in § 150.9 may have created confusion regarding the applicability of the proposed gross hedging guidance to enumerated hedges. Thus, the Commission is also revising the introductory language of the guidance to clarify that the guidance applies equally to enumerated and non-enumerated bona fide hedges.

Second, the Commission is clarifying that the guidance does not require market participants to develop written policies or procedures setting forth when gross or net hedging is appropriate. However, having such policies or procedures may help market participants demonstrate compliance with prongs (A), (B), and (C) of the guidance as finalized herein.

Finally, the Commission believes the concerns regarding subversion of position limits raised by Better Markets are already addressed by a combination of the guardrails in prongs (A)–(C) of the guidance as well as other Commission provisions, including some finalized herein. First, to receive recognition as a bona fide hedge, a position must comply with the bona fide hedging definition, regardless of whether the underlying risk is measured on a net or gross basis. A market participant thus may not use gross hedging to receive bona fide hedge treatment for a speculative position,[364] and measuring risk on a gross basis to willfully circumvent or evade speculative position limits would potentially run afoul of the § 150.2(i)(2) anti-evasion provision finalized herein. Similarly, market participants must comply with the Commission's aggregation requirements regardless of whether the participants are measuring risk on a net or gross basis.[365]

Second, concerns about cherry-picking are addressed by the guidance. By focusing on consistency and historical practice with respect to the manner in which a person measures risk, the guidance enables market participants to measure risk on a gross basis when dictated by the nature of the exposure,[366] but not simply when

[356] Better Markets at 60.

[357] ASR at 2; LDC at 2; NGSA at 3; COPE at 3; Chevron at 4; Suncor at 4.

[358] MGEX at 3; FIA at 14; CEWG at 4.

[359] Chevron at 4–5; Suncor at 4–5; CCI at 4–5; CEWG at 7–10.

[360] FIA at 14–15 (stating that risk managers decide on a case-by-case basis whether to hedge on a net or gross basis).

[361] IFUS at 3.

[362] The guidance will help ensure the integrity of the position limits regime for the reasons discussed below in response to comments from Better Markets. The Commission thus disagrees with IFUS that the guidance is unnecessary, but agrees with IFUS that the proposed guidance reflects considerations currently taken by exchange staff. In particular, the guidance is consistent in many ways with the manner in which exchanges require their participants to measure and report risk, which is consistent with the Commission's requirements with respect to the reporting of risk. For example, under § 17.00(d), futures commission merchants (''FCMs''), clearing members, and foreign brokers are required to report certain reportable net positions, while under § 17.00(e), such entities may report gross positions in certain circumstances, including if the positions are reported to an exchange or the clearinghouse on a gross basis. 17 CFR 17.00. The Commission's understanding is that certain exchanges generally prefer, but do not require, their participants to report positions on a net basis. For those participants that elect to report positions on a gross basis, such exchanges require such participants to continue reporting that way, particularly through the spot period. Such consistency is a strong indicator that the participant is not measuring risk on a gross basis simply to evade regulatory requirements.

[363] Additionally, market participants seeking exemptions remain subject to a variety of recordkeeping requirements, including Commission regulation § 1.31, and the Commission will receive information about all exchange-granted exemptions, including cash-market information, via the monthly spreadsheet submission required by § 150.5(a)(4).

[364] The introductory language to the guidance provides in relevant part that a person's ''gross hedging positions may be deemed in compliance . . . *provided that* all applicable regulatory requirements are met, including that the position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise and otherwise satisfies the bona fide hedging definition . . .''

[365] Under § 150.4, unless an exemption applies, a person's positions must be aggregated with positions for which the person controls trading or for which the person holds a 10% or greater ownership interest. Commission Regulation § 150.4(b) sets forth several permissible exemptions from aggregation. *See* Final Rule, Aggregation of Positions, 81 FR 91454, (December 16, 2016).

[366] The Commission continues to believe that a gross hedge may be a bona fide hedge in circumstances where net cash positions do not necessarily measure total risk exposure due to differences in the timing of cash commitments, the location of stocks, and differences in grades or types of the cash commodity. *See, e.g.,* Bona Fide Hedging Transactions or Positions, 42 FR at 14834. However, the Commission clarifies that these may not be the only circumstances in which gross hedging may be recognized as bona fide. Like the analysis of whether a particular position satisfies

utilizing gross hedging will yield a larger exposure than net hedging or will otherwise subvert Federal position limit or aggregation requirements. Use of gross or net hedging that is inconsistent with an entity's historical practice, or a change from gross to net hedging (or vice versa), could be an indication that an entity is seeking to evade position limits regulations.[367]

Third, all market participants seeking to exceed Federal position limits must request hedge exemptions at the exchange level, regardless of whether they are measuring risk on a gross or net basis, and regardless of whether they are seeking an enumerated or non-enumerated exemption at the Federal level. Under the Final Rule, the exchanges would have an opportunity to confirm whether such participants' use of gross hedging is consistent with the proposed guidance, including by reviewing detailed position information. The Commission will also have access to such information through a variety of means, including: Records maintained by market participants pursuant to Commission regulation § 1.31; the monthly spreadsheets that exchanges must submit to the Commission under § 150.5(a)(4) summarizing exchange-granted exemptions and related cash-market information; and the ability for the Commission to request such information directly from a market participant pursuant to prong (C) of the gross hedging guidance.

x. Pass-Through Swap and Pass-Through Swap Offset Provisions

a. Background—Pass-Through Swap and Pass-Through Swap Offset

As the Commission has noted above, CEA section 4a(c)(2)(B)[368] contemplates bona fide hedges that by themselves do not meet the criteria of CEA section 4a(c)(2)(A), but that are used to offset the swap exposure of a market participant (*e.g.,* a dealer) to the extent that the swap exposure does satisfy CEA section 4a(c)(2)(A) for such market participant's counterparty (*e.g.,* a commercial end user).[369] The Commission believes that, in affording bona fide hedging recognition for such offsets, Congress in CEA section 4a(c)(2)(B) intended to: (1) Encourage the provision of liquidity to commercial entities that are hedging physical commodity price risk in a manner consistent with the bona fide hedging definition; and (2) only recognize risk management positions as bona fide hedges when such positions are opposite a bona fide hedging swap counterparty.[370] The Commission has proposed a pass-through swap provision in each of its position limits rulemakings since 2011.

b. Summary of the 2020 NPRM—Pass-Through Swap and Pass-Through Swap Offset

The Commission proposed to implement the statutory pass-through swap provision in paragraph (2) of the bona fide hedging definition for physical commodities in proposed § 150.1. Proposed paragraph (2)(i) of the 2020 NPRM's bona fide hedging definition addressed a situation where: (a) A particular swap qualifies as a bona fide hedge by satisfying the temporary substitute test, the economically appropriate test, and the change in value requirement under proposed paragraph (1) of the bona fide hedging definition for one of the counterparties (the ''bona fide hedging swap counterparty''), but not for the other counterparty; and (b) the bona fide hedge treatment ''passes through'' from the bona fide hedging swap counterparty to the other counterparty (the ''pass-through swap counterparty''). The pass-through swap counterparty could be an entity that provides liquidity to the bona fide hedging swap counterparty (such as a swap dealer or a non-dealer that offers swaps).

Under the 2020 NPRM, the pass-through of the bona fide hedge treatment from the bona fide hedging swap counterparty to the pass-through swap counterparty was contingent on: (1) The pass-through swap counterparty's ability to demonstrate upon request from the Commission and/or from an exchange that the pass-through swap is a bona fide hedge;[371] and (2) the pass-through swap counterparty entering into a futures, option on a futures, or swap position in the ''same physical commodity'' as the pass-through swap to offset and reduce the price risk attendant to the pass-through swap.

If the two conditions above were satisfied, then the bona fides of the bona fide hedging swap counterparty ''pass through'' to the pass-through swap counterparty for purposes of recognizing as a bona fide hedge any futures position, option on futures position, or swap position entered into by the pass-through swap counterparty to offset the pass-through swap (*i.e.,* to offset and reduce the risks of the swap opposite the bona fide hedging swap counterparty). The pass-through swap counterparty could thus exceed Federal position limits for both: (1) The swap opposite the bona fide hedging swap counterparty, if applicable; and (2) an offsetting futures position, option on a futures position, or swap position in the same physical commodity, even though any such offsetting position on its own would not qualify as a bona fide hedge for the pass-through swap counterparty under proposed paragraph (1) of the bona fide hedging transaction or position definition. The Commission clarified that once the original bona fide pass-through swap is settled, positions held under the pass-through swap provision must be liquidated in an orderly manner in accordance with sound commercial practices. Further, under proposed § 150.3(d)(2), a pass-through swap counterparty would be required to maintain any representation it relied on regarding the bona fide hedge status of the swap for at least two years.

Proposed paragraph (2)(ii) of the bona fide hedging definition addressed a situation where a market participant who qualifies as a bona fide hedging swap counterparty (*i.e.,* a counterparty with a position in a previously-entered into swap that qualified, at the time the

the proposed bona fide hedge definition, the analysis of whether gross hedging may be utilized would involve a case-by-case determination made by the Commission and/or by an exchange using its expertise and knowledge of its participants.

[367] If an entity's (including a vertically-integrated entity's) practice is to switch between net and gross hedging based on particular circumstances, and those circumstances do not involve evading position limits or aggregation requirements, then such switching would not run afoul of prong (A). *See* Section II.B.9. (discussing anti-evasion).

[368] 7 U.S.C. 6a(c)(2)(B).

[369] CEA section 4a(c)(2)(B)(i) recognizes as a bona fide hedging position a position that reduces risks attendant to a position resulting from a swap that was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to'' 4a(c)(2)(A). 7 U.S.C. 6a(c)(2)(B)(i). CEA section 4a(c)(2)(B)(ii) further recognizes as a bona fide hedging position a position that ''reduce risks attendant to a position resulting from a swap that meets the requirements of 4a(c)(2)(A). 7 U.S.C. 6a(c)(2)(B)(ii).

[370] As described above, the Commission interprets the revised statutory temporary substitute test as limiting the Commission's authority to recognize risk management positions as bona fide hedges unless the position is used to offset exposure opposite a bona fide hedging swap counterparty.

[371] While the 2020 NPRM's proposed paragraph (2)(i) of the bona fide hedging definition in § 150.1 required the pass-through swap counterparty to be able to demonstrate the bona fides of the pass-through swap upon request, the 2020 NPRM did not prescribe the manner by which the pass-through swap counterparty obtains the information needed to support such a demonstration. The 2020 NPRM noted that the pass-through swap counterparty could base such a demonstration on a representation made by the bona fide hedging swap counterparty, and such determination may be made at the time when the parties enter into the swap, or at some later point. The 2020 NPRM also stated that for the bona fides to pass-through as described above, the swap position need only qualify as a bona fide hedging position at the time the swap was entered into.

swap was entered into, as a bona fide hedge under paragraph (1)) seeks, at some later time, to offset that bona fide hedge swap position using a futures position, option on a futures position, or a swap in excess of Federal position limits. Such step might be taken, for example, to respond to a change in the bona fide hedging swap counterparty's risk exposure in the underlying commodity.[372] Proposed paragraph (2)(ii) would allow such a bona fide hedging swap counterparty to use a futures position, option on a futures position, or a swap in excess of Federal position limits to offset the price risk of the previously-entered into swap, even though the offsetting position itself does not qualify for that participant as a bona fide hedge under paragraph (1).

The proposed pass-through exemption under paragraph (2) of the bona fide hedging or transaction definition would only apply to the pass-through swap counterparty's offset of the bona fide hedging swap, and/or to the bona fide hedging swap counterparty's offset of its bona fide hedging swap. Any further offset would not be eligible for a pass-through exemption under paragraph (2) unless the offsetting position itself meets paragraph (1) of the proposed bona fide hedging definition.

The Commission stated in the 2020 NPRM that it believes the pass-through swap provision may help mitigate some of the potential impact resulting from the removal of the ''risk management'' exemptions that are currently in effect.[373]

c. Summary of the Commission Determination—Pass-Through Swap and Pass-Through Swap Offset; Related Recordkeeping Requirement; Cross-Commodity Hedging Under the Pass-Through Swap Provision

The Commission is finalizing the pass-through swap and pass-through swap offset provision of the ''bona fide hedging transaction or position'' definition largely as proposed, with certain amendments in response to commenters' requests discussed below:

First, the Commission is amending the 2020 NPRM's proposed provision that would have required that the pass-through swap counterparty demonstrate upon request that its offsetting position is attendant to a position resulting from a bona fide hedging pass-through swap. Instead, under the Final Rule, in order for a pass-through swap counterparty to treat a pass-through swap offset as a bona fide hedge, the pass-through swap counterparty must receive from the bona fide hedging swap counterparty a written representation that the pass-through swap qualifies as a bona fide hedge. Under the Final Rule, the Commission is also amending the proposed regulatory text to add that the pass-through swap counterparty may rely in good faith on such written representation(s) made by the bona fide hedging swap counterparty, unless the pass-through swap counterparty has information that would cause a reasonable person to question the accuracy of the representation.

Second, the Commission is adopting a revised paragraph (i)(B) of the bona fide hedging transaction or position definition in § 150.1 to delete the language in the pass-through swap provision that requires the offset to be in the ''same physical commodity'' as the pass-through swap.

d. Comments—Application of Pass-Through Swap Offset to Affiliates; Recordkeeping; Cross-Commodity Hedging Under the Pass-Through Swap Provision

Comments generally fell into three categories, each discussed in turn below: (1) Application of pass-through swap offsets to affiliates; (2) pass-through recordkeeping requirements; and (3) pass through swaps and cross-commodity hedging.

(1) Application of Pass-Through Swap Offset to Affiliates

Commenters generally supported amending the bona fide hedge definition in accordance with the statutory language in CEA section 4a(c)(2)(B) to include a pass-through swap and pass-through swap offset.[374] Some commenters requested clarification on the application of the pass-through swap offset exemption to corporate affiliates. For example, Shell stated that an overly strict interpretation of ''pass-through swap counterparty'' may limit the application of the pass-through swap offset exemption to only one entity within a corporate structure, and such entity may not be the affiliate entity used by the firm for its market-facing activities or to execute transactions with exchanges to manage portfolios and position limits on an aggregated basis.[375] NGSA similarly requested that the Commission's interpretation of a pass-through swap counterparty apply to affiliates who may pass through their bona fide hedge position exemption to a market-facing, ''treasury-affiliate'' subsidiary within a corporate structure.[376]

(i) Discussion of Final Rule—Application of Pass-Through Swap Offset to Affiliates

The Commission clarifies that within a group of entities that aggregates its positions under § 150.4 [377] (such as an aggregated corporate group), any entity that is part of the aggregated group may avail itself of the pass-through swap offset exemption. For example, the pass-through swap offset provision extends to market-facing affiliates that are part of an aggregated group pursuant to § 150.4, such as treasury affiliate subsidiaries that firms commonly use to manage market-facing activities and portfolios. In such circumstances, recognition of a secondary pass-through swap transaction would not be necessary among an aggregated group because an aggregated group is treated as one person for purposes of Federal position limits.

Separately, in response to commenter requests to allow secondary pass throughs (*i.e.,* the further ''pass-through'' of a pass-through exemption from one entity to another), the Commission clarifies that outside the context of an aggregated group, additional positions entered into as an offset of a pass-through swap would not be eligible for a pass-through exemption under paragraph (2) of the bona fide hedging definition unless the offsetting position itself meets the bona fide hedging definition. Accordingly, the bona fides of a transaction will not extend to a third-party through the pass-through swap counterparty. For instance, if Producer A enters into an OTC swap with Swap Dealer B, and the OTC swap qualifies as a bona fide hedge for Producer A, then Swap Dealer B could be eligible for a pass-through exemption to offset that swap in the futures market. However, if Swap Dealer B offsets its swap opposite Producer A using an OTC swap with Swap Dealer C, Swap Dealer C would not be eligible for a pass-through exemption.

(2) Pass-Through Swap Provision and Recordkeeping

Commenters raised concerns with the 2020 NPRM's requirements that the pass-through swap counterparty

[372] Examples of a change in the bona fide hedging swap counterparty's cash-market price risk could include a change in the amount of the commodity that the hedger will be able to deliver due to drought, or conversely, higher than expected yield due to growing conditions.

[373] *See supra* Section II.A.1.iii.a. (discussion of the temporary substitute test).

[374] CEWG at 4; CMC at 5–6; FIA at 3; ICE at 6–7; ISDA at 12–13; and Shell at 2, 4–5.

[375] Shell at 4.

[376] NGSA at 8.

[377] Aggregation of Positions, 81 FR 91454 (Dec. 16, 2016).

document, and upon request, demonstrate the bona fides of the pass-through swap.[378] Commenters also requested that the Commission clarify the nature of the required documentation,[379] and/or eliminate the required demonstration/documentation altogether, provided that the pass-through swap counterparty has a legitimate, good-faith belief the swap is a bona fide hedge.[380]

(i) Discussion of Final Rule—Pass-Through Swap Provision and Recordkeeping

The Commission is amending the 2020 NPRM's proposed provision that would have required that the pass-through swap counterparty demonstrate upon request that its offsetting position is attendant to a position resulting from a bona fide hedging pass-through swap. For the Final Rule, the Commission is amending the pass-through swap provision's regulatory text to clarify that in order for a pass-through swap counterparty to treat a pass-through swap as a bona fide hedge, the pass-through swap counterparty must receive from the bona fide hedging swap counterparty a written representation that the pass-through swap qualifies as a bona fide hedge. The Commission is further amending the regulatory text to add that the pass-through swap counterparty may rely in good faith on such written representation(s) made by the bona fide hedging swap counterparty, unless the pass-through swap counterparty has information that would cause a reasonable person to question the accuracy of the representation. The Commission is adding the written representation requirement to enable to Commission to verify that only market participants with bona fide hedge exemptions are able to pass-through those exemptions to their swap counterparties.

The Commission agrees with commenters who stated that the bona fide hedging counterparty is the suitable party to determine the bona fide hedging status of the pass-through swap. This is because the bona fide hedging status is determined based upon the bona fide hedging counterparty's confidential, proprietary information. The Commission clarifies that the Commission is not requiring the bona fide hedging counterparty to share the proprietary, confidential information upon which it is basing its determination with its counterparties.

Similar to the 2020 NPRM, this Final Rule does not prescribe the form or manner by which the pass-through swap counterparty obtains the written representation. The Commission recognizes that the bona fide hedging counterparty may make such representations on a relationship basis through counterparty relationship documentation (*e.g.,* through ISDA documentation or other forms of documentation as agreed upon by the parties) or on a transaction basis (*e.g.,* through trade confirmations or in other forms as agreed upon by the parties).[381]

For example, if agreed to by the counterparties, the pass-through swap counterparty may rely on a written representation made by the bona fide hedging swap counterparty that an original pass-through swap and any subsequent pass-through swaps entered into by and between the bona fide hedging swap counterparty and the pass-through swap counterparty are bona fide hedges, unless the bona fide hedging swap counterparty provides written notice to the pass-through swap counterparty that a particular swap is not a bona fide hedge. The Commission believes providing market participants with flexibility recognizes counterparties' ongoing relationships, while enabling the Commission to verify that the pass-through swap offset reduces the risks of a bona fide hedging swap.

The Commission considered comments requesting the elimination of the pass-through swap provision recordkeeping requirement in § 150.3(d) based on arguments that requiring this recordkeeping was not practical. The Commission is not persuaded by those arguments as the recordkeeping requirements assist the Commission in verifying that the pass-through swap provision is only being utilized to offset risks arising from bona fide hedges. Accordingly, the Commission is finalizing the proposed pass-through swap recordkeeping requirement in § 150.3(d), subject to certain conforming changes to reflect amendments to the pass-through swap paragraph of the bona fide hedging definition.

Since not all swaps entered into by a commercial entity would qualify as a bona fide hedge, the Commission declines commenters' requests that a pass-through swap counterparty may reasonably rely solely upon the fact that the counterparty is a commercial end user and, absent an agreement between the counterparties, that the swap appears to be consistent with hedges entered into by end users in the same line of business.

(3) Comments—Pass-Through Swap Provision and Cross-Commodity Hedging

Commenters requested amending paragraph (i)(B) of the proposed bona fide hedge definition to permit the pass-through swap provision to apply to cross-commodity hedges by eliminating the proposed requirement that the pass-through swap offset must be in the ''same physical commodity'' as the pass-through swap.[382]

(i) Discussion of Final Rule—Pass-Through Swap Provision and Cross-Commodity Hedging

The Commission is adopting a revised paragraph (i)(B) of the bona fide hedging transaction or position definition in § 150.1 to delete the language in the pass-through swap provision that requires the offset to be in the ''same physical commodity'' as the pass-through swap. The Commission's enumerated cross-commodity bona fide hedge adopted herein thus applies to all the enumerated hedges, as well as to the pass-through swap provision in the bona fide hedge definition. The revised regulatory text confirms the Commission's intent to allow a pass-through swap counterparty to utilize the pass-through swap offset exemption when the offset itself is a cross-commodity hedge of the underlying pass-through swap, provided that such cross-commodity hedge meets all applicable requirements, including being substantially related to the commodity being offset.

2. ''Commodity Derivative Contract''

i. Summary of the 2020 NPRM—Commodity Derivative Contract

The Commission proposed to create the defined term ''commodity derivative contract'' for use throughout part 150 of the Commission's regulations as shorthand for any futures contract, option on a futures contract, or swap in a commodity (other than a security futures product as defined in CEA section 1a(45)).

[378] Cargill at 10; FIA at 11–12; CMC at 5; Shell at 6–7; ICE at 6–7; and ISDA at 11–12.

[379] ICE at 6–7; Shell at 6.

[380] Cargill at 10; CMC at 5; FIA at 11–12; and ISDA at 11–12.

[381] The Commission believes that allowing market participants to determine the form and manner of how they will document the written representation by the bona fide hedging counterparty and allowing the pass-through swap counterparty to rely on such representation addresses NRECA's comments on the pass-through swap provision recordkeeping obligations. NRECA at 23.

[382] FIA at 13 (quoting 85 FR at 11614); Shell at 5 (quoting 85 FR at 11614).

ii. Comments and Summary of the Commission Determination—Commodity Derivative Contract

No commenter addressed the proposed definition of ''commodity derivative contract.'' The Commission is adopting the definition as proposed, with some non-substantive technical modifications.

These technical changes include the Final Rule's reference to ''futures contract'' rather than merely ''futures,'' and ''swap'' rather than ''swap contract'' to conform to other uses in final § 150.1.[383]

3. ''Core Referenced Futures Contract''

i. Summary of the 2020 NPRM—Core Referenced Futures Contract

The Commission proposed to create the term ''core referenced futures contract'' as a short-hand phrase to refer to the futures contracts listed in proposed § 150.2(d) to which the Federal position limit rules would apply.[384] As per the ''referenced contract'' definition described below, position limits would also apply to any contract that is directly or indirectly linked to, or that has certain pricing relationships with, a core referenced futures contract.

ii. Comments and Summary of the Commission Determination—Core Referenced Futures Contract

No commenter addressed the proposed definition of ''core referenced futures contract.'' The Commission is adopting the definition as proposed.

4. ''Economically Equivalent Swap''

i. Background—Economically Equivalent Swap

The Commission's existing regulations do not currently subject swaps to Federal position limits. Similarly, the Commission is unaware of any exchange-set limits for swaps on any of the 25 core referenced futures contracts. Pursuant to CEA section 4a(a)(5), when the Commission imposes position limits on futures and options on futures pursuant to CEA section 4a(a)(2), the Commission also must develop limits ''concurrently'' and establish limits ''simultaneously'' for ''economically equivalent'' swaps ''as appropriate.'' [385] As the statute does not define the term ''economically equivalent,'' the Commission must apply its expertise in construing such term, and, as discussed further below, must do so consistent with the policy goals articulated by Congress, including in CEA sections 4a(a)(2)(C) and 4a(a)(3).

ii. Summary of the 2020 NPRM—Economically Equivalent Swap

The 2020 NPRM proposed a new term, ''economically equivalent swap.'' Under the 2020 NPRM, a swap would be deemed an ''economically equivalent swap'' with respect to a referenced contract so long as the swap shared identical ''material'' contractual specifications, terms, and conditions with the referenced contract, and provided that any differences between the swap and referenced contract with respect to the following would be disregarded: (i) Lot size or notional amount; (ii) for a swap and relevant referenced contract that are both physically-settled, delivery dates diverging by less than one calendar day, except for a physically-settled natural gas swap which could diverge by less than *two* calendar days; and (iii) post-trade risk management arrangements. Because the proposed ''economically equivalent swap'' definition referred to ''referenced contracts,'' under the 2020 NPRM's approach a swap could be deemed to be ''economically equivalent'' to not just a core referenced futures contract, but also to any cash-settled look alike futures contract or option on a futures contract.[386]

iii. Comments and Discussion of Final Rule—Economically Equivalent Swap

a. The Inclusion of Certain Swaps Within the Federal Position Limits Framework

Many commenters generally supported the proposed definition.[387] However, other commenters argued that swaps should not be subject to Federal position limits at all [388] or that subjecting swaps to position limits would increase costs without commensurate benefits.[389] Nevertheless, several of these same commenters that stated that swaps should not be subject to Federal position limits also generally supported the proposed ''economically equivalent swap'' definition to the extent the Commission determined to include swaps within Federal position limits.[390] Similarly, IATP stated that it was unclear why swaps are part of the 2020 NPRM given the Commission's limited information on the swaps market.[391]

In response to these comments, as an initial matter, the Commission emphasizes that Congress has determined, through the Dodd-Frank Act's amendments to CEA section 4a(a)(5), that the Commission must develop Federal position limits for economically equivalent swaps ''concurrently,'' and must establish such limits ''simultaneously,'' with the Federal position limits for futures and options on futures. Accordingly, the Commission has determined that, as a legal matter, a swap that qualifies as ''economically equivalent'' to any referenced contract must be included within the Federal position limits framework.

While it did not oppose the proposed definition, NCFC expressed a similar concern with respect to the costs that the proposed definition could impose on commercial end users and small- and mid-sized FCMs. To mitigate these costs, NCFC suggested that any swap that qualifies for an exception to the Commission's clearing requirement under existing § 50.50 of the Commission's regulations should not be deemed to be an ''economically equivalent swap.'' According to NCFC, such ''swap contracts already must meet the test 'to hedge or mitigate commercial

[383] The Commission notes that these technical changes are to conform more closely to CEA section 4a(a), which refers to ''*contracts* of sale of such commodity for future delivery'' (7 U.S.C. 6a(a)(1) (emphasis added)), ''*contracts* of sale for future delivery'' (7 U.S.C. 6a(a)(2)(A) (emphasis added)), or similar phraseology. Accordingly, the Commission is making the technical change to refer to ''futures *contracts*'' rather than merely ''futures'' in order to more closely conform to the CEA's terms. Similarly, CEA section 4a(a)(6) and section 1a(47) both refer to ''swap'' but not '' swap *contract,*'' and so the Commission is making a similar conforming change.

[384] The selection of the proposed core referenced futures contracts is explained below in the discussions of § 150.2 at Section II.B. and the necessity finding *infra* at Section III.C.

[385] CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5). In addition, CEA section 4a(a)(4) separately authorizes, but does not require, the Commission to impose Federal position limits on swaps that meet certain statutory criteria qualifying them as ''significant price discovery function'' swaps. 7 U.S.C. 6a(a)(4). The Commission reiterates, for the avoidance of doubt, that the definitions of ''economically equivalent'' in CEA section 4a(a)(5) and ''significant price discovery function'' in CEA section 4a(a)(4) are separate concepts and that contracts can be economically equivalent without serving a significant price discovery function. *See* 81 FR at 96736 (the Commission noting that certain commenters may have been confusing the two definitions).

[386] As discussed under the ''referenced contract'' definition, the term ''referenced contract'' includes core referenced futures contracts, linked cash-settled futures contracts, and options thereon. For further discussion, *see* Section II.A.16.

[387] *E.g.,* AQR at 10; FIA at 2–3; NCFC at 5; Suncor at 2; SIFMA AMG at 7; ISDA at 5; Chevron at 2; CEWG at 3; Citadel at 6.

[388] SIFMA AMG at 6–8; IATP at 19.

[389] CHS at 4–5; NCFC at 5; SIFMA AMG at 6–7; and ISDA at 5.

[390] Chevron at 2; FIA at 2, 3, 5; MFA/AIMA at 3; SIFMA AMG at 7; Suncor at 2; AQR at 10–11; COPE at 3; Better Markets at 4; 31; NCFC at 5; ISDA at 5; CEWG at 3; and Citadel at 6.

[391] IATP at 19.

risk,' and are 'not used for a purpose that is in the nature of speculation, investing, or trading,''' pursuant to § 50.50.[392] The Commission understands NCFC's concern, but believes NCFC's alternative is unnecessary for two reasons. First, to the extent a swap described by NCFC would ''hedge or mitigate commercial risk,'' such swap likely would qualify for an enumerated bona fide hedge under the Final Rule and therefore would not contribute to a commercial end-user's net position for Federal position limits purposes.[393] Second, commodity swaps are not required to be cleared under the Commission's existing regulations, so determining whether the end-user clearing exemption applies is not necessarily a helpful proxy in determining whether a swap is ''economically equivalent'' for purposes of CEA section 4a(a)(5).

b. Statutory Basis for the Commission's ''Economically Equivalent Swap'' Definition

In promulgating the Federal position limits framework, Congress instructed the Commission to consider several factors. First, CEA section 4a(a)(3)(B) requires the Commission when establishing Federal position limits, to the maximum extent practicable, in its discretion, to: (i) Diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for bona fide hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted. Second, CEA section 4a(a)(2)(C) requires the Commission to strive to ensure that any limits imposed by the Commission will not cause price discovery in a commodity subject to Federal position limits to shift to trading in foreign markets.

Accordingly, any definition of ''economically equivalent swap'' must consider these statutory objectives. The Commission also recognizes that swaps may include customized (*i.e.,* ''bespoke'') terms and are largely negotiated bilaterally and traded off-exchange (*i.e.,* OTC). In contrast, futures contracts have standardized terms and are generally exchange-traded or otherwise traded subject to the rules of an exchange. As explained further below, due to these differences between swaps and exchange-traded futures and related options, the Commission has preliminarily determined that Congress's underlying policy goals in CEA section 4a(a)(2)(C) and (3)(B) are best achieved by adopting a narrow definition of ''economically equivalent swap,'' compared to the broader definition of ''referenced contract.'' [394]

The ''referenced contract'' definition adopted in § 150.1 will include ''economically equivalent swaps,'' meaning any economically equivalent swap is subject to Federal position limits. Thus, a swap that is deemed economically equivalent would be required to be added to, and could be netted against, as applicable, an entity's other referenced contracts in the same commodity for the purpose of determining one's aggregate positions for Federal position limits.[395] Any swap that is not deemed economically equivalent is not a referenced contract, and thus could not be netted with referenced contracts nor required to be aggregated with any referenced contract for Federal position limits purposes.

The Commission has determined that the ''economically equivalent swap'' definition adopted herein supports the statutory objectives in CEA section 4a(a)(3)(B)(i) and (ii) by helping to prevent excessive speculation and market manipulation, including corners and squeezes, respectively, by: (1) Focusing on swaps that are the most economically equivalent in every significant way to the futures contracts and options on futures contracts for which the Commission deems position limits to be necessary; [396] and (2) limiting the ability of speculators to obtain excessive positions through netting. Any swap that meets the economically equivalent swap definition offers identical risk sensitivity to its associated referenced contract with respect to the underlying commodity, and thus could be used to effect a manipulation, benefit from a manipulation, or otherwise potentially distort prices in the same or similar manner as the associated futures contract or option on the futures contract. The Commission further has determined that the relatively narrow definition supports the statutory objective in CEA section 4a(a)(2)(C) by not causing price discovery to shift to trading in foreign markets.[397]

c. The Definition Balances Competing Statutory Goals and Is Neither Too Broad Nor Too Narrow

Several commenters argued that the proposed ''economically equivalent swap'' definition was too narrow and would therefore allow market participants to avoid Federal position limits.[398] In particular, CME Group and Better Markets requested the general ''referenced contract'' definition that applies to futures and options on futures also apply to swaps.[399] The Commission agrees with these commenters' general concerns that the ''economically equivalent swap'' definition should not allow market participants to avoid Federal position limits. In fact, the Commission believes that the approach adopted in this Final Rule achieves that goal better than the approach proposed by Better Markets and CME Group, first and foremost by preventing parties from using netting of swaps to create large positions in the futures market. The Final Rule's definition, compared to the relatively broader ''referenced contract'' definition that applies to futures and options on futures, better prevents inappropriate netting of market participants' positions and advances Congress's underlying policy goals in

[392] NCFC at 5–6.

[393] To the extent an FCM would not be able to qualify for a bona fide hedge, the Commission believes that excepting such swaps for purely financial firms would functionally have the same effect as maintaining the risk-management exemption, which Congress, through the Dodd-Frank Act's amendments to the CEA, has directed the Commission to eliminate. *See* Section IV.A.4.ii.a(1) (discussing elimination of the risk management exemption).

[394] The definition of ''referenced contract'' adopted herein will incorporate cash-settled look-alike futures contracts and related options that are either (i) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or (ii) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract. *See infra* Section II.A.16. (definition of ''referenced contract''). The definition of ''economically equivalent swap'' adopted herein is a type of ''referenced contract,'' but, as discussed herein, the ''economically equivalent swap'' definition includes a relatively narrower class of swaps compared to other types of ''referenced contracts,'' such as look-alike futures and options on futures contracts, for the reasons discussed below.

[395] *See infra* Section II.B.10. (discussion of netting).

[396] *See infra* Section III. (necessity finding).

[397] For clarity, a swap may be eligible for treatment under the pass-through swap provision as either a pass-through swap or a pass-through swap offset, discussed above under the bona fide hedge definition, and not necessarily be deemed to be an ''economically equivalent swap'' since the pass-through swap provision focuses on whether the swap serves as a bona fide hedge to one of the counterparties. Similarly, status as an economically equivalent swap is not dispositive for treatment under the pass-through swap provision.

[398] CME Group at 3; NEFI at 3; Better Markets at 31–33 (generally arguing that the ''economically equivalent swap'' and ''referenced contract'' definitions should be consistent to prevent loopholes).

[399] CME Group at 3–4; Better Markets at 33–34 (arguing that excluding penultimate swaps creates a technical delineation that is largely divorced from the economic realities relating to physical commodities underlying both contracts).

CEA section 4a(a)(2)(C) and (3)(B) for the following three reasons.

First, as the Commission stated above, it believes that a narrow ''economically equivalent swap'' definition that focuses on swaps with identical material terms and conditions reduces the ability of market participants to structure tangentially-related (*i.e.,* non-identical) swaps simply to net down large, speculative positions in excess of Federal position limits in futures or options on futures. Because referenced contracts in the same commodity are generally netted,[400] and because OTC swaps are bilaterally negotiated and customizable, market participants could structure swaps that do not necessarily offer identical risk or economic exposure or sensitivity simply to net down large positions in other referenced contracts. This is less of a concern with exchange-traded futures and related options, which are subject to exchange rules and oversight, and which have standardized terms, meaning they cannot be structured simply to net down large speculative positions in core referenced futures contracts.

The Commission recognizes as reasonable the concerns of CME Group and Better Markets that a relatively narrow ''economically equivalent swap'' definition, compared to a broader definition, could enable market participants to build excessive speculative risk exposure on one side of the market through OTC swap transactions. As discussed herein, the Commission is equally concerned that a broader definition similarly would permit a market participant to acquire a large position in a core referenced futures contract through inappropriate netting.[401] However, the Commission believes that a broader ''economically equivalent swap'' definition as advocated by these commenters also would be more likely to lead to the additional harms discussed below. Accordingly, while the Commission shares the same ultimate concerns as CME Group and Better Markets with respect to protecting market integrity, the Commission has determined that the relatively narrow definition concurrently protects market integrity while also better supporting the statutory directives in CEA sections 4a(a)(2)(C) and 4a(a)(3)(B) as discussed below.

Second, the Commission believes that the Final Rule's definition addresses statutory objectives by focusing Federal position limits on those swaps that pose the greatest threat for facilitating corners and squeezes. That is, the Final rule addresses those swaps with similar delivery dates and identical material economic terms to futures and options on futures subject to Federal position limits while also minimizing market impact and liquidity for bona fide hedgers for other positions and transactions. For example, if the Commission were to adopt a broader economically equivalent swap definition that included delivery dates that diverge by one or more calendar days, perhaps by several days or weeks, a liquidity provider (including a market maker or a speculator) with a large portfolio of swaps may be more likely to be constrained by the applicable position limits and therefore may have incentive either to minimize its swaps activity or move its swaps activity to foreign jurisdictions, resulting in reduced liquidity. If there were many similarly situated market participants, the market for such swaps could become less liquid, which in turn could harm liquidity for bona fide hedgers. As a result, the Commission has determined that the relatively narrow scope of the Final Rule's definition reasonably balances the factors in CEA section 4a(a)(3)(B)(ii) and (iii) by decreasing the possibility of illiquid markets for bona fide hedgers on the one hand while, on the other hand, focusing on the prevention of market manipulation during the most sensitive period of the spot month.

Third, the ''economically equivalent swap'' definition helps prevent regulatory arbitrage as required by CEA section 4a(a)(2)(C) and additionally will strengthen international comity. For example, if the Commission instead adopted a broader definition, U.S.-based swaps activity could potentially migrate to other jurisdictions with a narrower definition, such as the European Union (''EU''). In this regard, the Final Rule's definition is similar in certain ways to the EU definition for OTC contracts that are ''economically equivalent'' to commodity derivatives traded on an EU trading venue.[402] The Commission's ''economically equivalent swap'' definition thus furthers the statutory

[400] *See* Section II.B.10. (discussing the application of netting).

[401] For example, a broader economically equivalent swap definition would allow a market participant to hold a long position in a physically-settled futures contract that exceeds the applicable Federal position limit levels by netting down with an ''offsetting'' short OTC swap, even if the swap has a different material term than the futures contract. That is, the ''offsetting'' short swap could have different delivery location(s), delivery date(s), quality differential(s), or even a different underlying commodity (depending on how broad the definition would be) than the physically-settled futures contract. Such an ''offsetting'' short swap would allow the market participant to more profitably engage in—and therefore more likely to successfully effect—a corner or squeeze in two respects. First, the ''offsetting'' short swap would allow the market participant to obtain a larger long futures position, thus creating a more dominant position on the long side of the market. Second, the ''offsetting'' short swap would allow the market participant to more easily ''dispose'' of or ''bury the corpse'' at smaller expense by enabling the market participant to deliver the underlying physical commodity, which the market participant received pursuant to its long physically-settled futures positions, under more profitable circumstances compared to the terms specified in the futures contract. For example, the ''offsetting'' short swap could allow the market participant to deliver the commodity (*i.e.,* ''dispose of'' or ''bury the corpse'') at a different, more profitable (or at least for less of a loss) delivery location and/or wait for more favorable delivery dates with more favorable prices.

[402] *See* EU Commission Delegated Regulation (EU) 2017/591, 2017 O.J. (L 87). The applicable EU regulations define an OTC derivative to be ''economically equivalent'' when it has ''identical contractual specifications, terms and conditions, excluding different lot size specifications, delivery dates diverging by less than one calendar day and different post trade risk management arrangements.'' While the Final Rule's ''economically equivalent swap'' definition is similar, the Final Rule's definition requires ''identical *material*'' terms rather than merely ''identical'' terms. Further, the Final Rule's definition excludes different ''lot size specifications or *notional amounts*'' rather than referencing only ''lot size'' since swaps terminology usually refers to ''notional amounts'' rather than to ''lot sizes.'' The Commission notes that SIFMA AMG argued in its comment letter that the Commission should adopt the economically equivalent swap definition proposed by the EU. *See* SIFMA AMG at 7. However, while the Commission's definition will be similar to the EU's definition, to the extent that the Commission's definition differs from the EU's by requiring ''*material* identical'' rather than merely ''identical'' terms, the Commission discusses its reasoning below.

Both the Commission's definition and the applicable EU regulation are intended to prevent harmful netting. *See* European Securities and Markets Authority, *Draft Regulatory Technical Standards on Methodology for Calculation and the Application of Position Limits for Commodity Derivatives Traded on Trading Venues and Economically Equivalent OTC Contracts,* ESMA/2016/668 at 10 (May 2, 2016), available at *https://www.esma.europa.eu/sites/default/files/library/2016-668_opinion_on_draft_rts_21.pdf* (''[D]rafting the [economically equivalent OTC swap] definition in too wide a fashion carries an even higher risk of enabling circumvention of position limits by creating an ability to net off positions taken in on-venue contracts against only roughly similar OTC positions.'').

The applicable EU regulator, the European Securities and Markets Authority (''ESMA''), released a ''consultation paper'' discussing the status of the existing EU position limits regime and specific comments received from market participants. According to ESMA, no commenter, with one exception, supported changing the definition of an economically equivalent swap (referred to as an ''economically equivalent OTC contract'' or ''EEOTC''). ESMA further noted that for some respondents, ''the mere fact that very few EEOTC contracts have been identified is no evidence that the regime is overly restrictive.'' *See* European Securities and Markets Authority, *Consultation Paper MiFID Review Report on Position Limits and Position Management Draft Technical Advice on Weekly Position Reports,* ESMA70–156–1484 at 46, Question 15 (Nov. 5, 2019), available at *https://www.esma.europa.eu/document/ consultation-paper-position-limits.*

goals set forth in CEA section 4a(a)(2)(C), which requires the Commission to strive to ensure that any Federal position limits are ''comparable'' to foreign exchanges and will not cause ''price discovery . . . to shift to trading'' on foreign exchanges.[403] Further, market participants trading in both U.S. and EU markets should find the Commission's and the EU's respective definitions to be familiar, which may help reduce compliance costs for those market participants that already have systems and personnel in place to identify and monitor such swaps.

Each element of the Final Rule's definition, including the exclusions from the definition, and related comments, is discussed below.

d. Scope of Identical Material Terms

Under the Final Rule's definition, only ''material'' contractual specifications, terms, and conditions are relevant to the analysis of whether a particular swap qualifies as an economically equivalent swap. The definition thus does not require that a swap be identical in all respects to a referenced contract in order to be deemed ''economically equivalent'' to that referenced contract. Under the Final Rule, ''material'' specifications, terms, and conditions are limited to those provisions that drive the economic value of a swap, including with respect to pricing and risk. Examples of ''material'' provisions include, for example: The underlying commodity, including commodity reference price and grade differentials; maturity or termination dates; settlement type (*i.e.,* cash-settled versus physically-settled); and, as applicable for physically delivered swaps, delivery specifications, including commodity quality standards and delivery locations.[404]

In addition, a swap that either references another referenced contract, or incorporates by reference the other referenced contract's terms, is deemed to share identical terms with the referenced contract and therefore qualifies as an economically equivalent swap.[405] Any change in the material terms of such a swap, however, could render the swap no longer economically equivalent for Federal position limits purposes.

The Commission recognizes that the material swap terms noted above are essential to determining the pricing and risk profile for swaps. However, there may be other contractual terms that also may be important for the counterparties in determining the pricing and transaction risks, but that are not necessarily ''material'' for purposes of position limits. For example, as discussed below, certain other terms, such as clearing arrangements or governing law, may not be material for the purpose of determining economic equivalence for Federal position limits, but may nonetheless affect pricing and risk or otherwise be important to the counterparties.

Accordingly, the Commission generally considers those swap contractual terms, provisions, or terminology (*e.g.,* ISDA terms and definitions) that are unique to swaps (whether standardized or bespoke) not to be material for purposes of determining whether a swap is economically equivalent to a particular referenced contract, even though such terms may be important when negotiating the swap or contribute to the valuation and/or the counterparties' risk analysis. For example, the following swap provisions or terms are generally unique to swaps and/or otherwise not material, and therefore are not to be dispositive for determining whether a swap is economically equivalent: Designating business day or holiday conventions; day count (*e.g.,* 360 or actual); calculation agent; dispute resolution mechanisms; choice of law; or representations and warranties.[406]

Because the Commission considers settlement type to be a material ''contractual specification, term, or condition,'' a cash-settled swap could only be deemed to be economically equivalent to a cash-settled referenced contract, and a physically-settled swap could only be deemed to be economically equivalent to a physically-settled referenced contract. However, a cash-settled swap that initially did not qualify as ''economically equivalent'' due to no corresponding cash-settled referenced contract (*i.e.,* no cash-settled look-alike futures contract) could subsequently become an ''economically equivalent swap'' if a cash-settled futures contract market were to develop.

Commenters had various views on the treatment of cash-settled and physically-settled swaps. First, certain commenters requested the Commission exclude physically-settled swaps from Federal position limits[407] or at least clarify the class of instruments that would be deemed to be physically-settled swaps.[408] Second, other commenters requested the opposite—that the Commission instead exclude cash-settled swaps from Federal position limits.[409] Third, Better Markets argued that differentiating between cash-settled and physically-settled swaps by including settlement type as a material term would ''incentivize[ ] speculative liquidity formation away from more liquid, more transparent, and more restrictive futures exchanges and to the swaps markets.''[410]

i. Treatment of Physically-Settled Swaps Under the Final Rule

Several commenters requested that the Commission exclude physically-settled swaps from Federal position limits,[411] or at least clarify the scope of physically-settled swaps that would be subject to Federal position limits.[412] However, the Commission has determined that doing so is inconsistent with the statutory goals in CEA section

[403] 7 U.S.C. 6a(a)(2)(C).

[404] In developing its definition of an ''economically equivalent swap,'' the Commission, based on its experience, has determined that for a swap to be ''economically equivalent'' to a futures or option on a futures contract, the material contractual specifications, terms, and conditions must be identical. In making this determination, the Commission took into account, in regards to the economics of swaps, how a swap and a corresponding futures contract or option on a futures contract react to certain market factors and movements, the pricing variables used in calculating each instrument, the sensitivities of those variables, the ability of a market participant to gain the same type of exposures, and how the exposures move to changes in market conditions.

[405] For example, a cash-settled swap that either settles to the pricing of a corresponding cash-settled referenced contract, or incorporates by reference the terms of such referenced contract, would be deemed to be economically equivalent to the referenced contract.

[406] Commodity swaps, which generally are traded OTC, are less standardized compared to exchange-traded futures and therefore must include these provisions in an ISDA master agreement between counterparties. While certain provisions, for example choice of law, dispute resolution mechanisms, or the general representations made in an ISDA master agreement, may be important considerations for the counterparties, the Commission would not deem such provisions material for purposes of determining economic equivalence under the Federal position limits framework for the same reason the Commission would not deem a core referenced futures contract and a look-alike referenced contract to be economically different, even though the look-alike contract may be traded on a different exchange with different contractual representations, governing law, holidays, dispute resolution processes, or other provisions unique to the exchanges. Similarly, with respect to day counts, a swap could designate a day count that is different than the day count used in a referenced contract but adjust relevant swap economic terms (*e.g.,* relevant rates or payments, fees, basis, etc.) to achieve the same economic exposure as the referenced contract. In such a case, the Commission would not find such differences to be material for purposes of determining the swap to be economically equivalent for Federal position limits purposes.

[407] COPE at 4–5.

[408] ICEA at 3–5; NRECA at 19–20, 27.

[409] SIFMA AMG at 7; PIMCO at 3; and ISDA at 5.

[410] Better Markets at 32.

[411] COPE at 4–5.

[412] IECA at 3–5; NRECA at 1, 28.

4a(a)(3)(B), especially the mandates to deter corners and squeezes and to ensure sufficient market liquidity for bona fide hedgers enumerated in CEA section 4a(a)(3)(B)(ii) and (iii), respectively. For example, excluding physically-settled swaps could potentially incentivize liquidity to move from physically-settled core referenced futures contracts to physically-settled swaps, which could both harm market liquidity for bona fide hedgers and also enable potential manipulators to accumulate large directional positions in physically-settled contracts to effect a corner and squeeze more easily.

The Commission also received several comments requesting clarification regarding the Commission's use of the term ''physically-settled'' swaps in the 2020 NPRM's discussion of the definition.

First, COPE opined that since the 2020 NPRM excluded trade options from the ''referenced contract'' definition, as a result, only cash-settled swaps would be deemed to be ''economically equivalent swaps'' for purposes of Federal position limits. The Commission confirms that under the Final Rule, any swap that qualifies as a trade option under § 32.3 is *ipso facto* not subject to Federal position limits.[413] However, the Commission does not believe this means that only cash-settled swaps could be deemed ''economically equivalent swaps.'' For example, it is possible that a physically-settled swap may not qualify as a trade option, and if it were to otherwise satisfy the ''economically equivalent swap'' definition, it therefore would be subject to Federal position limits.

Second, IECA and NRECA requested the Commission clarify what it means when using language referring to a ''physically-settled swap,'' and suggested the Commission instead refer to a ''swap that allows for physical settlement or delivery.''[414] IECA stated that ''using this term in place of the term 'physically-settled swaps' in the Commission's proposed rulemaking will help to avoid confusion and misinterpretation in the future.''[415] While the Commission is adopting the ''economically equivalent swap'' definition as proposed (which includes the reference to ''delivery date''), the Commission agrees with IECA's statement and confirms that when the Commission refers to ''physically-settled swaps'' for the purpose of this definition, the Commission means a ''swap that allows for physical settlement or delivery.'' The Commission agrees with IECA that referring to ''swaps that allow for physical settlement or delivery'' does not alter the Commission's intended meaning and may avoid confusion and misinterpretation.[416] However, the Commission will continue to refer to ''physically-settled swaps'' in this preamble discussion because the Commission believes that changing the term for discussion purposes herein, compared to the 2020 NPRM's preamble discussion, could raise additional confusion. Further, the Commission distinguishes between ''cash-settled'' and ''physically-settled'' referenced contracts throughout this preamble discussion, and using different terms to refer to swaps also could increase confusion.

IECA was concerned that the term ''physically-settled swap'' could suggest that the Commission was seeking to regulate a commodity for deferred delivery as a swap, which is otherwise excluded from the ''swap'' definition under CEA section 1a(47)(B)(ii). The Commission confirms that neither the use of ''delivery dates'' in the definition adopted herein nor the Commission's use of the term ''physically-settled swaps'' for the purposes of this preamble discussion is intended to capture instruments that are excluded from the Commission's jurisdiction either by statute (*e.g.,* the CEA's statutory exclusion of the sale of a non-financial commodity for deferred shipment or delivery that is intended to be physically-settled)[417] or otherwise not deemed to be swaps pursuant to the Commission's rules and regulations, interpretations, exemption orders, or other guidance.[418]

NRECA additionally requested the Commission clarify that the ''economically equivalent swap'' definition does not include any ''customary commercial agreement, contract or transaction entered into as part of operations (so long as it is entered into off-facility and not involving a financial intermediary).''[419] As noted, to the extent such customary commercial agreement, contract, or transaction is exempt or excluded from either treatment as, or from the definition of, a ''swap'' by either statute or by the Commission's rules and regulations, interpretations, exemption orders, or other guidance, the Commission does not deem it to be an economically equivalent swap or otherwise subject to Federal position limits under the Final Rule.[420]

ii. Treatment of Cash-Settled Swaps Under the Final Rule

The Commission also received several comments discussing the treatment of cash-settled swaps under the proposed ''economically equivalent swap'' definition. Several financial industry commenters argued that the Final Rule should include only physically-settled swaps and should exclude cash-settled swaps, contending that cash-settled swaps do not affect price discovery or contribute to manipulation.[421]

The Commission disagrees with the commenters' request to exclude cash-settled swaps from the final definition, as doing so could incentivize liquidity to move from cash-settled referenced contracts to cash-settled OTC swaps, potentially harming the liquidity in the futures markets, including liquidity for bona fide hedgers. At the very least, the Commission does not want to preference OTC cash-settled swaps at the expense of corresponding exchange-traded cash-settled futures or options on futures contracts.

In contrast, Better Markets objected to the proposed definition because, according to Better Markets, under the 2020 NPRM cash-settled swaps would not be able to qualify as economically equivalent to a physically-settled core referenced futures contract.[422] As Better Markets commented, distinguishing between cash-settled and physically-settled swaps and futures contracts by

[413] As discussed under Section II.A.16., the ''referenced contract'' definition explicitly excludes any ''trade options that meets the requirements of § 32.3'' of the Commission's regulations. Accordingly, a ''trade option'' is not subject to Federal position limits under the Final Rule, even if the trade option otherwise would satisfy the ''economically equivalent swap'' definition.

[414] IECA at 3–5; NRECA at 1, 28.

[415] IECA at 5.

[416] IECA at 4–5.

[417] *See* CEA section 1a(47)(B)(ii).

[418] *See* NRECA at 18–19. For clarity, and as requested by NRECA, the Commission notes that these ''rules and regulations'' include the Commission's trade option rule in § 32.3 as well as the Commission's forward contract exclusion (*i.e.,* the Brent forward exclusion) in 55 FR 39188–92 and 77 FR 48,208, 48,246 (August 13, 2012).

[419] NRECA at 16–20.

[420] For example, the Commission's swap definition excludes certain capacity contracts and peaking supply contracts that qualify as forward contracts with ''embedded volumetric optionality.'' *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48,246. Since such instruments are excluded from the Commission's regulatory ''swap'' definition, they *ipso facto* will not be deemed to be ''economically equivalent swaps'' for purposes of Federal position limits.

[421] SIFMA AMG at 7; PIMCO at 3; and ISDA at 5 (PIMCO and ISDA each believe neither cash-settled swaps nor cash-settled futures should be subject to position limits).

[422] Better Markets at 32 (stating that cash-settled swaps would be ''essentially excluded from Federal position limits).

deeming settlement type (*i.e.,* cash-settled vs. physically-settled settlement) to be a material term would ''incentivize[ ] speculative liquidity formation away from more liquid, more transparent, and more restrictive futures exchanges and to the swaps markets.'' [423]

The Commission believes Better Markets' concern is mitigated since under the Final Rule, cash-settled swaps are subject to Federal position limits only if there is a corresponding (*i.e.,* ''economically equivalent'') cash-settled futures contract or option on a futures contract.[424] That is, cash-settled swaps are not subject to Federal position limits if there are no corresponding cash-settled futures contracts or options on a futures contract. In these situations, if no corresponding futures contract or option thereon exists, then there is no liquidity formation in cash-settled futures and options on futures contracts with which a cash-settled swap would be competing for liquidity in the first place.

FIA argued that cash-settled swaps should be subject to a separate spot-month limit.[425] However, as discussed in II.A.16.ii.a., the Commission has determined that FIA's request to establish separate Federal position limits for cash-settled swaps is not, as a default rule, consistent with the statutory goals in CEA section 4a(a)(3)(B). In particular, separate position limits for cash-settled swaps would make it easier for potential manipulators to engage in market manipulation, such as ''banging'' or ''marking'' the close, by effectively permitting higher Federal position limits in cash-settled referenced contracts. For example, a market participant would be able to double its cash-settled positions by maintaining positions in both cash-settled futures and cash-settled economically equivalent swaps since positions in each class would not be required to be aggregated for purposes of Federal position limits.

Furthermore, the Commission is concerned that class limits could impair liquidity in futures contracts or swaps, as the case may be. For example, a market participant (including a market maker or speculator) with a large portfolio of swaps (or futures contracts) near a particular class limit would be assumed to have a strong preference for executing futures contracts (or swaps) transactions in order to maintain a swaps (or futures contracts) position below the class limit. If there were many similarly situated market participants, the market for such swaps (or futures contracts) could become less liquid. The absence of class limits should decrease the possibility of illiquid markets for referenced contracts subject to Federal position limits. Because economically equivalent swaps and the corresponding futures contracts and option on futures contracts are close substitutes for each other, the absence of class limits should allow greater integration between the economically equivalent swaps and corresponding futures and options markets for referenced contracts and should also provide market participants with more flexibility whether hedging, providing liquidity or market making, or speculating.

e. Exclusions From the Definition of ''Economically Equivalent Swap''

As noted above, the Final Rule's definition provides that differences in lot size or notional amount, delivery dates diverging by less than one calendar day (or less than two calendar days for natural gas), or post-trade risk management arrangements do not disqualify a swap from being deemed ''economically equivalent'' to a particular referenced contract.

i. Delivery Dates Diverging by Less Than One Calendar Day

The definition as it applies to commodities (other than natural gas) encompasses swaps with delivery dates that diverge by less than one calendar day from that of a referenced contract.[426] As a result, a swap with a delivery date that differs from that of a referenced contract by one calendar day or more is not deemed economically equivalent under the Final Rule, and such swaps are not required to be added to, nor permitted to be netted against, any referenced contract when calculating compliance with Federal position limits.[427] For example, these include contracts commonly referred to as ''penultimate'' contracts, which settle on the trading day immediately preceding the final trading day of the corresponding core referenced futures contract.

In response to the definition's proposed exclusion of physically-settled penultimate swaps, Better Markets argued, among other things, that excluding penultimate swaps ''creates technical delineations that are largely divorced from the economic realities relating to physical commodities underlying both contracts.'' [428] In response, the Commission recognizes that while a penultimate contract may be significantly correlated to its corresponding spot-month contract, a penultimate contract does not necessarily offer identical economic or risk exposure to the spot-month contract, and depending on the underlying commodity and market conditions, a market participant may open itself up to material basis risk by moving from the spot-month contract to a penultimate contract.[429]

Accordingly, the Commission has determined that it is not appropriate *ex ante* to permit market participants to net such penultimate swap positions (other than natural gas) against their core referenced futures contract positions since such positions do not necessarily reflect equivalent economic or risk exposure. However, the Commission underscores that under the Final Rule, a penultimate swap still could be deemed economically equivalent to the extent that another penultimate referenced contract exists (assuming the swap and other referenced contract share identical material terms and the swap otherwise satisfies the economically equivalent swap definition). For example, if a core referenced futures contract has a corresponding penultimate futures contract that qualifies as a referenced contract, then a penultimate swap could be deemed economically equivalent to the penultimate futures contract. In such cases, the penultimate swap would be an economically equivalent swap subject to Federal position limits.

The Commission acknowledges that liquidity could shift from the core referenced futures contract to penultimate swaps in cases where there are no corresponding penultimate futures contracts or options contracts (and therefore the swap would not be deemed to be an economically equivalent swap), but the Commission

[423] *Id.*

[424] The Commission notes that a swap could be deemed to be ''economically equivalent'' to any referenced contract, including cash-settled look-alikes, and that the ''economically equivalent swap'' definition is not limited to core referenced futures contracts.

[425] FIA at 7–8.

[426] This aspect of the proposed definition would be irrelevant for cash-settled swaps since ''delivery date'' applies only to physically-settled swaps.

[427] A swap as so described that is not ''economically equivalent'' would not be subject to a Federal speculative position limit under the Final Rule.

[428] Better Markets at 32.

[429] As discussed under Sections II.A.16.iii.a(2)(iii) and II.B.3.vi.c, the Final Rule includes penultimate look-alike futures contracts and options on futures contracts as ''referenced contracts.'' Since futures contracts and options on futures contracts are standardized and exchange-traded, the Commission is less concerned about the potential for manipulation or evasion through inappropriate netting in this context.

believes that this concern is mitigated for two reasons. First, basis risk may exist between the penultimate swap and the referenced contract, and so the Commission believes that a market participant is less likely to hold a penultimate swap the greater the economic difference compared to the corresponding referenced contract. Second, the absence of penultimate futures contracts or options contracts may indicate lack of appropriate penultimate liquidity to hedge or offset one's penultimate swap position and therefore may militate against entering into penultimate swaps. However, as discussed below, these reasons do not necessarily apply to penultimate swaps for natural gas.

ii. Post-Trade Risk Management

The Commission is specifically excluding differences in post-trade risk management arrangements, such as clearing or margin, in determining whether a swap is economically equivalent. As noted above, many commodity swaps are traded OTC and may be uncleared or cleared at a different clearing house than the corresponding referenced contract.[430] Moreover, since the core referenced futures contracts, along with futures and options on futures contracts in general, are traded on DCMs with vertically integrated clearing houses, as a practical matter, it is unlikely that OTC commodity swaps, which historically have been uncleared, would share identical post-trade clearing house or other post-trade risk management arrangements with their associated core referenced futures contracts. However, to the extent an OTC commodity swap does share the same clearing arrangements as a corresponding referenced contract, the Commission does not want to incentivize the switching of cleared swap contracts to non-cleared status for the sake of avoiding Federal position limits.

Therefore, if differences in post-trade risk management arrangements were sufficient to exclude a swap from economic equivalence to a core referenced futures contract, then such an exclusion could otherwise render ineffective the Commission's statutory directive under CEA section 4a(a)(5) to include economically equivalent swaps within the Federal position limits framework. Accordingly, the Commission has determined that differences in post-trade risk management arrangements should not prevent a swap from qualifying as economically equivalent with an otherwise materially identical referenced contract.[431]

iii. Lot Size or Notional Amount

The last exclusion clarifies that differences in lot size or notional amount do not prevent a swap from being deemed economically equivalent to its corresponding referenced contract. The Commission's use of ''lot size'' and ''notional amount'' refer to the same general concept. Futures terminology usually employs ''lot size,'' and swap terminology usually employs ''notional amount.'' Accordingly, the Commission is using both terms to convey the same general meaning, and in this context does not mean to suggest a substantive difference between the two terms.

f. Economically Equivalent Natural Gas Swaps

Market dynamics in natural gas are unique in several respects including, among other things, that ICE and NYMEX both list high volume contracts, whereas liquidity in other commodities tends to pool at a single DCM. As expiration approaches for natural gas contracts, volume tends to shift from the NYMEX NG core referenced futures contract that is physically-settled, to an ICE look-alike contract that is cash settled. This trend reflects certain market participants' desire for exposure to natural gas prices without having to make or take delivery.[432] NYMEX and ICE also list several ''penultimate'' cash-settled referenced contracts that use the price of the physically-settled NYMEX contract as a reference price for cash settlement on the day before trading in the physically-settled NYMEX contract terminates.[433]

In order to recognize the existing natural gas markets, which include active and vibrant markets in penultimate natural gas contracts, the Final Rule includes a slightly broader economically equivalent swap definition for natural gas so that physically-settled swaps with delivery dates that diverge by less than two calendar days from an associated referenced contract could still be deemed economically equivalent and would be subject to Federal position limits. The Commission intends for this provision to prevent and disincentivize manipulation and regulatory arbitrage and to prevent volume from shifting away from the NYMEX NG core referenced futures contract to penultimate natural gas contract futures and/or penultimate swap markets in order to avoid Federal position limits.

As noted above, the Commission is adopting a relatively narrow ''economically equivalent swap'' definition in order to prevent market participants from inappropriately netting positions in referenced contracts against swap positions further out on the curve. The Commission acknowledges that liquidity could shift to penultimate swaps as a result but believes that, with the exception of natural gas, this concern is mitigated since there may be basis risk between the penultimate swap and the referenced contract and lack of liquidity to specifically hedge or offset one's penultimate swap position. However, compared to other contracts, the Commission believes that natural gas has a relatively liquid penultimate futures market that enables a market participant to hedge or set-off its penultimate swap position. The Commission believes that without the exception to the economically equivalent swap definition for natural gas swaps, liquidity otherwise could be incentivized to shift from the NYMEX NG core referenced futures contract to penultimate natural gas swaps in order to avoid Federal position limits.

CME Group stated in its comment letter that that these concerns also may apply to other energy core referenced

[430] Similar to the Commission's understanding of ''material'' terms, the Commission construes ''post-trade risk management arrangements'' to include various provisions included in standard swap agreements, including, for example: Margin or collateral requirements, including with respect to initial or variation margin; whether a swap is cleared, uncleared, or cleared at a different clearing house than the applicable referenced contract; close-out, netting, and related provisions; and different default or termination events and conditions.

[431] In addition, CEWG asked for clarification that the Commission would not extend certain preamble language in the 2020 NPRM addressing the exclusion of post-trade risk management arrangements from consideration when determining whether a swap is economically equivalent to support a finding that such swaps are actually off-exchange futures contracts rather than swaps. CEWG at 31. The Commission confirms that excluding post-trade risk management arrangements from the determination that a swap is economically equivalent does not extend to supporting a finding that such swaps are actually off-exchange futures contracts rather than swaps.

[432] In part to address historical concerns over the potential for manipulation of physically-settled natural gas contracts during the spot month in order to benefit positions in cash-settled natural gas contracts, the Commission discusses later in this release that the Final Rule will allow for a higher ''conditional'' spot month limit in cash-settled natural gas referenced contracts under the condition that market participants seeking to utilize such conditional limit exit any positions in physically-settled natural gas referenced contracts. *See infra* Section II.C.2.e. (proposed conditional spot month limit exemption for natural gas).

[433] Such penultimate contracts include: ICE's Henry Financial Penultimate Fixed Price Futures (PHH) and options on Henry Penultimate Fixed Price (PHE), and NYMEX's Henry Hub Natural Gas Penultimate Financial Futures (NPG).

futures contracts.[434] As a result, the Commission intends to observe the behavior in these other markets in response to the Final Rule, but the Commission understands that the natural gas markets are likely the most sensitive to these concerns based on the size of the corresponding natural gas penultimate market. As a result, the Commission is adopting the proposed exception for natural gas, but emphasizes that it will continue to observe the other energy markets in order to determine the proper course of action with respect to those markets.

g. Determination of Economic Equivalence

The Commission is unable to publish a list of swaps it deems to be economically equivalent swaps because any such determination would involve a facts and circumstances analysis, and because most physical commodity swaps are created bilaterally between counterparties and traded OTC. Absent a requirement that market participants identify their economically equivalent swaps to the Commission on a regular basis, the Commission believes that market participants are best positioned to determine whether particular swaps share identical material terms with referenced contracts and would therefore qualify as ''economically equivalent'' for purposes of Federal position limits. However, the Commission understands that for certain bespoke swaps it may be unclear whether the facts and circumstances demonstrate whether the swap qualifies as ''economically equivalent'' with respect to a referenced contract.

MFA/AIMA requested that the Commission facilitate compliance by providing clearer guidance on terms that would be deemed material for determining which swaps are ''economically equivalent.'' [435] Similarly, NCFC requested that the Commission adopt a ''safe harbor'' under which ''demonstrable good faith compliance with respect to inadvertent violations would not serve as the basis for an enforcement action.'' [436] In response, the Commission emphasizes that under the Final Rule, a market participant will have the discretion to make such determination as long as the market participant makes a reasonable, good faith effort in reaching such determination. The Commission will not pursue any enforcement action for violating Federal position limits against such market participant with respect to such swaps positions as long as the market participant (i) performed the necessary due diligence and is able to provide sufficient evidence, if requested, to support its reasonable, good faith determination that the swap is or is not an economically equivalent swap and (ii) comes into compliance with the applicable Federal position limits within a commercially reasonable time, as determined by the Commission in consultation with the market participant, and if applicable, any relevant exchange.[437] The Commission anticipates that this should provide a greater level of certainty to provide market participants with the comfort they need to enter into swap positions, in contrast to the alternative in which market participants would be required to first submit swaps to the Commission staff and wait for feedback before entering into swaps.[438]

While the Commission will primarily rely on market participants to initially determine whether their swaps meet the proposed ''economically equivalent swap'' definition, the Commission is adopting paragraph (3) to the ''economically equivalent swap'' definition to clarify that the Commission may determine on its own initiative that any swap or class of swaps satisfies, or does not satisfy, the economically equivalent definition with respect to any referenced contract or class of referenced contracts. The Commission believes that this provision will provide the ability to offer clarity to the marketplace in cases where uncertainty exists as to whether certain swaps would qualify (or would not qualify) as ''economically equivalent,'' and therefore would be (or would not be) subject to Federal position limits. Similarly, where market participants hold divergent views as to whether certain swaps qualify as ''economically equivalent,'' the Commission can ensure that all market participants treat OTC swaps with identical material terms similarly, and serve as a backstop in case market participants fail to properly treat economically equivalent swaps as such. As noted above, the Commission will not take any enforcement action with respect to violating the Commission's position limits regulations if the Commission disagrees with a market participant's determination as long as the market participant is able to provide sufficient support to show that it made a reasonable, good faith effort in applying its discretion.[439]

Better Markets encouraged the release of additional guidance, suggesting that the Commission should delegate its authority to the DMO Director to issue guidance with respect to specific types of terms and conditions, and noting that the proposed process for the Commission to provide clarification is cumbersome.[440] The Commission does not believe such delegation is necessary since Commission staff will continue to have the ability to offer informal guidance as well as formal no-action relief or interpretive guidance as needed.

Better Markets also suggested that in order to ensure market participants conduct proper diligence, the Commission should clarify and codify that a swap dealer must include an appendix in its reasonably-designed policies and procedures under existing § 23.601 that identifies swaps ''in any manner'' referencing commodities subject to Federal position limits, regardless of whether the entity deems the swap to be ''economically equivalent.'' [441] In contrast, ISDA believed the obligations in § 23.601 impose costs that are overly burdensome and are not commensurate with benefits.[442] ISDA stated that further guidance is necessary, but noted that even if further guidance is provided, the regime would still impose unnecessary burdens on swap dealers.[443] ISDA requested the Commission consider including further

[434] CME Group at 4.

[435] MFA/AIMA at 9.

[436] NCFC at 6.

[437] As noted below, the Commission reserves the authority under the Final Rule to determine that a particular swap or class of swaps either is or is not ''economically equivalent'' regardless of a market participant's determination. *See infra* Section II.A.4.iii.g. (discussion of commission determination of economic equivalence). As long as the market participant made its determination, prior to such Commission determination, using reasonable, good faith efforts, the Commission would not take any enforcement action for violating the Commission's position limits regulations if the Commission's determination subsequently differs from the determination of the market participant and the market participant comes into compliance with the applicable Federal position limits within a commercially reasonable time, as determined by the Commission in consultation with the market participant, and if applicable, any relevant exchange.

[438] As discussed under Section II.A.16. (definition of ''referenced contract''), the Commission is including a list of futures contracts and options on futures contracts that qualify as referenced contracts because such contracts are standardized and published by exchanges. In contrast, since swaps are largely bilaterally negotiated and OTC traded, a swap could have multiple permutations and any published list of economically equivalent swaps would be unhelpful or incomplete.

[439] *See supra* Section II.A.4. (discussing market participants' discretion in determining whether a swap is economically equivalent).

[440] Better Markets at 34.

[441] Better Markets at 34.

[442] ISDA at 10.

[443] *Id.*

clarification and/or interim relief for swap dealers.[444]

At this time, the Commission does not believe it is necessary to provide further detail with respect to § 23.601 because, as discussed above, the Commission will defer to a market participant's determination as long as the market participant is able to provide sufficient support to show that it made a reasonable, good faith effort in applying its discretion.[445]

h. Phased Implementation of Federal and Exchange-Set Limits on Swaps

As discussed under Section I.D., the Final Rule generally gives market participants until January 1, 2022 to comply with Federal position limits for the 16 non-legacy referenced contracts that are subject to Federal position limits for the first time under the Final Rule, and the Final Rule provides an extra year to comply with respect to economically equivalent swaps (January 1, 2023). After such compliance period, economically equivalent swaps will be subject to Federal position limits. In general, commenters supported a phase-in for such swaps.[446]

As discussed further under Section II.D.4.i, final § 150.5 requires exchanges to establish and enforce exchange-set limits for any referenced contract, which includes economically equivalent swaps. The Commission has determined to permit exchanges to delay enforcing their respective exchange-set position limits on economically equivalent swaps at this time. Specifically, with respect to exchange-set position limits on swaps, the Commission notes that in two years (which generally coincides with the compliance date for economically equivalent swaps), the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms to implement DCM Core Principle 5 and SEF Core Principle 6 with respect to economically equivalent swaps. However, after the swap compliance date (January 1, 2023), the Commission underscores that it will enforce Federal position limits in connection with OTC swaps.

In response to the Commission's proposal to allow exchanges to delay enforcing exchange-set position limits on swaps, IATP opined that the Commission's decision to ''[d]elay compliance with position limit requirement [sic] to avoid imposing costs on market participants makes it appear that the Commission is serving as a swap dealer booster, although swaps dealers are amply resourced to provide the necessary data to the exchanges and to the Commission. The Commission is bending over backward to avoid requiring swaps market participants from paying the costs of exchange trading.'' [447] However, the Commission stated in the same section of the 2020 NPRM that it would enforce Federal position limits on swaps even though it would not require exchanges to enforce position limits on swaps until the Commission determines that exchanges have had the opportunity to access swaps data and establish appropriate swaps oversight infrastructure.[448] Additionally, the Commission notes that physical commodity swaps are not subject to the Commission's trade execution mandate to trade on exchanges, and the Commission understands that most physical commodity swaps are traded OTC rather than on exchanges. Accordingly, the Commission's rationale for delaying the requirement that exchanges enforce position limits for swaps is based on *exchanges'* existing capabilities and lack of insight into the OTC swaps markets, rather than for swap dealers who will remain subject to Federal position limits and Commission oversight.[449]

i. Cross-Border Application

Several commenters opined that the Commission should address the cross-border application of the Final Rule, including in connection with OTC swaps.[450]

In response, the Commission makes three observations. First, as discussed above regarding the treatment of physically-settled swaps, if a swap is otherwise excluded from the Commission's jurisdiction either by statute or pursuant to the Commission's rules and regulations, interpretations, exemption orders, or other guidance, then the swap is not subject to Federal position limits. Accordingly, while related, this determination is distinct from the Final Rule's position limits framework. Second, the Final Rule provides a compliance period for economically equivalent swaps until January 1, 2023. Accordingly, the Commission and its staff expect to continue to discuss the status of OTC swaps with market participants during this compliance period and provide additional feedback as necessary based on the individual facts and circumstances. Third, to a certain extent, some of the comments are more related to the position limit aggregation rules in existing § 150.4, which was finalized in 2016.[451] Moreover, the 2020 NPRM did not discuss cross-border application, which is therefore beyond the scope of this rulemaking.

5. ''Eligible Affiliate''

i. Summary of the 2020 NPRM—Eligible Affiliate

The Commission proposed to create the new defined term ''eligible affiliate'' to be used in proposed § 150.2(k). As discussed further in connection with § 150.2, an entity that qualifies as an ''eligible affiliate'' would be permitted to voluntarily aggregate its positions, even though it is eligible for an exemption from aggregation under § 150.4(b).[452]

ii. Comments and Summary of the Commission Determination—Eligible Affiliate

The Commission received no comments on this definition and is adopting it as proposed with certain technical changes. The Commission is making these technical changes to clarify the antecedent to the use of ''its'' and ''such entity'' in the definition. The Commission expects these changes will clarify the definition, but do not represent a substantive change in the meaning.

[444] *Id.*

[445] *See supra* Section II.A.4. (discussing market participants' discretion in determining whether a swap is economically equivalent).

[446] MFA/AIMA at 8 (requesting an additional 6–12 months phase-in); SIFMA AMG at 9 (requesting an additional 6–12 months); Citadel at 9 (requesting an additional 6 months); and NGSA at 15–16 (requesting a general phase-in in order ''to avoid the risk of harm to market recovery and to facilitate efficiency in market participant implementation'').

[447] IATP at 20.

[448] The 2020 NPRM stated, ''Nonetheless, the Commission's preliminary determination to permit exchanges to delay implementing Federal position limits on swaps could incentivize market participants to leave the futures markets and instead transact in economically-equivalent swaps, which could reduce liquidity in the futures and related options markets, although the Commission recognizes that this concern should be mitigated by the reality that *the Commission would still oversee and enforce Federal position limits on economically equivalent swaps.*'' (emphasis added). 85 FR at 11680.

[449] The Commission also notes that IATP quotes from the cost-benefits considerations section of the 2020 NPRM, and thus the Commission's focus on benefits and costs to exchanges and market participants in the excerpt quoted by IATP.

[450] FIA at 27–28; ISDA at 11; CHS at 6 (''CHS believes that global organizations should be in a position to better understand the Commission's approach with respect to the cross–border application of the rules to referenced contract positions. In CHS's view, the proposal does not address whether and how global companies must aggregate referenced contract positions of affiliates around the world. As part of the retooling of the position limit regime, CHS urges the Commission to address such an application'').

[451] For further discussion related to the position limits aggregation rules, *see* Section II.B.11.

[452] *See* Section II.B.11.

6. ''Eligible Entity''

i. Summary of the 2020 NPRM—Eligible Entity

The Commission adopted a revised ''eligible entity'' definition in the 2016 Final Aggregation Rulemaking.[453] The Commission proposed no further amendments to this definition, but is including the revised definition in this Final Rule given that the definitions for part 150 are set forth or restated in § 150.1, thus ensuring that all defined terms are included. As noted above, the Commission also proposed a non-substantive change to remove the lettering from this and other definitions that appear lettered in existing § 150.1, and to list the definitions in alphabetical order.

7. ''Entity''

i. Summary of the 2020 NPRM—Entity

The Commission proposed defining ''entity'' to mean ''a 'person' as defined in section 1a of the Act.'' [454] The term ''entity,'' not defined in existing § 150.1, is used throughout proposed part 150 of the Commission's regulations.

ii. Comments—Entity

The Commission received two comments that recommended clarification of the proposed definition of ''entity.'' [455] FIA and MGEX contended the proposed definition of ''entity'' should not cross-reference the definition of ''person'' in section 1a of the CEA because the CEA defines ''person'' to include individuals (*i.e.,* natural persons), as well as entities.[456] MGEX argued that the definition of ''entity'' should not apply to individuals.[457] FIA stated that, for purposes of the 2020 NPRM, it is unclear whether the cross-reference to the definition of ''person'' in section 1a of the CEA is meant to be limited to non-natural persons.[458] If so, FIA recommended that the Commission amend the definition of ''entity'' to refer only to the non-natural persons listed in the definition of ''person'' under section 1a of the CEA.[459] Further, FIA suggested that provisions in part 150 that are applicable to both natural and non-natural persons should refer to ''persons'' and those that apply to only non-natural persons should refer to ''entity.'' [460]

[453] *See* 17 CFR 150.1(d).

[454] 7 U.S.C. 1a(38).

[455] FIA at 26; MGEX at 2.

[456] *Id.*

[457] MGEX at 2.

[458] FIA at 26.

[459] *Id.*

[460] *Id.*

iii. Discussion of Final Rule—Entity

The Commission declines to adopt the commenters' suggestion to carve ''individuals'' out of the proposed definition of ''entity'' or to otherwise differentiate between ''person(s)'' and ''entity(ies)'' for purposes of part 150 of the Final Rule. The proposed definition of ''entity'' expressly included ''individuals'' and neither commenter explained why individuals should be excluded from the definition and why the CEA's statutory definition of ''person'' is inappropriate. Accordingly, the Commission is adopting the definition of ''entity'' as proposed.

8. ''Excluded Commodity''

i. Summary of the 2020 NPRM—Excluded Commodity

The phrase ''excluded commodity'' is defined in CEA section 1a(19), but is not defined or used in existing part 150 of the Commission's regulations. The Commission proposed including a definition of ''excluded commodity'' in part 150 that references that term as defined in CEA section 1a(19).[461]

ii. Comments and Summary of the Commission Determination—Excluded Commodity

No commenter addressed the proposed definition of ''excluded commodity.'' The Commission is adopting the definition as proposed.

9. ''Futures-Equivalent''

i. Background—Futures-Equivalent

The phrase ''futures-equivalent'' is currently defined in existing § 150.1(f) and is used throughout existing part 150 of the Commission's regulations to describe the method for converting a position in an option on a futures contract to an economically equivalent amount in a futures contract. The Dodd-Frank Act amendments to CEA section 4a, in part, direct the Commission to apply aggregate Federal position limits to physical commodity futures contracts and to swap contracts that are economically equivalent to such physical commodity futures contracts.

ii. Summary of the 2020 NPRM—Futures-Equivalent

In order to aggregate positions in futures, options [462] on futures, and swaps for purposes of calculating compliance with the Federal position limits set forth in the 2020 NPRM, the Commission proposed adjusting position sizes to an equivalent position based on the size of the unit of trading of the relevant core referenced futures contract. The phrase ''futures-equivalent'' is used for that purpose throughout the 2020 NPRM, including in connection with the ''referenced contract'' definition in proposed § 150.1. The Commission also proposed broadening the existing ''futures-equivalent'' definition to include references to the proposed new term ''core referenced futures contracts.'' Additionally, with respect to options, the proposed ''futures-equivalent'' definition also provided that a participant that exceeds Federal position limits as a result of an option assignment would be allowed a one-day grace period to liquidate the excess position.

[461] 7 U.S.C. 1a(19).

[462] As stated in this definition, the term ''option'' includes an option on a futures contract and an option that is a swap.

iii. Commission Determination—Futures-Equivalent

The Commission is adopting the proposed definition of ''futures-equivalent'' with one substantive modification: In addition to the 2020 NPRM's grace period in connection with position limit overages dues to option assignments, under the Final Rule, the one-day grace period would also extend to an option position that exceeds Federal position limits as a result of certain changes in the option's exposure to price changes of the underlying referenced contract, as long as the applicable option contract does not exceed such position limits under the previous business day's exposure to the underlying referenced contract. This grace period does not apply on the last day of the spot month for the corresponding core referenced futures contract.

As discussed further below, the Final Rule also includes several technical changes, including referring to an option's ''exposure'' to price changes of the underlying referenced contract and eliminating references to an option's ''risk factors'' and ''delta coefficient.'' As discussed below, the Commission believes these changes will add flexibility in assessing exposure to price changes of an option to the underlying futures contract and are not intended to reflect a substantive difference.

iv. Comments—Futures-Equivalent

Several commenters supported the proposed definition, including the one-business-day grace period related to position limit overages due to options assignments.[463] In addition to

[463] MFA/AIMA at 11; CME Group at 14; FIA at 26; and IFUS Exhibit 1 RFC 23.

supporting the proposed definition, CME Group and ICE both supported expanding the proposed definition's one business day grace period to include Federal position limit overages resulting from changes in the option's delta coefficient, noting that such a change is consistent with their respective exchange rules.[464] However, CME Group noted that exercising an in-the-money option that results in a position over the position limit should be treated as a violation if the futures-equivalent position was over the position limit based on both the previous and current day's delta.[465]

FIA sought clarification from the Commission on certain aspects of the proposed definition. FIA stated that it is unclear how a spread contract that qualifies as a referenced contract would be converted to a futures-equivalent position.[466] FIA also requested the Commission clarify which calculation method applies to swaps and options that are swaps.[467]

v. Discussion of Final Rule—Futures-Equivalent

The Commission agrees with CME Group and ICE that the one-business-day grace period also should apply to position overages in connection with changes in the current day's option's exposure to price changes of the underlying referenced contract (*e.g.,* option delta coefficient). The Commission understands that providing a one business day grace period for these situations is consistent with existing market practice. Further, consistent with CME Group's comment, a market participant will not have a grace period if the market participant's position also exceeded Federal position limits based on the previous day's exposure (including option delta coefficient). To alleviate concerns about delivery and to help prevent corners and squeezes, this one-day grace period does not apply on the last trading day of the spot month of the option's corresponding core referenced futures contract.

Additionally, the Commission is eliminating references to an option's ''risk factor'' and ''delta co-efficient'' and instead referring to an option's ''exposure'' to price changes of the underlying referenced contract.

The Commission understands that the term ''exposure'' in the present context is more commonly used by market participants. Accordingly, the Commission believes that the reference to an option's ''exposure'' to price changes of the underlying referenced contract is the technically correct term to use over ''risk factor'' or ''delta coefficient,'' which are used in the existing ''futures-equivalent'' definition. However, the Commission's use of ''exposure'' here is meant to encompass the concepts of ''risk factor'' and ''delta co-efficient.'' As a result, the Commission believes that this change provides flexibility, and is consistent with existing market practice and understanding, in assessing the exposure of an option to the price movement of futures contract and is not intended to reflect a substantive change.

Additional technical changes include the Final Rule's reference to ''futures contract'' rather than merely ''futures'' and ''entity'' rather than ''participant'' since the former terms conform to other uses in final § 150.1. The Final Rule also makes several technical changes in connection with the use of ''computed'' in the definition, and these changes are meant to clarify the meaning rather than imply a substantive change.

With respect to FIA's request for clarification regarding how a spread contract that qualifies as a referenced contract would be converted to a futures-equivalent position, the Commission recognizes the inherent challenge with converting a spread contract that qualifies as a referenced contract to a futures-equivalent position.[468] The Commission expects that a market participant will adjust such a spread contract to a futures-equivalent position consistent with existing exchange practice.

With respect to FIA's question regarding the calculation for swaps and options that are swaps, subparagraph (1) of the futures-equivalent definition applies to an option that is a swap, and subparagraph (3) of the definition applies to a swap that is not an option.

10. ''Independent Account Controller''

i. Summary of the 2020 NPRM—Independent Account Controller

The Commission adopted a revised ''independent account controller'' definition in the 2016 Final Aggregation Rule.[469] The Commission proposed no further amendments to this definition, but included that revised definition in the 2020 NPRM so that all defined terms appeared together.

11. ''Long Position''

i. Summary of the 2020 NPRM—Long Position

The phrase ''long position'' is currently defined in § 150.1(g) to mean ''a long call option, a short put option or a long underlying futures contract.'' The Commission proposed to update this definition to apply to swaps and to clarify that such positions would be on a futures-equivalent basis. This provision would thus be applicable to options on futures and swaps such that a long position would also include a long futures-equivalent option on futures and a long futures-equivalent swap.

ii. Comments and Summary of the Commission Determination—Long Position

No commenter addressed the proposed definition of ''long position.'' The Commission is adopting the definition as proposed.

12. ''Physical Commodity''

i. Summary of the 2020 NPRM—Physical Commodity

The Commission proposed to define the term ''physical commodity'' for position limits purposes. Congress used the term ''physical commodity'' in CEA sections 4a(a)(2)(A) and 4a(a)(2)(B) to mean commodities ''other than excluded commodities as defined by the Commission.''[470] The proposed definition of ''physical commodity'' thus included both exempt and agricultural commodities, but not excluded commodities.

ii. Comments and Summary of the Commission Determination—Physical Commodity

No commenter addressed the proposed definition of ''physical commodity.'' The Commission is adopting the definition as proposed.

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[464] CME Group MRAN 1907–5 states that ''[i]f a position exceeds position limits as a result of an option assignment, the person who owns or controls such position shall be allowed one business day to liquidate the excess position without being considered in violation of the limits. Additionally, if, at the close of trading, a position that includes options exceeds position limits when evaluated using the delta factors as of that day's close of trading, but does not exceed the limits when evaluated using the previous day's delta factors, then the position shall not constitute a position limit violation.'' *See* CME Group Market Regulation Advisory Notice RA1907–5 (Aug. 2, 2019), available at: *https://www.cmegroup.com/content/dam/cmegroup/notices/market-regulation/2019/08/RA1907-5.pdf*; IFUS Rule 6.13(a) similarly provides persons one business day to bring into position limits compliance any position that exceeds limits due to changes in the deltas of the options, or as the result of an option assignment.

[465] CME Group at 14.

[466] FIA at 7.

[467] FIA at 6–7.

[468] FIA at 7.

[469] *See* 17 CFR 150.1(e).

[470] 7 U.S.C. 6a(a)(2)(A) and (B).

13. ''Position Accountability''

i. Summary of the 2020 NPRM—Position Accountability

Existing § 150.5 permits position accountability in lieu of exchange position limits in certain cases, but does not define the term ''position accountability.'' The proposed amendments to § 150.5 would allow exchanges, in some cases, to adopt position accountability levels in lieu of, or in addition to, position limits. The Commission proposed a definition of ''position accountability'' for use throughout proposed § 150.5 as discussed in greater detail in connection with proposed § 150.5.

ii. Comments and Summary of the Commission Determination—Position Accountability

No commenter addressed the proposed definition of ''position accountability.'' The Commission is adopting the definition as proposed with some non-substantive technical changes related to the numbering structure. The Commission is also changing the reference of ''trader'' to ''entity'' since ''entity'' is the proper defined term in § 150.1 under the Final Rule while ''trader'' is not a defined term under § 150.1.

14. ''Pre-Enactment Swap''

i. Summary of the 2020 NPRM—Pre-Enactment Swap

The Commission proposed to create the defined term ''pre-enactment swap'' to mean any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which had not expired as of the date of enactment of the Dodd-Frank Act. As discussed in connection with proposed § 150.3 later in this release, if acquired in good faith, such swaps would be exempt from Federal position limits, although such swaps could not be netted with post-effective date swaps for purposes of complying with spot month Federal position limits.

ii. Comments and Summary of the Commission Determination—Pre-Enactment Swap

No commenter addressed the proposed definition of ''pre-enactment swap.'' The Commission is adopting the definition as proposed. For further discussion of the treatment of pre-existing positions, see Sections II.B.7. and II.C.7.

15. ''Pre-Existing Position''

i. Summary of the 2020 NPRM—Pre-Existing Position

The Commission proposed to create the defined term ''pre-existing position'' to reference any position in a commodity derivative contract acquired in good faith prior to the effective date of a final Federal position limit rulemaking. Proposed § 150.2(g) would set forth the circumstances under which Federal position limits would apply to such positions.

ii. Comments and Summary of the Commission Determination—Pre-Existing Position

No commenter addressed the proposed definition of ''pre-existing position.'' The Commission is adopting the term ''pre-existing position'' as proposed. However, the Commission did receive comments related to the treatment of certain pre-existing positions. For further discussion of the treatment of pre-existing positions and related comments, see Sections II.B.7. and II.C.7.

16. ''Referenced Contracts''

i. Background—Referenced Contracts

When a futures contract expires, all open futures contract positions in such contract are settled by physical delivery (which the Commission refers to as ''physically-settled'' herein) or cash settlement (which the Commission refers to as ''cash-settled'' herein), depending on the contract terms set by the exchange. The nine legacy agricultural contracts currently subject to Federal position limits are all physically-settled futures contracts. Deliveries on physically-settled futures contracts are made through the exchange's clearinghouse, and the delivery of the physical commodity must be consummated between the buyer and seller per the exchange rules and contract specifications. On the other hand, other futures contracts are ''cash-settled'' because they do not involve the transfer of physical commodity ownership and require that all open positions at expiration be settled by a transfer of cash to or from the clearinghouse based upon the final settlement price of the contracts.

Market participants may use the settlement price of physically delivered futures contracts as a key benchmark to price cash-market contracts and other derivatives, including so-called ''look-alike'' cash-settled derivatives (which could be futures, options on futures, or swaps contracts). Look-alike cash-settled derivative contracts are explicitly linked to the physically-settled futures contracts. A look-alike cash-settled derivatives contract has nearly identical specifications as its physically-settled counterpart, but rather than calling for delivery of the underlying commodity at expiration, the contract terms require a cash payment at expiration. Each look-alike cash-settled derivatives contract is linked by design to its respective physically-settled contract in that the final settlement value of the cash-settled contract is defined as the final settlement price of the physically-settled contract in the same commodity for the same month. Additionally, other types of cash-settled derivatives contracts may be similar to a look-alike, but the final settlement price of such contracts are determined based on a basis, or differential, to the final settlement price of the corresponding physically-settled contract.

Existing § 150.2 applies Federal position limits to the nine legacy agricultural contracts as well as to options thereon on a futures-equivalent basis, but the existing Federal framework does not include provisions to apply Federal position limits to contracts that are linked in some manner to the nine physically-settled legacy agricultural contracts. As a result, the existing Federal position limits do not apply to any cash-settled contracts, including both look-alike contracts and contracts that settle at a basis or differential to a physically-settled contract, options on such cash-settled contracts, or swaps.[471]

As the Final Rule is expanding the position limits framework to cover certain cash-settled futures contracts, options on such futures contracts, and economically equivalent swaps, for the reasons discussed below, the Commission is adopting the proposed defined term ''referenced contract,'' with modifications, for use throughout final part 150 to refer to derivatives contracts that are subject to Federal position limits.

ii. Summary of the 2020 NPRM—Referenced Contracts

The 2020 NPRM proposed a new ''referenced contract'' definition that included:

(1) Any core referenced futures contract listed in proposed § 150.2(d); (2) any other contract (futures or option on futures), on a futures-equivalent basis with respect to a particular core referenced futures contract, that is directly or indirectly linked to the price of a core referenced futures contract, or

[471] Under CEA section 1a(47)(A), an option on a swap is deemed to be a swap.

that is directly or indirectly linked to the price of the same commodity underlying a core referenced futures contract (for delivery at the same location(s)); and (3) any economically equivalent swap, on a futures-equivalent basis.

The proposed referenced contract definition thus included look-alike futures contracts and options on look-alike futures contracts (as well as economically equivalent swaps with respect to such look-alike contracts), contracts of the same commodity but different sizes (*e.g.,* mini contracts), and penultimate contracts.[472]

Additionally, the 2020 NPRM explicitly excluded from the ''referenced contract'' definition: (1) Commodity index contracts; (2) location basis contracts; (3) swap guarantees; and (4) trade options that satisfy the requirement of § 32.3 of the Commission's regulations. Further, while not in the proposed regulatory text, the Commission indicated in the preamble to the 2020 NPRM that a contract for which the settlement price is based on an index published by a price reporting agency (a ''PRA index contract'') that surveys cash-market transactions (even if the cash-market practice is to price at a differential to a futures contract) was not deemed to be ''directly or indirectly'' linked to a referenced contract, and thus that such PRA index contract also was excluded from the ''referenced contract'' definition under the 2020 NPRM.[473]

Under the 2020 NPRM, a position in a referenced contract in certain circumstances could be netted with a position in another referenced contract, including a core referenced futures contract, which as noted above is a type of referenced contract under the proposed ''referenced contract'' definition. However, to avoid evasion and undermining of the Federal position limits framework, the 2020 NPRM prohibited the use of non-referenced contracts to net down positions in referenced contracts.[474]

Finally, the 2020 NPRM also stated that, in an effort to provide clarity to market participants regarding which exchange-traded contracts would be subject to Federal position limits, the Commission anticipated publishing, and regularly updating, a list of such contracts on its website. The Commission thus proposed to publish a ''CFTC Staff Workbook,'' which would provide a non-exhaustive list of referenced contracts and may be helpful to market participants in determining categories of contracts that would fit within the referenced contract definition.

iii. Commission Determination—Referenced Contracts

The Commission is adopting the proposed ''referenced contract'' definition with the modification discussed below, as well as one technical change that the Commission believes clarifies the ''referenced contract'' definition, consistent with the intent of the 2020 NPRM.[475] Like the proposed definition, the final ''referenced contract'' definition also includes (1) the 25 core referenced futures contracts, (2) futures and options on futures that are directly or indirectly linked either to (i) the price of any other core referenced futures contract or (ii) the same commodity underlying a core referenced futures contract,[476] and (3) economically equivalent swaps. Like the 2020 NPRM, the final definition also explicitly excludes certain contract types so that these contracts may not be netted against referenced contract positions for purposes of Federal position limits (but also are not aggregated with referenced contract positions).

However, in addition to the proposed definition's exclusions of commodity index contracts, location basis contracts, swap guarantees, and trade options that satisfy the requirement of § 32.3 of the Commission's regulations, the Final Rule is modifying the 2020 NPRM's definition to also exclude two additional contract types: ''outright price reporting agency index contracts'' and ''monthly average pricing contracts.''

This section will address the following issues, including related comments, in the following order:

a. Cash-settled referenced contracts and contracts that are ''directly or indirectly'' linked to a core referenced futures contract, including cash-settled and penultimate contracts;

b. Contracts explicitly excluded from the ''referenced contract'' definition; and

c. The list of referenced contracts and the related Commission staff ''Workbook.''

The Commission is also adopting ''economically equivalent swaps,'' as proposed, as part of the final ''referenced contract'' definition. However, the Commission addresses the final ''economically equivalent swap'' definition in Section II.A.4.

a. Contracts That Are Directly or Indirectly Linked to a Core Referenced Futures Contract

(1) Summary of the 2020 NPRM—Linked to a Core Referenced Futures Contract

Paragraph (1) of the proposed referenced contract definition provided that a contract would qualify as a referenced contract if it is a core referenced futures contract, or, with respect to a particular core referenced futures contract, if it is directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of either (i) the core referenced futures contract itself or (ii) the same commodity underlying the core referenced futures contract for delivery at the same location or locations as specified in the core referenced futures contract's specifications. As the Commission explained in the 2020 NPRM, this provision included a cash-settled ''look-alike'' future or an option thereon.[477]

(2) Summary of the Commission Determination—Linked to a Core Referenced Futures Contract

The Commission is adopting as final the language in paragraph (1) of the proposed ''referenced contract'' definition. Accordingly, under paragraph (1) of the final ''referenced contract'' definition, referenced contracts include a core referenced

[472] A penultimate contract is a cash-settled contract in which trading ceases one business day prior to the settlement date of the corresponding referenced contract with which the penultimate contract is linked. With respect to penultimate contracts, the 2020 NPRM stated that ''Federal limits would apply to all cash-settled futures and options on futures contracts on physical commodities that are linked in some manner, whether directly or indirectly, to physically-settled contracts subject to Federal limits.'' Further to this general statement, the 2020 NPRM provided a footnote example of a penultimate contact that, because it cash-settles directly to a core referenced futures contract, the 2020 NPRM explained would therefore be included as a referenced contract. 85 FR at 11619.

[473] 85 FR at 11620.

[474] 85 FR at 11619. For further discussion of the Final Rule's treatment of the netting of positions, *see* Section II.B.10.

[475] The Commission is providing a clarifying technical change to the ''referenced contract'' definition in that the final definition refers to ''an option on a futures contract'' instead of ''options on a futures contract'' as proposed by the 2020 NPRM, to make clear the original intent of the Commission in the 2020 NPRM that a single option would qualify as a referenced contract.

[476] Prong (ii) encompasses physically-settled contracts that do not directly reference a core referenced futures contract but that are nonetheless based on the same commodity and delivery location as the core referenced futures contract.

[477] For example, the 2020 NPRM noted that ICE's Henry Penultimate Fixed Price Future, which cash-settles directly to NYMEX's Henry Hub Natural Gas core referenced futures contract, would be considered a referenced contract. 85 FR at 11620.

futures contract, and any cash-settled futures and options on futures that are directly or indirectly linked either to (i) the price of any other core referenced futures contract or (ii) the same commodity underlying a core referenced futures contract for delivery at the same location or locations as specified in the core referenced futures contract's specifications.[478]

Further, in response to the comments described below, the Commission is reaffirming that penultimate futures contracts and options thereon qualify as referenced contracts because they satisfy paragraph (1) of the referenced contract definition under the Final Rule.

(i) Comments—Cash-Settled Referenced Contracts

Commenters provided differing opinions as to whether linked cash-settled futures and related options should be subject to Federal position limits.[479] CME Group and NEFI supported the Commission's proposal to subject these contracts to Federal position limits.[480] According to CME Group, absent parity between cash and physically-settled contracts, artificial distortions on one side of the market could occur due to manipulations on the other side of the market, regulatory arbitrage, or liquidity drain.[481] CME Group warned that, ultimately, a lack of parity could undermine the statutory goals of position limits.[482] NEFI agreed, arguing that applying Federal position limits to cash-settled contracts is essential to guard against manipulation by a trader who holds positions in both physically-settled and cash-settled contracts for the same underlying commodity.[483]

Other commenters disagreed. PIMCO and SIFMA AMG contended that cash-settled referenced contracts should not be subject to Federal position limits at all because cash-settled contracts do not introduce the same risk of market manipulation. They argued that subjecting cash-settled referenced contracts to Federal position limits would reduce market liquidity and depth in these instruments.[484]

ISDA argued that cash-settled contracts should not be included in an immediate Federal position limits rulemaking, and should instead be deferred until the Commission has adopted Federal limits with respect to physically-delivered spot month futures contracts, and after which the Commission should revisit Federal limits for cash-settled contracts.[485]

FIA and ICE suggested that Federal position limits for cash-settled referenced contracts should apply per DCM (rather than in aggregate across DCMs).[486] FIA additionally suggested setting a separate Federal spot-month position limit for economically equivalent swaps.[487] FIA and ICE further argued that limits for cash-settled referenced contracts should be higher relative to Federal position limits for physically-settled referenced contracts. They similarly posited that cash-settled referenced contracts are "not subject to corners and squeezes" and higher limits for cash-settled contracts will " 'ensure market liquidity for *bona fide* hedgers.' "[488]

(ii) Discussion of Final Rule—Cash-Settled Reference Contracts

As a general matter, the Commission does not agree with FIA and ICE that Federal position limits should be applied at the DCM level instead of in the aggregate for the reasons discussed below under Section II.B.11.[489]

Further, the Commission addresses FIA's contention that the Commission should impose a separate Federal spot-month position limit for economically equivalent swaps in further detail above under Section II.A.4.iii.

While the Commission acknowledges commenter views to the effect that cash-settled contracts are less susceptible to effectuating corners and squeezes,[490] the Commission is of the view that generally speaking, linked cash-settled and physically-settled contracts form one market, and thus should be subject to Federal position limits. Because the settlement price of a physically delivered futures contract is used as a price benchmark in many other derivative and cash-market contracts, a change in the futures settlement price can affect the value of a trader's overall portfolio of derivative and cash-market positions. Accordingly, the link between physically delivered futures and their cash-settled derivative counterparts can create incentives for manipulation. This view is informed by the Commission's experience overseeing derivatives markets, where the Commission has observed that it is common for the same market participant to arbitrage linked cash- and physically-settled contracts, and where the Commission has also observed instances where linked cash-settled and physically-settled contracts have been used together as part of an attempted manipulation.[491]

Applying position limits to both physically delivered futures and linked cash-settled contracts, including their look-alike cash-settled derivative contracts, reduces a trader's incentive and ability to manipulate futures markets. Without position limits on

[478] Clause (ii) of this description comprises as referenced contracts any physically-settled contracts that are linked to the same commodity for delivery at the same location underlying a core referenced futures contract. The Commission believes as failure to do so could undermining this Federal position limits framework through the creation of physically-settled look-alike contracts by other exchanges. For example, without including clause (ii) above, an exchange could create a physically-settled look-alike contract, but unlike the existing core referenced futures contract, this new contract would be outside the Federal position limits framework. Such an outcome would clearly disadvantage the exchange with the existing core referenced futures contract and harm liquidity for bona fide hedgers by possibly dividing liquidity among competing physically-settled look-alike contracts, as well as provide significant incentives for market participants to trade contracts that subvert this Federal position limits framework.

[479] CME Group at 3–4; FIA at 7–8; ICE at 12; ISDA at 3–5; NEFI at 3; PIMCO at 3; and SIFMA AMG at 4–6.

[480] CME Group at 3–4 (stating "CME Group believes that economically and substantively alike contracts should be accorded the same regulatory treatment to prevent artificial distortions from opening doors for manipulators or shifting one market's liquidity to another. . . In this regard, as noted above, CME Group recommends that the Commission apply similar provisions to both cash-settled and physically settled swaps.").

[481] CME Group at 6.

[482] *Id.*

[483] NEFI at 3.

[484] PIMCO at 3; SIFMA AMG at 4–6.

[485] ISDA at 3–5.

[486] FIA at 7–8; ICE at 12.

[487] FIA 7–8.

[488] ICE at 3, 15 (also arguing that cash-settled limits should apply per exchange, rather than across exchanges); FIA at 7–8; For further discussion on the Commission's determination to generally apply Federal position limits on an aggregate basis across exchanges, *see* Section II.B.11.

[489] As discussed below, as an initial matter, the Commission interprets CEA section 4a(a)(6) as requiring aggregate Federal position limits across exchanges. However, as discussed below, the Commission is providing an exception to this general rule for natural gas pursuant to the Commission's exemptive authority under CEA section 4a(a)(7). For further discussion, *see* Sections II.B.3.vi. and II.B.11.

[490] FIA at 7, stating "Section 4a(a)(3)(B)(ii) directs the Commission to set limits as appropriate 'to deter and prevent market manipulation, squeezes and corners.' " The Commission notes that FIA provides an example as to the effect of squeezes and corners for cash-settled contracts—only two out of three of the points for which the Commission should set an appropriate limit—the third point, which is overlooked by the commenter (market manipulation) is also a statutory objective, and for the reasons described below, provides a basis for including cash-settled contracts within the Federal position limits regime.

[491] The Commission has previously found that traders with positions in a cash-settled contract may have an incentive to manipulate and undermine price discovery in the physically-settled contract to which the cash-settled contract is linked. *See, e.g., CFTC* v. *Parnon Energy Inc. et al.,* No. 1:11-cv-03543 (S.D.N.Y. 2014) (alleging defendants amassed sufficient quantity of physical WTI while contemporaneously purchasing cash-settled WTI derivatives positions on NYMEX and ICE with the intent to profit on those positions by manipulating the price of the physically-settled WTI contract).

both types of futures contracts, traders could amass a substantial position in the cash-settled look-alike contract and benefit their position by manipulating the settlement price of the physically delivered futures contracts.

Additionally, the absence of position limits on look-alike cash-settled derivative contracts would enable traders to manipulate a particular cash commodity price to benefit their cash-settled derivatives position. For example, where market conditions create a shortage of a particular commodity, that shortage should increase the price of the commodity. If markets are functioning properly, the price of the physically delivered futures contract will also increase. A trader could acquire a massive long position in the look-alike cash-settled derivative contract and profit by bidding up the cash price of an already scarce cash commodity. Thus, the trader's cash commodity positions would directly affect the price of the physically-settled futures contract and its look-alike cash-settled derivative. The trader's strategy to purchase the cash commodity and bid up its price could cause the value of the look-alike cash-settled derivative position to increase because of the direct links connecting all three markets (*i.e.,* the positions in the underlying cash commodity, the physically-settled derivative, and the cash-settled derivative). Accordingly, the absence of position limits in look-alike cash-settled derivative contracts would enable traders to effectively influence and manipulate cash prices to benefit their cash-settled derivatives position, which could impact the price of the physically-settled futures contract as well.

Additionally, excessive speculation in cash-settled derivative contracts can affect the price of the physically-settled futures contract and the underlying cash commodity and therefore harm the price discovery function of the underlying markets. That is, futures prices are determined by immediate cash commodity prices, and therefore the relationship between cash and futures prices also depends, in part, on the storage location of a particular commodity in relation to its delivery point, and should result in the correct amount of a particular commodity available at the delivery point. Thus, excessive speculation in cash-settled derivative contracts can produce excessive supplies at delivery points and a disruption of the flows of money and commodities exchanged.[492]

Accordingly, the Commission considers cash-settled referenced contracts to be generally economically equivalent to physical-delivery contracts in the same commodity. In the absence of position limits, an entity with positions in both the physically delivered and cash-settled contracts may have an increased ability and an increased incentive to manipulate one of these contracts to benefit positions in the other contract. As such, the Commission believes that it is essential to apply Federal position limits to cash-settled futures and options on futures that are directly or indirectly linked to physically-settled contracts in order to further the statutory objective in CEA section 4a(a)(3)(B)(iv) to deter and prevent market manipulation.

Furthermore, the Commission has determined that including futures contracts and options on futures contracts that are indirectly linked to the core referenced futures contract under the ''referenced contract'' definition will help prevent the evasion of position limits through the creation of an economically equivalent futures contract or option on a futures contract, as applicable, that does not directly reference the price of the core referenced futures contract. Such contracts that settle to the price of a referenced contract but not to the price of a core referenced futures contract, for example, would be indirectly linked to the core referenced futures contract.[493]

However, a physically-settled derivative contract with a settlement price that is based on the same underlying commodity at a different delivery location would not be linked, directly or indirectly, to the core referenced futures contract. By way of example, a hypothetical physically-settled futures contract on ultra-low sulfur diesel delivered at L.A. Harbor instead of the NYMEX ultra-low sulfur diesel core referenced futures contract delivered in New York Harbor would not be linked, directly or indirectly, to the core referenced futures contract because NYMEX's ultra-low sulfur diesel futures contract does not include L.A. Harbor as a possible delivery point. Therefore, the contract specification price of the hypothetical physically delivered L.A. Harbor contract would reflect the L.A. Harbor market price for ultra-low sulfur diesel and not the NYMEX contract's price.

(iii) Comments and Discussion of Final Rule—Penultimate Contracts Are a Subset of Cash-Settled Referenced Contracts

Penultimate contracts are a type of cash-settled futures contract (or an option thereon) that settles the day before the corresponding physically-settled futures contract. Penultimate contracts therefore share the same determinative attributes as the other cash-settled look-alike referenced contracts discussed above, including the fact that the settlement price of a penultimate contract is linked to the corresponding physically-settled core referenced futures contract.

In response to certain commenters requesting that the Commission exclude penultimate contracts from the 2020 NPRM's proposed ''referenced contract'' definition (discussed below), the Commission is affirming that penultimate contracts, as a type of linked cash-settled look-alike contracts, fall within the Final Rule's ''referenced contract'' definition.

Commenters were split as to whether these penultimate contracts should be included within the ''referenced contract'' definition. ICE argued that penultimate contracts, and specifically its penultimate cash-settled natural gas contract, should be excluded from position limits for several reasons, including that its natural gas penultimate contract is economically distinct from the NYMEX NG core referenced futures contract and has no ability to impact settlement of that core referenced futures contract.[494] SIFMA AMG and ISDA broadly concurred with this position.[495] In contrast, CME Group supported the inclusion of penultimate contracts within the definition of

[492] For example, manipulated ''higher'' futures contract prices in a cash-settled futures contract can spill over into ''lower'' prices for a physically-settled futures contract through arbitrage trades between the two futures contracts. Traders arbitraging between the cash-settled and physically-settled futures contracts would short the ''higher priced'' cash-settled and long the ''lower-priced'' physically-settled futures contracts until an equilibrium price is achieved. However, that equilibrium price may be distorted due to the manipulation occurring in the higher priced cash-settled contract, and as a result the physically-settled contract would have an artificially higher price relative to the actual cash-market price of the underlying commodity. That higher futures contract price would then act as a false price signal to the underlying cash commodity market, thus incentivizing owners of the cash commodity to increase supplies at the delivery points for the physically-settled futures contract. Accordingly, excessive speculation in cash-settled derivative contracts can produce excessive supplies at delivery points and a disruption of liquidity, price discovery, and distribution of the underlying cash commodities.

[493] As discussed above, the Commission adopted an ''economically equivalent swap'' definition that is narrower than the class of futures contracts and option on futures contracts that would be included as referenced contracts. For further discussion of the ''economically equivalent swap'' definition, *see* Section II.A.4.

[494] ICE at 13–14.

[495] ISDA at 9; SIFMA AMG at 10–11.

referenced contract.[496] As the Commission outlined above, its ''one market'' view applies to cash-settled contracts that are linked in some manner to physically-settled contracts. Penultimate futures contracts (including options thereon), as a type of linked cash-settled contract, have the same relation to their physically-settled counterparts as discussed above for other linked cash-settled contracts. The Commission therefore is applying Federal position limits to all of these instruments.

In support of its view that penultimate contracts should not be subject to Federal position limits, ICE offered the example of the Henry Hub LD1 (''H'') futures contract (which has an exchange-set spot-month position limit) and the Henry Hub Penultimate (''PHH'') futures contract (which has exchange-set position accountability), stating that these contracts trade side-by-side, and that there has been no evidence of a migration to the penultimate contract due to the presence of an accountability level rather than a hard spot-month position limit. According to ICE, this suggests that the Commission need not be concerned about an arbitrage opportunity between the two.[497]

However, in further support of its argument that penultimate contracts should not be subject to Federal position limits, ICE suggested that penultimate contracts ''empirically'' are not economically the same as the last day contract, as demonstrated by settlement prices.[498] To that end, the Commission reviewed the settlement prices of NYMEX NG (the physically settled natural gas core referenced futures contract), H (the ICE LD1 natural gas contract cash-settled to the NYMEX NG), and PHH (the ICE natural gas penultimate contract cash-settled to the NYMEX NG).[499] Contrary to the empirical assertion made by ICE, the prices of the six near-month contracts for each of the contracts described above settled at *identical* prices on the relevant penultimate day for all contracts at all months.[500] As reinforced by this observation, the Commission agrees with the commenter that the penultimate contract is tightly correlated (and trades side-by-side) with the cash-settled contract, as well as being demonstrated here, with the physically settled futures contract.

However, it is not in spite of this tight correlation, but rather because of it, that the Commission considers these contracts to form one market, and as such, raises the importance of Federal position limits for these instruments. As noted above, the Commission believes that Federal position limits should apply to all contracts covered by the Final Rule's ''referenced contract'' definition, including all varieties of linked cash-settled contracts, such as linked penultimate contracts, given the linkages between the physically-settled contract, the cash-settled contract (including penultimate contracts), and the underlying cash-market commodity, and the incentives and opportunities for market manipulation that those linkages create.

b. Exclusions From the Referenced Contract Definition

(1) Summary of the 2020 NPRM—Exclusions From the Referenced Contract Definition

In the 2020 NPRM, paragraph (3) of the proposed ''referenced contract'' definition explicitly excluded: (1) A location basis contract; (2) a commodity index contract; (3) a swap guarantee; and (4) a trade option that meets the requirements of Commission regulation § 32.3. The 2020 NPRM also included guidance in proposed Appendix C setting forth additional clarification regarding the types of contracts that would qualify as either a location basis contract or a commodity index contract for purposes of the proposed exclusions from the ''referenced contract'' definition.

(2) Summary of the Commission Determination—Exclusions From the Referenced Contract Definition

The Commission is adopting paragraph (3) of the 2020 NPRM's proposed ''referenced contract'' with the following changes. In addition to excluding the contracts mentioned above, the Final Rule is modifying paragraph (3) to additionally exclude ''outright price reporting agency index contracts'' and ''monthly average pricing contracts'' from the ''referenced contract'' definition. To the extent a contract fits within one of the excluded contracts in paragraph (3), such contract is not a referenced contract, is not subject to Federal position limits, and could not be used to net down positions in referenced contracts (but also is not required to be added to referenced contract positions when determining compliance with Federal position limits).

In order to clarify the types of contracts that qualify as location basis contracts and commodity index contracts, and thus are excluded from the ''referenced contract'' definition, the Commission also is adopting, with modifications described below, the guidance with respect to these instruments in Appendix C to part 150 of the Commission's regulations. This guidance includes information to help define the parameters of the terms ''location basis contract'' and ''commodity index contract.''[501] To the extent a particular contract fits within this guidance, such contract would not be a referenced contract, would not be subject to Federal position limits, and could not be used to net down positions in referenced contracts.[502] Unlike the 2020 NPRM, the final guidance in Appendix C will also include additional information regarding the definition of the terms ''outright price reporting agency index contracts'' and ''monthly average pricing contracts.''

Comments on these topics, and the Commission's responses, are set forth below.

(3) Comments—Exclusions From the Referenced Contract Definition

On balance, commenters were generally supportive of the 2020 NPRM's proposed exclusions from the referenced contract definition.[503]

(i) Location Basis Contracts

Commenters that provided an explicit opinion about location basis contracts were unanimously supportive of the Commission excluding such contracts from the definition of a referenced contract.[504]

[496] CME Group at 3–4 (arguing that ''economically and substantively alike contracts should be accorded the same regulatory treatment to prevent artificial distortions from opening doors for manipulations or shifting one market's liquidity to another.'').

[497] ICE at 14.

[498] *Id.*

[499] Commission review of these contracts as of August 4, 2020, based on data submitted to the Commission pursuant to part 16 of the Commission's regulations.

[500] The six near-month contracts reviewed by the Commission are as follows: Sep20, Oct20, Nov20, Dec20, Jan21, and Feb21, for each of NYMEX NG, H, and PHH. The Commission does not compare the spot-day price on the last day of trading of the NYMEX NG contract with the penultimate PHH contract since by definition the PHH contract settles on the penultimate day—that is, PHH settles on the day before NYMEX NG's last day of trading and therefore there is no PHH price to compare against the NYMEX NG price on NYMEX NG's last day of trading.

[501] The Commission notes that the further definition of parameters regarding a commodity index contract is responsive to the Better Markets comment letter suggesting such additional clarifications. Better Markets at 34.

[502] *See infra* Section II.B.10. (discussion of netting).

[503] AGA at 9; CHS at 2; FIA at 2; ICE at 10–11; NCFC at 2.

[504] AGA at 9; ICE at 10.

(ii) Commodity Index Contracts

Commenters were divided, however, regarding the exclusion of commodity index contracts. Better Markets and IATP opposed the exclusion,[505] while ICE and PIMCO supported it.[506] Better Markets concurred with the view expressed by the Commission in the 2020 NPRM that commodity index contracts should not be permitted to net down referenced contract positions, but in lieu of the Commission's proposal to exclude commodity index contracts as referenced contracts, Better Markets suggested in the alternative that the Commission adopt individual limits for commodity index contracts for persons also involved in physically-settled contracts on physical commodities serving as a constituent in the applicable index.[507] IATP cited several studies, including one published by Better Markets, contending that commodity index contracts have price impacts that are detrimental to commercial hedgers.[508] IECA stated that the passive speculation provided by commodity index contracts is harmful to the price discovery function of the market.[509]

In contrast, PIMCO argued in favor of the exclusion for commodity index contracts, contending that commodity index contracts are useful tools for investors looking for broad-based portfolio hedging or to take a view on price trends in the commodity markets.[510]

(iii) Trade Options

All commenters offering a specific opinion regarding trade options unanimously supported the exclusion of trade options from the definition of referenced contract.[511]

[505] Better Markets at 34, 46; IATP at 7–8 (citing studies which they believe demonstrate that commodity index trading harms commercial hedgers).

[506] ICE at 2; PIMCO at 5.

[507] Better Markets at 46.

[508] IATP at 7–8 (citing David Frenk and Wallace Turbeville, ''Commodity Index Traders: Boom and Bust in Commodity Prices,'' Better Markets, October 2011, at 15). *https://bettermarkets.com/sites/default/files/Better%20Markets%20Commodity%20Index%20Traders%20and%20Boom-Bust%20in%20Commodities%20Prices.pdf*.

[509] Industrial Energy at 3–4, suggesting a ban on natural gas commodity index contracts, which functionally equates to a Federal position limit of zero, or alternatively a limit to not exceed the current percentage of the physical market.

[510] PIMCO at 5.

[511] AGA at 8; CCI at 2; EPSA at 3–4; NGSA at 4; NRECA at 17; CEWG at 4; Chevron at 3; CHS at 2; FIA at 2; NCFC at 2; NGSA at 4; and Suncor at 3.

(iv) Swap Guarantees

Similarly, commenters supported the exclusion of swap guarantees from the definition of reference contract.[512]

(v) Outright Price Reporting Agency Index Contracts

FIA and ICE further recommended that the Commission should exclude any outright contracts whose settlement price is based on an index published by a price reporting agency that surveys cash-market transaction prices from the ''referenced contract'' definition.[513]

(vi) Monthly Average Pricing Contracts

CME Group commented that because a significant amount of commerce is transacted on a monthly average basis, and that because monthly average pricing contracts are calculated using the daily prices during the contract month such that a final settlement price of a core referenced futures contract would have the same weight as the other twenty or more daily prices used in the monthly average price calculation, it would be extremely unlikely for monthly average pricing contracts to be used to manipulate or benefit from a manipulation during the spot period. Thus, CME Group argued monthly average pricing contracts should also be excluded from the definition of referenced contracts.[514]

(vii) Additional Basis, Differential, and Spread Contracts

ICE recommended that certain other contracts, such as additional basis and spread contracts, should generally be excluded from the definition of a referenced contract, even if the contracts reference a core referenced futures contract as one component.[515]

(4) Discussion of Final Rule—Exclusions From the Referenced Contract Definition

The Commission is finalizing as proposed the exclusions from the referenced contract definition for location basis contracts, commodity index contracts, swap guarantees, and trade options that meet the requirements of § 32.3. Further, as noted above, the Commission is expanding prong (3) of the proposed referenced contract definition to additionally exclude two other contract types: ''outright price reporting agency index contracts'' and ''monthly average pricing contracts.''

[512] CHS at 2; FIA at 2; NCFC at 2, offering general support for excluding swap guarantees, but not providing a specific rationale for doing so.

[513] FIA at 6; ICE at 10–11.

[514] CME Group at 13.

[515] ICE at 12; *see also* FIA at 4 (recommending that the spread transaction definition should be expanded to exempt additional, commonly used spreads). For further discussion on the ''spread transaction'' definition, *see* Section II.A.20.

(i) Location Basis Contracts

The Commission has determined that, unless location basis contracts are excluded from the ''referenced contract'' definition, speculators would be able to net portions of their location basis contracts with outright positions in one of the locations comprising the core referenced futures contract, which would permit extraordinarily large speculative positions in the outright core referenced futures contract.[516] For example, the 2020 NPRM explained that a large outright position in NYMEX Henry Hub Natural Gas (NG) futures contracts could not be netted down against a location basis contract that cash-settles to the difference in price between the Gulf Coast Natural Gas futures contract and the NYMEX NG futures contract.[517] Absent this exclusion, a market participant could increase its exposure in the outright contract by using the location basis contract to net down against its NYMEX NG futures position, thereby allowing the market participant to further increase the outright NYMEX NG futures contract position that would otherwise exceed the Federal position limits.

While excluding location basis contracts from the referenced contract definition would prevent the circumstance described above, it would also mean that location basis contracts would not be subject to Federal position limits. The Commission is comfortable with this outcome because location basis contracts generally demonstrate minimal volatility and are typically significantly less liquid than the core referenced futures contracts, meaning, in the Commission's estimation, it is less likely that a potential manipulator would be able to effect a market manipulation using these contracts. Further, excluding location basis contracts from the referenced contract definition may allow commercial end-users to more efficiently hedge the cost of commodities at their preferred location to the extent they may frequently require the physical commodity at a location other than the core referenced futures contract's specified contract delivery point.

(ii) Commodity Index Contracts

With respect to commodity index contracts, the Commission similarly has

[516] *See infra* Section II.B.10. (discussion of netting).

[517] 85 FR at 11620.

determined that excluding commodity index contracts from the ''referenced contract'' definition will ensure that market participants cannot use a position in a commodity index contract to net down an outright position in a referenced contract that was a component of the commodity index contract.

Regarding Better Markets' and IATP's requests that the Commission alter the proposed ''referenced contract'' definition to include commodity index contracts (*i.e.,* to remove commodity index contracts from the list of excluded contracts in paragraph (3) of the ''referenced contract'' definition), the Commission notes that if it did not exclude commodity index contracts, the Commission's rules would allow speculators to take on massive outright positions in referenced contracts by netting against a position in a commodity index contract, which could lead to excessive speculation.

For example, the Commission understands that it is common for swap dealers to enter into commodity index contracts with participants for which the contract would not qualify as a bona fide hedging position (*e.g.,* with a pension fund). Failing to exclude commodity index contracts from the referenced contract definition could enable a swap dealer to use positions in commodity index contracts to net down offsetting outright futures positions in the components of the index. Additionally, this would have the effect of subverting the statutory pass-through swap provision in CEA section 4a(c)(2)(B), which is intended to foreclose the recognition of positions entered into for risk management purposes as bona fide hedges unless the swap dealer is entering into positions opposite a counterparty for which the swap position is a bona fide hedge.[518]

The Commission recognizes that although excluding commodity index contracts from the ''referenced contract'' definition would prevent the potentially risky netting circumstance described above, it would also mean that commodity index contracts would not be subject to Federal position limits. The Commission concludes that this is an acceptable outcome because the contracts comprising the index would themselves be subject to limits, and because commodity index contracts generally tend to exhibit low volatility since they are diversified across many different commodities.

With respect to Better Markets', ICEA's, and PMAA's requests to impose separate standalone, or aggregate, position limits on commodity index contracts, the Commission does not believe doing so is useful to the extent that the individual components of a commodity index contract are subject to Federal position limits under the Final Rule. The Commission also is concerned that adopting a standalone limit for a commodity index contract could inadvertently limit transactions in commodity derivatives contracts outside the Final Rule's scope. Specifically, a commodity index contract may contain components that are subject to Federal position limits, as well as additional components that are not. If the Commission were to place standalone limits on these commodity index contracts, it would impose *de facto* constraints on commodity derivative contracts that are not intended to be the subject to the Final Rule and for which the Commission has not found position limits to be necessary.

(iii) Trade Options

The Commission also is finalizing, as proposed, the exclusion of trade options that meet the requirements of § 32.3 from the definition of referenced contract. The Commission has traditionally exempted trade options from a number of Commission requirements because trade options are typically employed by end-users to hedge physical risk and thus do not contribute to excessive speculation. Trade options are not subject to position limits under current regulations, and the proposed exclusion of trade options from the referenced contract definition would simply codify existing practice.[519]

(iv) Swap Guarantees

The Commission additionally is excluding, as proposed, swap guarantees from the ''referenced contract'' definition. In connection with further defining the term ''swap'' jointly with the Securities and Exchange Commission in the ''Product Definition Adopting Release,'' [520] the Commission interpreted the term ''swap'' (that is not a ''security-based swap'' or ''mixed swap'') to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position.[521] Excluding guarantees of swaps from the definition of ''referenced contract'' will help avoid any potential confusion regarding the application of position limits to guarantees of swaps. The Commission understands that swap guarantees generally serve as insurance, and, in many cases, swap guarantors guarantee the performance of an affiliate in order to entice a counterparty to enter into a swap with such guarantor's affiliate. As a result, the Commission believes that swap guarantees do not contribute to excessive speculation, market manipulation, squeezes, or corners. Furthermore, the Commission believes that swap guarantees were not contemplated by Congress when Congress articulated its policy goals with respect to position limits in CEA section 4a(a).[522] Accordingly, the Commission is finalizing the exclusion of swap guarantees from the definition of ''referenced contract.''

(v) New Exclusions from the ''Referenced Contract'' Definition—Price Reporting Agency Index Contracts and Monthly Average Pricing Contracts

Finally, the Commission is modifying prong (3) of the proposed ''referenced contract'' definition to additionally exclude from the Final Rule: (a) Monthly average pricing contracts and (b) outright price reporting agency index contracts.

(a) Monthly Average Pricing Contracts

In response to commenter suggestions, the Commission is providing non-binding guidance in Appendix C to this Final Rule to assist market participants and exchanges in determining whether a particular contract qualifies as a ''monthly average pricing contract,'' that the Final Rule is excluding from the ''referenced contract'' definition. Specifically, in response to Question 15 of the 2020 NPRM, CME Group commented that contract types that are generally referred to in industry nomenclature as calendar-month average (''CMA''), trade-month average (''TMA''), and balance-of-the-month (''BALMO'') contracts should be excluded from the list of referenced contracts and subject solely to exchange-set position limits.[523] CME

[518] 7 U.S.C. 6a(c)(2)(B).

[519] In the trade options final rule, the Commission stated its belief that Federal position limits should not apply to trade options, and expressed an intention to address trade options in the context of any final rulemaking on position limits. *See* Trade Options, 81 FR at 14971.

[520] *See generally* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208 (Aug. 13, 2012) (''Product Definitions Adopting Release'').

[521] 77 FR at 48226.

[522] To the extent that swap guarantees may lower costs for uncleared OTC swaps in particular by incentivizing a counterparty to enter into a swap with the guarantor's affiliate, excluding swap guarantees may improve market liquidity, which is consistent with the CEA's statutory goals in CEA section 4a(a)(3)(B) to ensure sufficient liquidity for bona fide hedgers when establishing its position limit framework.

[523] CME Group at 13.

Group explains the prevalence of these contracts in the market, and notes an example of the June 2020 monthly average contract (in which there are 22 U.S. business days and thus 22 daily referenced prices incorporated into the calendar month average), concluding that it is difficult to manipulate a CMA. CME Group thus posits that excluding CMAs would not incentivize manipulation of the underlying core referenced futures contract.[524]

As an initial matter, the Commission's addition of the new term ''monthly average pricing contracts'' to Appendix C of this Final Rule is intended to generally cover the types of contracts addressed in CME Group's comments, which are generally referred to in the industry as ''CMAs,'' ''TMAs,'' and ''BALMOs.'' The Commission agrees with CME Group's rationale. The Commission understands that because the final settlement price of a core referenced futures contract is only one of many pricing points that constitute that monthly average, and as such generally has a relatively insignificant impact on such core referenced futures contract's monthly average price, it therefore also has a relatively insignificant impact on the settlement price of the corresponding monthly average pricing contract. Accordingly, the Commission concludes that on balance, excluding monthly average pricing contracts from the definition of referenced contract is consistent with the statutory goals in CEA section 4a(a)(3), including with respect to ensuring sufficient market liquidity for bona fide hedgers due to: (1) The difficulty and expense of any entity artificially moving the price of the monthly average by manipulating one or more component prices within the contract; and (2) the widespread use and utility of these contracts to commercial entities to hedge their risk. The Commission provides non-binding guidance in Appendix C of the Final Rule to assist market participants and exchanges in determining whether a particular contract qualifies as a ''monthly average pricing contract.''

(b) Outright Price Reporting Agency Index Contracts

The Commission is also modifying prong (3) of the proposed ''referenced contract'' definition to explicitly exclude ''outright price reporting agency index contracts.'' ICE supported the exclusion of such contracts in its comment letter.[525] Further, FIA also commented that it believed that a price reporting agency index contract is outside the definition of a referenced contract.[526]

The Commission agrees with ICE and FIA and confirms this understanding. The Commission explained in the 2020 NPRM that based on its plain reading, the ''referenced contract'' definition excluded such contracts because outright price reporting agency index contracts were not ''directly or indirectly'' linked to the price of a referenced contract.[527] The Commission reaffirms its conclusion that an ''outright price reporting agency index contract,'' which is based on an index published by a price reporting agency that surveys cash-market transaction prices (even if the cash-market practice is to price at a differential to a futures contract), is not directly or indirectly linked to the corresponding referenced contract. The Commission is modifying the final ''referenced contract'' definition to explicitly exclude such contracts for the sake of regulatory certainty. Similar to the other contracts excluded from the ''referenced contract'' definition, the Commission is providing non-binding guidance in Appendix C of the Final Rule to assist market participants and exchanges in determining whether a particular contract qualifies as an ''outright price reporting agency index contract'' and therefore is excluded as a referenced contract. The Commission underscores that this exclusion applies only to ''outright'' price reporting agency index contracts, and that a contract that settles to the *difference* (*i.e.,* settled at a basis) between a referenced contract and the price reporting agency index would be directly linked, and thus would qualify as a referenced contract, because it settles in part to the referenced contract price.

Since the Commission stated in the preamble to the 2020 NPRM that an outright price reporting agency index contract does not qualify as a ''referenced contract,'' the Commission does not believe that the Final Rule's modification to explicitly exclude the term in the regulatory definition of ''referenced contract'' represents a change in policy. Instead, it is merely a technical change to the regulatory text to provide regulatory clarity to market participants.

(vi) Additional Basis, Differential, and Spread Contracts

Regarding ICE's comment that additional basis, differential, and spread contracts should generally be excluded from the ''referenced contract'' definition,[528] the Commission notes a heightened concern with potential manipulation through the use of outright positions (particularly through inappropriate netting) and spreads, compared to location basis contracts or commodity index contracts.[529] Notably, and as described in greater detail above, the Commission views the constraints on the liquidity and volatility associated with location basis and commodity index contracts as not present to an equal degree in other basis and spread contracts. As noted above, while excluding location basis contracts and commodity index contracts from the referenced contract definition could permit large outright positions in such contracts, the Commission believes that excluding these contracts will nonetheless prevent the potentially risky and inappropriate netting of a core referenced futures contract described above. Further, as stated above, the Commission believes that location basis contracts generally demonstrate minimal volatility and are typically significantly less liquid than the core referenced futures contracts, meaning they would be more costly to try to use to manipulate a core referenced futures contract. Similarly, with respect to commodity index contracts, commodities comprising the index could themselves be subject to Federal position limits, and commodity index contracts also generally tend to exhibit low volatility since they are diversified across many different commodities.

Additionally, it is unclear from ICE's discussion what additional contract types that ICE has in mind, other than outright price reporting agency index contracts that the Commission discusses above, since several of the examples provided by ICE may already be exempt under the ''spread transaction'' definition (*e.g.,* the spread examples provided by ICE[530] may qualify for a spread exemption under the Final Rule as either a quality differential spread or an inter-commodity spread). ICE also stated that the requirement that a spread exemption be approved by the exchange seems unnecessary and is probably unworkable, but did not provide any arguments as to why obtaining exchange approval would be unnecessary.[531]

[524] *Id.*

[525] ICE at 10.

[526] FIA at 6.

[527] 85 FR at 11620.

[528] ICE at 12, noting contracts that capture the differential between different grades of a commodity (*e.g.,* WTI vs. sour crude) or between different but related commodities (*e.g.,* a crack differential) as examples of contracts it believes should excluded.

[529] *See* 78 FR at 75696–75697.

[530] ICE at 12.

[531] For further discussion of the ''spread transaction'' definition, *see* Section II.A.20.

Additionally, the Commission notes that under the Final Rule, an exemption for any spread that is included in the ''spread transaction'' definition is self-effectuating for purposes of Federal position limits, and, unlike the role that exchanges may play with respect to non-enumerated bona fide hedges in final § 150.9, exchanges have no analogous role with respect to spread exemptions for Federal position limits purposes under the Final Rule.

iv. List of Referenced Contracts

a. Summary of the 2020 NPRM—List of Referenced Contracts

In order to provide clarity to market participants, the Commission proposed to publish, and anticipated regularly updating, a *CFTC Staff Workbook of Commodity Derivative Contracts under the Regulations Regarding Position Limits for Derivatives* (the ''Staff Workbook'') on the Commission's website which would list exchange-traded products that are subject to Federal position limits. In order to ensure that the list remained accurate, the Commission also proposed changes to certain provisions of part 40 of its regulations, which pertain to the collection of position limits information through the filing of product terms and conditions.

In particular, under existing §§ 40.2, 40.3, and 40.4, DCMs and SEFs must submit certain requirements related to the listing of certain new products. Many of the required submissions include the product's ''terms and conditions,'' as defined in § 40.1(j), which in turn includes under § 40.1(j)(1)(vii) ''Position limits, position accountability standards, and position reporting requirements.''

The Commission proposed to expand § 40.1(j)(1)(vii), which addresses futures contracts and options contracts, to also include an indication as to whether the submitted contract meets the ''referenced contract'' definition in proposed § 150.1. If so, proposed § 40.1(j)(1)(vii) required the submission to also include the name of the core referenced futures contract on which the submitted new product is based.

The Commission further proposed to expand § 40.1(j)(2)(vii), which addresses swaps, to require the applicant to indicate whether the submitted contract meets the proposed ''economically equivalent swap'' definition in § 150.1. If so, proposed § 40.1(j)(2)(vii) similarly required the submission to include the name of the referenced contract to which the swap is economically equivalent.

b. Comments and Summary of the Commission Determination—List of Referenced Contracts

The Commission is adopting as final the 2020 NPRM's amendments to part 40 of its regulations with one modification that relates to filing the name of the referenced contract on which the new product is based. Part 40 and the Commission's amendments pertain to the collection of position limits information through the filing of product terms and conditions, and the publication and regular updates of exchange-traded contracts that are subject to Federal position limits.[532] The Commission notes that the Staff Workbook is intended to provide a non-exhaustive list of exchange-traded referenced contracts that are subject to Federal position limits. Although the Commission endeavors to timely update this list of contracts, the omission of a contract from the Staff Workbook does not mean that such contract is outside the definition of a referenced contract subject to Federal position limits.

While proposed § 40.1(j)(1)(vii) required the submitted futures contract (or option thereon) to also include the name of the *core referenced futures contract* on which the submitted new product is based, final § 40.1(j)(1)(vii) instead requires that the submitted product includes the name of either the core referenced futures contract or referenced contract, as applicable, on which the contract is based. This is because, as discussed above under the ''referenced contract'' definition, a referenced contract could be indirectly or directly linked to another referenced contract that is not a core referenced futures contract. For example, an options contract could be based on a cash-settled look-alike or penultimate futures contract that is a referenced contract rather than on the physically-settled core referenced futures contract.

The Commission's concurrent publication of the Staff Workbook will provide a non-exhaustive list of exchange-traded referenced contracts, and will help market participants in determining categories of contracts that fit within the referenced contract definition. This effort is intended to provide clarity to market participants regarding which exchange-traded contracts are subject to Federal position limits.

The proposed amendments to part 40 to specify new referenced contracts generally received support.[533] ICE noted the need for clear guidance on how new contracts will be assessed, in order to determine whether such contracts will be referenced contracts, and make consistent determinations with respect to economically similar products.[534] Although commenters also generally supported the publication of the Workbook, many suggested modifications, including clarifications regarding which contracts are included as referenced contracts, and the basis for making such determinations.[535] The Commission believes that the amendments to part 40 will allow the Commission to consistently and accurately assess whether contracts should be included within the Staff Workbook. The Commission also believes that by providing regular updates to the Staff Workbook, market participants will have accurate and consistent information to assess whether such contracts are subject to Federal position limits. Additionally, the Staff Workbook will provide a linkage between each referenced contract, and either the core referenced futures contract or referenced contract, as applicable, to which it is linked, to aid in market participants' understanding of the Commission's determination.

Alternatively, some commenters suggested that the Staff Workbook could include a list of all contracts Commission staff finds are *not* referenced contracts,[536] and CME Group and ICE each provided a list of contracts they believe should be excluded from the Staff Workbook.[537]

The Commission believes that by providing a Staff Workbook listing core referenced futures contracts, and the referenced contracts that are directly or indirectly related to them, the Commission is presenting a list of contracts subject to Federal position limits in the clearest possible fashion. Additionally, the amendments to part 40 will allow regular and accurate updates to this list.

Some commenters expressed concern that the Staff Workbook lists contracts that are not referenced contracts,[538] or

[532] As discussed above, the Commission will provide market participants with reasonable, good-faith discretion to determine whether a swap would qualify as economically equivalent for Federal position limit purposes. Due to differences between OTC swaps and exchange-traded futures contracts and options thereon, the Staff Workbook would not include a list of economically equivalent swaps. For further discussion, *see supra* Section II.A.4. (discussion of economically equivalent swaps).

[533] AGA at 10; MFA/AIMA at 4.

[534] ICE at 12.

[535] AGA at 10; MFA/AIMA at 9; FIA at 6; Chevron at 14; Suncor at 14; and CEWG at 29–30.

[536] FIA at 6; MFA/AIMA at 9.

[537] CME Group at 13; ICE at 12.

[538] FIA at 6; ICE at 9–12. ICE is specifically concerned that the proposed workbook contains

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provided examples asking for clarification.[539] One commenter recommended that the Commission appoint a task force to develop a comprehensive baseline list of referenced contracts listed for trading on exchanges.[540]

The Commission believes that Commission staff (as opposed to a taskforce) is best positioned to continually refine the Workbook through accurate, timely updates, as aided by the additional information required by the newly adopted amendments to part 40 under the Final Rule.

Further, some commenters believed that the Commission should require exchanges to publish and maintain a definitive list of referenced contracts (other than economically equivalent swaps).[541] While CME Group did not believe that the Commission should impose such a requirement on exchanges, it supported coordinating with the Commission to ensure consistency, and publishing this information on CME Group's website.[542]

The Commission believes that publication of the Staff Workbook on the *www.cftc.gov* website will provide a centralized location for market participants to assess whether certain instruments are subject to Federal position limits. Although the Commission is encouraged that exchanges may provide redundancy in also publishing this list of core referenced futures contracts and related referenced contracts listed for trading on their respective exchanges, the Commission is not adopting a requirement for exchanges to publish this information at this time.

Finally, CME Group contended that for commodities with only spot month limits, financially-settled futures and options contracts should be excluded from the Staff Workbook and not subject to Federal position limits if the final settlement/expiry of the cash-settled futures or option occurs before the spot month period of its core referenced futures contract begins. CME Group additionally asserted that option contracts that exercise into physically-settled core referenced futures contracts should be included in the Staff Workbook and subject to Federal position limits even if final settlement/expiry of the option occurs before spot month period begins.

The Commission agrees with both of CME Group's assertions with one exception. While the Commission agrees that cash-settled futures contracts and options on such futures contracts that are non-legacy contracts (*i.e.,* the 16 core referenced futures contracts that will not have Federal non-spot position limits) and settle or expire prior to when the spot month limits would become effective in the spot period are not subject to Federal spot month position limits, such futures and options contracts do qualify as referenced contracts based on the settlement price being linked to a core referenced futures contract. However, because the corresponding 16 core referenced futures contracts are not subject to non-spot month Federal position limits, then these cash-settled futures contracts and options contracts similarly are also not subject to Federal position limits during the non-spot month. Accordingly, as contracts not subject to Federal spot or non-spot month position limits, these contracts will not be included in the Staff Workbook, even if such contracts qualify as referenced contracts. The Commission further agrees that options that exercise into the physically-settled core referenced futures contract are within the definition of referenced contract because when the options are exercised, they become positions in the core referenced futures contract.

The Commission is clarifying that it will publish a revised Staff Workbook shortly after the publication of this Final Rule on the Commission's website and before the Final Rule's Effective Date. This revised Staff Workbook will reflect the revised ''referenced contract'' definition, clarify CME Group's discussion with respect to options discussed in the immediately above paragraph, and generally fix any errors identified by commenters.

17. ''Short Position''

i. Summary of the 2020 NPRM—Short Position

The Commission proposed to expand the existing definition of ''short position,'' currently defined in § 150.1(h), to include swaps and to clarify that any such positions would be measured on a futures-equivalent basis.

ii. Comments and Summary of the Commission Determination—Short Position

No commenter addressed the proposed definition of ''short position.'' The Commission is adopting the definition as proposed.

18. ''Speculative Position Limit''

i. Summary of the 2020 NPRM—Speculative Position Limit

The Commission proposed to define the term ''speculative position limit'' for use throughout part 150 of the Commission's regulations to refer to Federal or exchange-set limits, net long or net short, including single month, spot month, and all-months-combined limits. This proposed definition was not intended to limit the authority of exchanges to adopt other types of limits that do not meet the ''speculative position limit'' definition, such as a limit on gross long or gross short positions, or a limit on holding or controlling delivery instruments.

ii. Comments and Summary of the Commission Determination—Speculative Position Limit

No commenter addressed the proposed definition of ''speculative position limit.'' The Commission is adopting the definition as proposed with some non-substantive technical changes related to the numbering structure.

19. ''Spot Month,'' ''Single Month,'' and ''All-Months''

i. Summary of the 2020 NPRM—Spot Month, Single Month, and All Months

The Commission proposed to expand the existing definition of ''spot month'' to: (1) Account for the fact that the proposed limits would apply to both physically-settled and certain cash-settled contracts; (2) clarify that the spot month for referenced contracts would be the same period as that of the relevant core referenced futures contract; and (3) account for variations in spot month conventions that differ by commodity.

In particular, for the ICE Sugar No. 11 (SB) core referenced futures contract, the spot month would mean the period of time beginning at the opening of trading on the second business day following the expiration of the regular option contract traded on the expiring futures contract and ending when the contract expires. For the ICE Sugar No. 16 (SF) core referenced futures contract, the spot month would mean the period of time beginning on the third-to-last trading day of the contract month and ending when the contract expires. For the CME Live Cattle (LC) core referenced futures contract, the spot month would mean the period of time beginning at the close of trading on the first business day following the first Friday of the contract month and ending when the contract expires.

The Commission also proposed to eliminate the existing definitions of

inconsistencies, such as including location basis contracts and PRA/Price Index Contracts.

[539] Chevron at 14; CEWG at 29.

[540] CEWG at 30.

[541] MFA/AIMA at 7; Citadel at 4–5; SIFMA AMG at 11–12.

[542] CME Group at 14.

''single month'' and ''all-months'' because the definitions for those terms would be built into the proposed definition of ''speculative position limit'' described above.

ii. Comments and Summary of the Commission Determination—Spot Month, Single Month, and All Months

No commenter addressed the proposed definition of ''spot month'' or the proposed elimination of the existing definitions of ''single month'' and ''all months.'' The Commission is adopting the definition of spot month as proposed, but with a correction to reflect the proper spot month period for the Live Cattle (LC) core referenced futures contract. Final § 150.1 defines the spot month for the Live Cattle (LC) core referenced futures contract as the period of time beginning at the close of trading on the first business day following the first Friday of the contract month and ending when the contract expires. The Commission is eliminating the existing definitions of ''single month'' and ''all months'' as proposed. Finally, the Commission is adopting some non-substantive technical changes related to the numbering structure.

20. ''Spread Transaction''

i. Background—Spread Transaction, Existing § 150.3(a)(3)

In existing § 150.3(a)(3), the Commission exempts from Federal position limits ''spread or arbitrage positions,'' subject to certain restrictions, including the restriction that the spread position be outside of the spot month.[543] The existing regulations do not, however, define ''spread or arbitrage positions.'' Further, under existing regulations, spread exemptions from Federal positions limits are self-effectuating and do not require prior Commission approval. Rather, market participants must request spread exemptions from the relevant exchange(s) in advance of exceeding exchange limits.

ii. Summary of the 2020 NPRM—Spread Transaction

The Commission proposed a ''spread transaction'' definition to exempt from Federal position limits transactions normally known to the trade as ''spreads.'' The proposed definition would explicitly include common types of spread strategies, including: Calendar spreads; inter-commodity spreads; quality differential spreads; processing spreads (such as energy ''crack'' or soybean ''crush'' spreads); product or by-product differential spreads; and futures-options spreads. The proposed spread transaction definition would also eliminate the existing § 150.3(a)(3) restrictions on spread exemptions, including the restriction that spread positions be outside of the spot-month.

Under proposed § 150.3(a)(2)(i), positions that meet the ''spread transaction'' definition would be self-effectuating for purposes of Federal position limits. Separately, under proposed § 150.3(a)(2)(ii), the Commission would, on a case-by-case basis, be able to exempt any other spread transaction that was not included in the proposed spread transaction definition, but that the Commission has determined is consistent with CEA section 4a(a)(3)(B),[544] and exempted, pursuant to proposed § 150.3(b).

iii. Summary of the Commission Determination—Spread Transaction

The Commission is adopting the definition of ''spread transaction'' with certain modifications to the definition to include additional spread types, as described below, to address commenters' views and other considerations. The Commission is providing additional clarification with respect to cash-and-carry exemptions as well as the application of spread exemptions to the NYMEX NG core referenced futures contract. The Commission is also adopting Appendix G to part 150 under the Final Rule to provide additional clarifications to market participants in connection with the Commission's treatment of spread exemptions under the Final Rule.

iii. Comments—Spread Transaction

Generally, commenters requested that the Commission expand or clarify the ''spread transaction'' definition to ensure that other commonly-used spread strategies are exempted from Federal position limits, including: (1) Intra-market and inter-market spread positions;[545] (2) inter-market spread positions where the legs of the transaction are futures contracts in the same commodity and same calendar month or expiration;[546] (3) inter-market spreads in which one leg is a referenced contract and the other is a commodity derivative contract (including an OTC swap) that is not subject to Federal positions limits;[547] (4) a spread between a physically-settled position and a cash-settled position;[548] (5) a spread between two cash-settled contracts in the spot period, even if one leg is not subject to Federal position limits;[549] (6) intra-commodity spreads (including an intra-commodity spread between two cash-settled contracts or between the cash-settled and related physically-settled futures contract);[550] and (7) cash-and-carry exemptions that are currently permitted under IFUS Rule 6.29(e).[551]

[543] *See* 17 CFR 150.3(a)(3) (permitting spread or arbitrage positions that are ''between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; provided, however, that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in § 150.2.'')

[544] As noted above, CEA section 4a(a)(3)(B) provides that the Commission shall set limits ''to the maximum extent practicable, in its discretion—(i) to diminish, eliminate, or prevent excessive speculation as described under this section; (ii) to deter and prevent market manipulation, squeezes, and corners; (iii) to ensure sufficient market liquidity for bona fide hedgers; and (iv) to ensure that the price discovery function of the underlying market is not disrupted.''

[545] MFA/AIMA at 10; CMC at 7.

[546] ICE at 7.

[547] ICE at 7; FIA at 21.

[548] CME Group at 11.

[549] *Id.*

[550] CEWG at 27; FIA at 20–21 (explaining that the intra-commodity spread would acknowledge the link between the prices of cash-settled and physical delivery futures involving the same commodity). *See also* CEWG at 27; CCI at 2–3 (requesting an exemption for intra-commodity spreads that are: (1) In the same class of referenced contract, (2) across classes of referenced contracts, or (3) across markets in referenced contracts (*i.e.,* on different exchanges) in the same or different calendar months); CEWG at 27 (providing proposed revisions to the ''spread transaction'' regulatory text); CME Group at 11.

[551] FIA at 21; *see also,* IFUS at 7–9 (providing an example of a cash-and-carry exemption and describing such exemption as a type of calendar month spread where a person holds a long position in the spot month and a short position in the second nearby contract month) and IFUS Rule 6.29(e) (outlining its strict procedures that set the terms by which cash-and-carry exemptions may be permitted, including the following conditions: (i) The person seeking the exemption must provide the cost of carrying the physical commodity, the minimum spread differential at which it will enter into a straddle position in order to obtain profit, and the quantity of stocks currently owned in IFUS licensed warehouses or tank facilities; (ii) when granted a cash and carry exemption, the person receiving the exemption shall agree that before the price of the nearby contract month rises to a premium to the second contract month, it will liquidate all long positions in the nearby contract month; and (iii) block trades may not be used to establish positions upon which a cash and carry exemption request is based). IFUS further explained that it has a long history of granting cash and carry exemptions for certain warehoused contracts (specifically coffee, cocoa, and FCOJ), and that where there are plentiful supplies, these exemptions serve an economic purpose in the days leading up to the first notice day and throughout the notice period, because: (1) They help maintain an appropriate economic relationship between the nearby and next successive contract month; (2) they allow commercial market participants the opportunity to compete for the ownership of certified inventories beyond the limitations of the spot-month position limit; and (3) the holder of the exemption provides liquidity so that traders that carry short positions into the notice period without capability to deliver may exit their positions in an orderly manner. According to IFUS, if the appropriate supply and price relationship exists in a given expiry, and the exchange grants the

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In addition, commenters requested that the Commission clarify that: (1) The ''spread transaction'' definition is a non-exhaustive list, and therefore, permit exchanges to grant spread exemptions that are not covered by § 150.3(a)(2) by using the streamlined process in § 150.9 for recognizing non-enumerated bona fide hedges; [552] and (2) a calendar spread would permit a market participant to net down its positions for the purposes of Federal spot-month and single-month limits.[553]

iv. Discussion of Final Rule—Spread Transaction

The Commission is adopting the proposed definition of ''spread transaction'' with certain modifications, as described below, to address commenters' views and other considerations. First, the Commission is expanding the definition to include additional types of spreads. Second, the Commission is clarifying the treatment of cash-and-carry exemptions as permissible calendar spreads and providing additional guidance to exchanges in connection with such spreads. Third, the Commission addresses the application of spread exemptions in connection with the NYMEX NG core referenced futures contract. The Commission is also providing additional guidance on the use of exempt spread transactions in Appendix G of this Final Rule.

a. The ''Spread Transaction'' Definition Includes Several Additional Spread Types Under the Final Rule

First, the Commission is expanding the proposed ''spread transaction'' definition to make clear that the definition as finalized includes intra-market, inter-market, and intra-commodity spread positions in addition to the spread strategies listed in the proposed definition. The final ''spread transaction'' definition will cover: Intra-market spreads, inter-market spreads, intra-commodity spreads, and inter-commodity spreads, including calendar spreads, quality differential spreads, processing spreads, product or by-product differential spreads, and futures-options spreads.[554] The Commission intends for the spread transaction definition to be sufficiently broad to capture most, if not all, spread strategies currently granted by exchanges and used by market participants. The Commission believes this is consistent with, but provides more clarity than, its existing approach to spread exemptions in existing § 150.3(a)(3), which broadly exempts ''spread or arbitrage positions.'' [555]

In light of the revised ''spread transaction'' definition, the Commission expects that most spread strategies will qualify as intra-market, inter-market, inter-commodity, or intra-commodity spreads, and is providing a non-exhaustive list of the most common specific types of spread strategies that fall within those four categories. Any requests for spread exemptions that fall outside of the spread transaction definition are required to be submitted to the Commission in advance pursuant to § 150.3(b) of the Final Rule. Accordingly, the Commission has determined not to allow exchanges to grant new types of spread exemptions using the streamlined process in § 150.9 for various reasons explained below in detail under the discussion of § 150.3.[556]

In addition, considering the significant number of requests for clarification commenters submitted regarding the spread transaction definition, the Commission is providing guidance on spread transactions in Appendix G to part 150 of the Commission's regulations, as adopted in this Final Rule, to address those questions and other considerations. In particular, paragraph (a) of the guidance provides some recommended best practices for exchanges to consider when granting spread exemptions, especially during the spot period. Paragraph (a) of the guidance also reminds exchanges of their existing obligations as self-regulatory organizations, including under DCM Core Principle 5 and SEF Core Principle 6, as applicable, to implement their exchange-set limits and exemption granting processes in a way that (consistent with the rules and procedures in final § 150.5 adopted herein) [557] reduces the potential threat of market manipulation or congestion.

Moreover, paragraph (b) of the guidance clarifies that the following spread strategies are covered by the ''spread transaction'' definition: (1) Inter-market spread positions where the legs of the transaction are futures contracts in the same commodity and same calendar month or expiration; (2) spread positions in which one leg is a referenced contract and the other is a commodity derivative contract that is not subject to Federal positions limits (including OTC commodity derivative contracts, but not including commodity index contracts); [558] (3) a spread between a physically-settled position and a cash-settled position; (4) a spread between two cash-settled contracts; (5) certain cash-and-carry exemptions, subject to certain recommendations and considerations outlined in paragraph (c) of the Commission's guidance in Appendix G of this Final Rule; and (6) spreads that are ''legged in'' or carried out in two steps.

b. ''Cash-and-Carry'' Exemptions

Second, as mentioned above, paragraph (c) of the guidance recommends certain factors for exchanges to consider when granting cash-and-carry exemptions.[559] The

application, then proper application of the terms as expiry approaches will assist in an orderly expiration. IFUS 7–9; FIA at 21.

[552] ICE at 7.

[553] Citadel at 8–9.

[554] For example, trading activity in many commodity derivative markets is concentrated in the nearby contract month, but a hedger may need to offset risk in deferred months where derivative trading activity may be less active. A calendar spread trader could provide liquidity without exposing himself or herself to the price risk inherent in an outright position in a deferred month. Processing spreads can serve a similar function. For example, a soybean processor may seek to hedge his or her processing costs by entering into a ''crush'' spread, *i.e.,* going long soybeans and short soybean meal and oil. A speculator could facilitate the hedger's ability to do such a transaction by entering into a ''reverse crush'' spread (*i.e.,* going short soybeans and long soybean meal and oil). Quality differential spreads, and product or by-product differential spreads, may serve similar liquidity-enhancing functions when spreading a position in an actively traded commodity derivatives market such as CBOT Wheat (W) against a position in another actively traded market, such as MGEX Wheat.

[555] Under existing regulations, the Commission views its use of the term ''spread'' to mean the same as ''arbitrage'' or ''straddle'' as those terms are used in CEA section 4a(a) and existing § 150.3(a)(3) of the Commission's regulations. Consistent with existing regulations, the Commission's sole use of the term ''spread'' in this rulemaking is intended to also capture arbitrage or straddle strategies, and is not intended to be a substantive change from its existing regulations. The Commission notes that certain exchanges may distinguish between ''spread'' and ''arbitrage'' positions for purposes of exchange exemptions, but the Commission does not make that distinction here for purposes of its ''spread transaction'' definition.

[556] *See infra* Section II.C.4. (discussing statutory and policy reasons why the Commission will not permit exchanges to process requests for spread exemptions that are not included in the ''spread transaction'' definition using the § 150.9 process).

[557] *See infra* Section II.D. (discussing exchanges' obligations when setting exchange position limits and granting exemptions therefrom).

[558] To avoid subverting the Commission's policy on not allowing self-effectuating risk management exemptions (except through the pass-through swap provision), the spread transaction definition would not cover a spread position in which one leg is a referenced contract and the other leg is a commodity index contract, as clarified in Appendix G.

[559] As final Appendix G provides, the spread transaction definition in § 150.1 permits transactions commonly known as ''cash-and-carry'' trades whereby a market participant enters a long futures positions in the spot month and an equivalent short futures position in the following month, in order to guarantee a return that, at minimum, covers the costs of its carrying charges.

Commission understands that IFUS has granted this type of calendar spread exemption for some time, and has experience monitoring the use of such exemptions to ensure that its market operates in a manner that is consistent with the applicable DCM Core Principles.[560] The Commission has, however, previously expressed concern about these exemptions and their impact on the spot month price for a particular futures contract.[561] In particular, the Commission has explained that a large demand for delivery on cash-and-carry positions might distort the price of the expiring futures contract upwards.[562] This would particularly be a concern in those commodity markets where price discovery for the cash spot price occurred in the expiring futures contract.[563]

The Commission recognizes, however, the importance of cash-and-carry positions in the price discovery process in certain markets and reminds exchanges of their responsibility to monitor and safeguard against convergence issues that could arise related to the use of cash-and-carry exemptions. Accordingly, the Commission views these exemptions as a type of calendar spread strategy that warrants additional guidance to encourage exchanges to have suitable safeguards in place to ensure that they grant and monitor cash-and-carry exemptions in a manner that is consistent with their obligation to reduce the potential threat of market manipulation and congestion.

c. Treatment of Spread Transactions Involving NYMEX NG

Third, the Commission is providing clarification regarding the intersection of the conditional natural gas spot month limit exemption and spread exemptions permitted under § 150.3. As set forth in Appendix G, the Commission reinforces that a spread transaction exemption would not cover natural gas spot month positions that exceed the conditional natural gas spot month limit in § 150.3(a)(4) of this Final Rule. That is, a market participant cannot rely on a spread transaction exemption to hold a spot month position that would exceed the equivalent of 10,000 contracts of the NYMEX Henry Hub Natural Gas core referenced futures contract per exchange that lists a natural gas cash-settled referenced contract. Additional discussion on the natural gas conditional spot month limit exemption is provided further below.[564]

As discussed further below, in § 150.3, the Commission is providing an exemption from the Federal spot month position limit level for natural gas. The natural gas conditional spot month limit exemption allows a trader to hold up to: (1) 10,000 spot month cash-settled NYMEX NG referenced contracts per exchange that lists a cash-settled NYMEX NG referenced contract (of which there are currently three—NYMEX, IFUS, and Nodal); and (2) an additional position in cash-settled economically equivalent NYMEX NG OTC swaps that has a notional amount equal to 10,000 equivalent-sized contracts; provided, that the market participant does not hold positions in the spot month of the physically-settled NYMEX NG referenced contract.[565] The Commission adopted the Federal conditional limit for natural gas in order to avoid disrupting the well-developed, unique liquidity characteristics of the natural gas derivatives markets, in which the cash-settled natural gas referenced contracts, when combined, have significantly higher liquidity than the physically-settled natural gas contracts. The Federal conditional limit requires divestiture of the spot month physically-settled NYMEX referenced contract due to concerns about, among other things, fostering an environment that incentivizes traders to manipulate the physically-settled NYMEX NG referenced contract in order to benefit a larger cash-settled position in natural gas (*i.e.,* ''bang'' or ''mark'' the close). The Commission intends for the natural gas conditional limit's position limit levels to serve as a firm cap for the maximum amount of cash-settled natural gas spot month positions a trader can hold. The Commission clarifies that a person cannot circumvent this cap using a spread transaction exemption.

That is, the Commission believes that cash-settled natural gas positions that exceed the natural gas conditional limit in the spot month would be unusually large and could potentially have a disruptive effect on the physically-settled natural gas contract, including by inhibiting convergence at expiration. Specifically, by allowing traders to layer additional cash-settled natural gas spot month positions on top of the maximum cash-settled natural gas spot month positions permitted under the natural gas conditional limit, a person could amass an extremely large cash-settled spot month position in natural gas. This extremely large cash-settled spot month position could push prices up for cash-settled spot month contracts vis-à-vis the physically-settled spot month contracts. In response, arbitrageurs may attempt to capitalize on this price discrepancy by going short the cash-settled spot month contracts, which would have a downward pressure on the price of these contracts, and going long on the physically-settled spot month contracts, which would have an upward pressure on the price of these contracts. This upward price pressure on the physically-settled contract could potentially push the price of the physically-settled contract away from the actual cash price for the natural gas commodity, which could disrupt convergence upon expiration of the physically-settled contract. As such, the Commission clarifies that a person cannot layer a spread exemption on top of the conditional spot month limit in natural gas and thereby circumvent the conditional spot month limit cap.[566]

21. ''Swap'' and ''Swap Dealer''

i. Summary of the 2020 NPRM—Swap and Swap Dealer

The Commission proposed to incorporate the definitions of ''swap'' and ''swap dealer'' as they are defined in section 1a of the Act and § 1.3 of this chapter.[567]

ii. Comments and Summary of the Commission Determination—Swap and Swap Dealer

No commenter addressed the proposed definitions of ''swap'' or ''swap dealer.'' The Commission is adopting these definitions as proposed.

With this exemption, the market participant is able to take physical delivery of the product in the nearby month and may redeliver the same product in a deferred month.

[560] *See* IFUS at 7–9 and ICE Futures U.S. Rule 6.29(e).

[561] *See* 81 FR at 96833.

[562] *Id.*

[563] *See* 81 FR at 96833.

[564] *See infra* Section II.B.3.vi.a. (discussing the Federal spot-month limit for natural gas under § 150.2) and Section II.C.6 (discussing the conditional spot-month limit for natural gas under § 150.3(a)(4)).

[565] This is different from the final Federal spot month position limits for NYMEX NG, pursuant to which a trader may hold up to: (1) 2,000 cash-settled NYMEX NG referenced contracts per exchange that lists a cash-settled NYMEX NG referenced contract; (2) an additional position in cash-settled economically equivalent NYMEX NG OTC swaps that has a notional amount equal to 2,000 equivalent-sized contracts; and (3) 2,000 physically-settled NYMEX NG referenced contracts.

[566] For the avoidance of doubt, traders who avail themselves of a spread exemption and enter into spread positions between the physically-settled NYMEX NG core referenced futures contract during the spot month and one or more cash-settled natural gas referenced contracts or cross commodity contracts, are not allowed under the Final Rule to avail themselves of the natural gas conditional limit until they exit the above-noted spread position.

[567] 7 U.S.C. 1a(47) and 1a(49); 17 CFR 1.3.

22. ''Transition Period Swap''

i. Summary of the 2020 NPRM—Transition Period Swap

The Commission proposed to create the defined term ''transition period swap'' to mean any swap entered into during the period commencing after the enactment of the Dodd-Frank Act of 2010 (July 22, 2010) and ending 60 days after the publication of a final Federal position limits rulemaking in the **Federal Register**. As discussed in connection with proposed § 150.3 later in this release, if acquired in good faith, such swaps would be exempt from Federal position limits, although such swaps could not be netted with post-effective date swaps for purposes of complying with spot month speculative position limits.

ii. Comments and Summary of the Commission Determination—Transition Period Swap

No commenter addressed the proposed definition of ''transition period swap.'' The Commission is adopting the definition as proposed, with two modifications. The Commission is clarifying that a transition period swap is a swap entered into during the period commencing ''on the day of,'' rather than ''after,'' the enactment of the Dodd-Frank Act of 2010 to clarify the ambiguity of the phrase ''after the enactment.'' The Commission is also adding a phrase to clarify that the terms of such swaps ''have not expired as of 60 days after the publication date.'' The Commission intended to include this in the 2020 NPRM, but the language was inadvertently omitted from the proposed definition. This modification conforms to the definition of ''pre-enactment swap,'' which also addresses the timeframe for expiration of a swap's terms.

23. Deletion of § 150.1(i)

i. Summary of 2020 NPRM—Deletion of § 150.1(i)

The Commission proposed to eliminate existing § 150.1(i), which includes a table specifying the ''first delivery month of the crop year'' for certain commodities. The crop year definition had been pertinent for purposes of the spread exemption to the individual month limit in current § 150.3(a)(3), which limits spreads to those between individual months in the same crop year and to a level no more than that of the all-months limit. This provision was pertinent at a time when the single month and all-months-combined limits were different, which is no longer the case.

ii. Comments and Summary of the Commission Determination—Deletion of § 150.1(i)

No commenter addressed the proposed elimination of existing § 150.1(i). The Commission is adopting as proposed. Now that the current and proposed single month and all months combined limits are the same, and now that the Commission is adopting new enumerated bona fide hedges in § 150.1 and Appendix B to part 150 as well as a new process for granting spread exemptions in § 150.3, this provision is no longer needed.

*B. § 150.2—Federal Position Limit Levels*

This section will address the issues related to Federal position limit levels in final § 150.2 in the following order:[568]

(1) Background of the existing Federal position limit levels;

(2) identification of contracts subject to both Federal spot and non-spot month position limits, and contracts subject only to Federal spot month position limits;

(3) Federal spot month position limit levels;

(4) Federal non-spot month position limit levels;

(5) the establishment of subsequent spot month and non-spot month position limit levels;

(6) relevant contract months;

(7) limits on ''pre-existing positions'';

(8) positions on foreign boards of trade;

(9) anti-evasion;

(10) netting and Federal position limit levels for cash-settled referenced contracts; and

(11) ''eligible affiliates'' and position aggregation.

As part of the discussion of Federal spot month position limit levels (noted as issue (3) above and found in Section II.B.3. below), the Commission also will address Federal spot month position limit levels specifically for (i) ICE Cotton No. 2 (CT), (ii) NYMEX Henry Hub Natural Gas (NG), and (iii) the three wheat core referenced futures contracts. Similarly, as part of the discussion of Federal non-spot month position limit levels (noted as issue (4) above and found in Section II.B.4. below), the Commission will also address Federal non-spot month position limit levels specifically for (i) ICE Cotton No. 2 (CT) and (ii) the three wheat core referenced futures contracts.

1. Background—Existing Federal Position Limit Levels—§ 150.2

Federal spot month, single month, and all-months-combined position limits currently apply to the nine physically-settled legacy agricultural contracts listed in existing § 150.2, and, on a futures-equivalent basis, to options contracts thereon. Existing Federal position limit levels set forth in § 150.2 [569] apply net long or net short and are as follows:

[568] In connection with the discussion of § 150.2 that appears below, for each numbered section, the Commission generally provides a summary of the proposed approach, a brief overview of the Commission's final determination, a summary of comments, and the Commission's response to comments.

[569] 17 CFR 150.2.

**Existing Legacy Agricultural Contract Federal Spot Month, Single Month, and All-Months-Combined Position Limit Levels**

| Contract | Spot Month Position Limit Level | Single Month and All-Months-Combined Position Limit Level |
|---|---|---|
| Chicago Board of Trade ("CBOT") Corn (C) | 600 | 33,000 |
| CBOT Oats (O) | 600 | 2,000 |
| CBOT Soybeans (S) | 600 | 15,000 |
| CBOT Soybean Meal (SM) | 720 | 6,500 |
| CBOT Soybean Oil (SO) | 540 | 8,000 |
| CBOT Kansas City Hard Red Winter Wheat (KW) | 600 | 12,000 |
| CBOT Wheat (W) | 600 | 12,000 |
| ICE Cotton No. 2 (CT) | 300 | 5,000 |
| MGEX Hard Red Spring Wheat (MWE) | 600 | 12,000 |

While not explicitly stated in § 150.2, the Commission's practice has been to set Federal spot month position limit levels at or below 25% of deliverable supply based on exchange estimates of deliverable supply (''EDS'') that are verified by the Commission, and to set Federal position limit levels outside of the spot month at 10% of open interest for the first 25,000 contracts of open interest, with a marginal increase of 2.5% of open interest thereafter.

2. Application of Federal Position Limits During the Spot Month and the Non-Spot Month

i. Summary of the 2020 NPRM—Application of Federal Position Limits During the Spot Month and the Non-Spot Month

The 2020 NPRM imposed Federal position limits during all contract months for the nine legacy agricultural contracts (and their associated referenced contracts), and only during the spot month for the 16 non-legacy core referenced futures contracts (and their associated referenced contracts) that would be subject to Federal position limits for the first time.[570] For the 16 non-legacy core referenced futures contracts (and their associated referenced contracts), the 2020 NPRM also required that they be subject to exchange-set position limits or position accountability outside of the spot month.[571]

The Commission proposed to maintain (rather than remove) Federal non-spot month position limits for the nine legacy agricultural contracts, with the modifications described further below, because the Commission has observed no reason to eliminate them.[572] These non-spot month position limits have been in place for decades, and while the Commission proposed to modify the Federal non-spot month position limit levels, the Commission believed that removing them entirely could potentially result in market disruption. The Commission's position was reinforced by the feedback it received from commercial market participants trading the nine legacy agricultural contracts who requested that the Commission maintain Federal position limits outside of the spot month in order to promote market integrity.[573]

ii. Summary of the Commission Determination—Application of Federal Position Limits During the Spot Month and the Non-Spot Month

The Commission is adopting the approach that was proposed in the 2020 NPRM. Under the Final Rule, Federal position limits apply to all 25 core referenced futures contracts during the spot month. The 16 non-legacy core referenced futures contracts subject to Federal position limits for the first time under the Final Rule are subject to Federal position limits only during the spot month (and not outside of the spot month). Outside of the spot month, these 16 core referenced futures contracts are subject only to exchange-set position limits or position accountability.

iii. Comments—Application of Federal Position Limits During the Spot Month and the Non-Spot Month

Many commenters generally agreed with the proposed approach and supported Federal position limits during the spot month for all 25 core referenced futures contracts, and outside of the spot month for only the nine legacy agricultural contracts.[574] The Commission did not receive any comments objecting to Federal spot month position limits for all 25 core referenced futures contracts.

On the other hand, the Commission received comments expressing concern over two related issues. First, a few commenters disagreed with the 2020 NPRM imposing Federal non-spot month position limits on only the nine legacy agricultural contracts.[575] NEFI stated that ''the proposed rule arbitrarily fails to establish limits for non-spot month referenced energy contracts'' and stated that ''distributing limits across all

[570] As noted in further detail in Section II.A.16., their associated referenced contracts are also subject to Federal position limits.

[571] Proposed § 150.5(b)(2). For existing exchange-set position limits, *see Market Resources,* ICE Futures U.S. Website, available at *https://www.theice.com/futures-us/market-resources* (ICE exchange-set position limits); *Position Limits,* CME Group website, available at *https://www.cmegroup.com/market-regulation/position-limits.html*; *Rules and Regulations of the Minneapolis Grain Exchange, Inc.,* MGEX, available at *http://www.mgex.com/documents/Rulebook_051.pdf* (MGEX exchange-set position limits).

[572] 85 FR at 11628.

[573] *Id.*

[574] *See* MGEX at 1; CHS at 2; CME Group at 2; IFUS at 2; ICE at 2, 3–4; Chevron at 2; CMC at 6; EEI at 4; FIA at 2; MFA/AIMA at 2–3; NCFC at 4; Shell at 3; PIMCO at 4; SIFMA AMG at 4; Suncor at 2; AQR at 2, 4–5, 7–10; CCI at 2; COPE at 4; IECA at 2; NGSA at 3; CEWG at 3; and AFIA at 2.

[575] In addition to comments from NEFI and PMAA, which are discussed below, AFR and Rutkowski asserted that the 2020 NPRM will likely be ''ineffective in controlling excessive speculation'' due, in part, to its failure to ''impose Federal position limits outside of the current spot month for most commodities (outside of legacy agricultural commodities).'' AFR at 2 and Rutkowski at 2.

months is preferable, as it would protect market convergence and mute disruptive signals from large speculative trades.'' [576] PMAA echoed similar concerns by stating that there was ''no data or discussion provided in the proposal indicating why the Commission believes limits for non-spot months are not appropriate.'' [577]

Second, commenters also expressed concern that, by only having Federal non-spot month position limits for the nine legacy agricultural contracts, the Commission is relying too much on the exchanges to address excessive speculation.[578] In particular, commenters were concerned about the incentives and other conflicts of interest that exchanges may have to permit ''higher trading volumes and large numbers of market participants'' [579] and about the exchanges' use of position accountability by alleging that it is a ''voluntary'' limit [580] and pointing to ''recent notable failures in exchange accountability regimes.'' [581]

iv. Discussion of Final Rule—Application of Federal Position Limits During the Spot Month and the Non-Spot Month

The Commission is adopting the approach that was proposed in the 2020 NPRM by applying Federal position limits to all 25 core referenced futures contracts during the spot month, but only to the existing nine legacy agricultural contracts outside of the spot month for the reasons discussed below.

a. Response to Comments Opposing the 2020 NPRM's Approach To Subject Only the Nine Legacy Agricultural Contracts to Federal Non-Spot Month Position Limits

The Commission has concluded that, while it may be important and, as described below, necessary [582] to impose Federal spot month position limits on each core referenced futures contract, the analysis changes with respect to the non-spot month for the following reasons.

First, while the Final Rule only applies Federal position limits to the 16 non-legacy core referenced futures contracts during the spot month, the Final Rule requires exchanges to establish either position limit levels or position accountability outside of the spot month for all such contracts.[583] Accordingly, all 16 non-legacy core referenced futures contracts will be subject to either position limits or position accountability outside of the spot month at the exchange level. Any such exchange-set position limit and position accountability must comply with the standards established by the Commission in final § 150.5(b) including, among other things, that any such levels be ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' [584] Exchanges are also required to submit any rules adopting or modifying such position limit or position accountability to the Commission in advance of implementation pursuant to part 40 of the Commission's regulations.[585] Additionally, exchanges are subject to DCM Core Principle 5 or SEF Core Principle 6, as applicable, which establish additional protections against manipulation and congestion.[586] These tools and legal obligations, in conjunction with surveillance at both the exchange and Federal level, will continue to offer strong deterrence and protection against manipulation and disruptions outside of the spot month.[587]

Second, in response to the concerns expressed by NEFI and PMAA that a lack of Federal non-spot month position limits could harm market convergence and lead to disruptive signals from large speculative trades,[588] the Commission reiterates that corners and squeezes, and related convergence issues, do not occur outside of the spot month when there is no threat of delivery.[589] Convergence occurs during the spot month and, specifically, at the expiration of the spot month for a physically-settled contract. As a result, positions outside of the spot month have minimal impact on convergence. The Commission, however, recognizes that it is possible that unusually large positions in contracts outside of the spot month could distort the natural spread relationship between contract months. For example, if traders hold unusually large positions outside of the spot month, and if those traders exit those positions immediately before the spot month, that could cause congestion and also affect the pricing of the spot month contract. While such congestion or price distortion cannot be ruled out, exchange-set position limits and position accountability function to mitigate against such risks. Thus, the position limits framework adopted herein is able to guard against any such possibility through the tools and legal obligations applicable to exchanges that are described in the prior paragraph.

Third, limiting Federal non-spot month position limits to the nine legacy agricultural commodities may limit any market disruptions that could result

[576] NEFI at 3 and PMAA at 3 (with respect to energy commodity positions, ''[h]istory has shown on a number of occasions that large trades in non-spot months can distort markets and increase volatility'').

[577] PMAA at 3. PMAA also suggested that the Commission apply the ''traditional 2.5% limit formula to energy contracts and economically equivalent energy futures, options, and swaps in non-spot months.''

[578] NEFI at 3; PMAA at 3; and IATP at 10.

[579] NEFI at 3.

[580] *Id.*

[581] IATP at 10. *See also* PMAA at 3 (''[u]nfortunately, the proposal instead finds accountability limits to be sufficient to manage speculation'').

[582] *See infra* Section III.E. (discussing necessity finding for spot month and non-spot month position limits).

[583] Final § 150.5(b)(2).

[584] *Id.*

[585] 17 CFR part 40. Under the final ''position accountability'' definition in § 150.1, exchange accountability rules must require a trader whose position exceeds the accountability level to consent to: (1) Provide information about its position to the exchange; and (2) halt increasing further its position or reduce its position in an orderly manner, in each case as requested by the exchange.

[586] Commission regulation § 38.300, which mirrors DCM Core Principle 5, states: ''To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. For any contract that is subject to a position limitation established by the Commission, pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.'' 17 CFR 38.300 and 7 U.S.C. 7(d)(5). Likewise, Commission regulation § 37.600, which mirrors SEF Core Principle 6, states: ''(a) *In general.* To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators. (b) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility shall: (1) Set its position limitation at a level no higher than the Commission limitation; and (2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.'' 17 CFR 37.600 and 7 U.S.C. 7b–3(f)(6).

[587] 85 FR at 11629.

[588] NEFI at 3 and PMAA at 3.

[589] In the case of certain commodities, it may become difficult to exert market power via concentrated futures positions in deferred month contracts. For example, a participant with a large cash-market position and a large deferred futures position may attempt to move cash markets in order to benefit that deferred futures position. Any attempt to do so could become muted due to general futures market resistance from multiple vested interests present in that deferred futures month (*i.e.,* the overall size of the deferred contracts may be too large for one individual to influence via cash-market activity). However, if a large position that is accumulated over time in a particular deferred month is held into the spot month, it is possible that such positions could form the groundwork for an attempted corner or squeeze in the spot month.

from adding new Federal non-spot month position limits on certain metal and energy commodities that have never been subject to Federal position limits.[590]

b. Response to Comments Regarding the Commission's Reliance on Exchanges

In response to commenters' specific concerns about the reliance on exchanges' position accountability, the Commission views position accountability outside of the spot month as a more flexible alternative to Federal non-spot month position limits.[591] Position accountability establishes a level at which an exchange will start investigating a trader's current position. This will include, among other things, asking traders additional questions regarding their strategies and their purpose for the positions, while evaluating them under current market conditions. If a position does not raise any concerns, the exchange will allow the trader to exceed the accountability level. If the position raises concerns, the exchange has the authority to instruct the trader to stop adding to the trader's position, or to reduce the position. Position accountability is a particularly effective tool because it provides the exchanges with an opportunity to intervene once a position hits a relatively low level (vis-à-vis the level at which a Federal or an exchange position limit level would typically be set), while still affording market participants with the flexibility to establish a position that exceeds the position accountability level if it is justified by the nature of the position and market conditions. Position accountability applies to all participants on the exchange, whether commercial or non-commercial, and regardless of whether the relevant participant would qualify for an exemption.

The Commission has decades of experience overseeing position accountability implemented by exchanges, including for all 16 non-legacy core referenced futures contracts that are not subject to Federal position limits outside of the spot month.[592] Based on the Commission's experience, position accountability has functioned effectively.[593] Furthermore, the Commission notes that position accountability is not the only tool available for exchanges. As noted previously, exchanges can also utilize exchange-set position limits. Several exchanges have set non-spot month position limits for contracts that are not subject to Federal position limits, and all of them appear to have functioned effectively based on the Commission's observation of those markets.[594]

With respect to IATP's reference to ''recent notable failures'' in position accountability levels, IATP appears to be referencing the events that involve Kraft Foods Group, Inc. and Mondelēz Global LLC with respect to the CBOT Wheat (W) contract in 2011[595] and United States Oil Fund, LP (''US Oil'') with respect to the WTI contract earlier this year.[596] With respect to CBOT Wheat (W), CBOT did not have position accountability for that contract at that time. With respect to the WTI contract, IATP does not describe the failure in position accountability that occurred with respect to US Oil and how such failure resulted in negative prices in the WTI contract.[597]

With respect to commenter concerns about the incentives of exchanges, the Commission believes that, although exchanges may have a financial interest in increased trading volume, whether speculative or hedging, the Commission closely oversees the establishment, modification, and implementation of exchange-set position limits and position accountability. As noted above, both exchange-set position limits and position accountability must comply with standards established by the Commission in final § 150.5(b) including, among other things, that any such levels be ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' [598] Exchanges are also required to submit any rules adopting or modifying exchange-set position limits or position accountability to the Commission in advance of implementation, pursuant to part 40 of the Commission's regulations.[599] Additionally, exchanges are subject to DCM Core Principle 5 or SEF Core Principle 6, as applicable, which establishes additional protections against manipulation and congestion.[600] Furthermore, exchange-set position limits and position accountability will be subject to rule enforcement reviews by the Commission.[601] Finally, the Commission notes that exchanges also have significant financial incentives and regulatory obligations to maintain well-functioning markets. This observation, which has been supported by studies, is discussed in greater detail below.[602]

3. Federal Spot Month Position Limit Levels

i. Summary of the 2020 NPRM—Federal Spot Month Position Limit Levels

[590] 85 FR at 11629.

[591] *Id.*

[592] *See, e.g.,* 56 FR at 51687 (Oct. 15, 1991) (permitting CME to establish position accountability for certain financial contracts traded on CME); Speculative Position Limits—Exemptions from Commission Rule 1.61, 57 FR 29064 (June 30, 1992) (permitting the use of accountability for trading in energy commodity contracts); and 17 CFR 150.5(e) (2009) (formally recognizing the practice of accountability for contracts that met specified standards).

[593] 85 FR at 11629.

[594] For example, exchanges have set non-spot month position limits for the following core referenced futures contracts, even though such contracts currently are not subject to Federal non-spot month position limits (and will continue to be subject only to Federal spot month position limits under this Final Rule): (1) CME Live Cattle (LC), which has an exchange-set single month position limit level of 6,300 contracts, but no all-months-combined position limit; (2) ICE FCOJ–A (OJ), which has an exchange-set single month position limit level of 3,200 contracts and an all-months-combined position limit level of 3,200 contracts; and (3) ICE Sugar No. 16, which has an exchange-set single month position limit level of 1,000 contracts and an all-months-combined position limit level of 1,000 contracts.

[595] CFTC Charges Kraft Foods Group, Inc. and Mondelēz Global LLC with Manipulation of Wheat Futures and Cash Wheat Prices (Apr. 1, 2015), U.S. Commodity Futures Trading Commission website, available at *https://www.cftc.gov/PressRoom/PressReleases/7150–15*.

[596] IATP at 5, 10, and 18.

[597] *Id.*

[598] Final § 150.5(b)(2).

[599] 17 CFR part 40.

[600] 17 CFR 38.300 and 17 CFR 37.600.

[601] The Commission conducts regular rule enforcement reviews of each exchange's audit trail, trade practice surveillance, disciplinary, and dispute resolution programs for ongoing compliance with the Core Principles. *See* Rule Enforcement Reviews of Designated Contract Markets, available at *https://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/dcmruleenf.html*.

[602] Section II.B.3.iii.b.(3)(iii) (Concern over Exchanges' Conflict of Interest and Improper Incentives in Maintaining Their Markets).

Under the 2020 NPRM, the Commission proposed applying Federal spot month position limits to all 25 core referenced futures contracts and any associated referenced contracts.[603] The spot month limits would apply separately to physically-settled and cash-settled referenced contracts, which meant that a market participant could net positions across physically-settled referenced contracts and separately net positions across cash-settled referenced contracts.[604] However, the market participant would not be permitted to net cash-settled referenced contracts with physically-settled referenced contracts.[605] Proposed § 150.2(e) provided that Federal spot month position limit levels would be set forth in proposed Appendix E to part 150.[606] The proposed spot month position limit levels were as follows:

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| Core Referenced Futures Contract | 2020 Proposed Federal Spot Month Position Limit Level | Existing Federal Spot Month Position Limit Level | Existing Exchange-Set Spot Month Position Limit Level[607] |
|---|---|---|---|
| **Legacy Agricultural Contracts** | | | |
| CBOT Corn (C) | 1,200 | 600 | 600 |
| CBOT Oats (O) | 600 | 600 | 600 |
| CBOT Soybeans (S) | 1,200 | 600 | 600 |
| CBOT Soybean Meal (SM) | 1,500 | 720 | 720 |
| CBOT Soybean Oil (SO) | 1,100 | 540 | 540 |
| CBOT Wheat (W) | 1,200 | 600 | 600/500/400/300 /220[608] |
| CBOT KC HRW Wheat (KW) | 1,200 | 600 | 600 |
| MGEX HRS Wheat (MWE) | 1,200 | 600 | 600 |
| ICE Cotton No. 2 (CT) | 1,800 | 300 | 300 |
| **Other Agricultural Contracts** | | | |
| CME Live Cattle (LC) | 600/300/200[609] | n/a | 600/300/200[610] |
| CBOT Rough Rice (RR) | 800 | n/a | 600/200/250[611] |
| ICE Cocoa (CC) | 4,900 | n/a | 1,000 |
| ICE Coffee C (KC) | 1,700 | n/a | 500 |
| ICE FCOJ-A (OJ) | 2,200 | n/a | 300 |

[603] As described below, under the 2020 NPRM, Federal non-spot month position limit levels would only apply to the nine legacy agricultural contracts and their associated referenced contracts. The 16 non-legacy core referenced futures contracts and their associated referenced contracts would be subject to Federal position limits during the spot month, and exchange-set position limits or position accountability outside of the spot month.

[604] *See* Section II.B.10.

[605] *Id.*

[606] Proposed 150.2(e) additionally provided that market participants would not need to comply with the Federal position limit levels until 365 days after publication of the Final Rule in the **Federal Register**. For further discussion of the Final Rule's compliance and effective dates, *see* Section I.D. (Effective Date and Compliance Period).

[607] As of October 15, 2020.

[608] CBOT's existing exchange-set position limit level for CBOT Wheat (W) is 600 contracts. However, for its May contract month, CBOT has a variable spot month position limit level that is dependent upon the deliverable supply that it publishes from the CBOT's Stocks and Grain report on the Friday preceding the first notice day for the May contract month. In the last five trading days of the expiring futures month in May, the speculative spot month position limit level is: (1) 600 contracts if deliverable supplies are at or above 2,400 contracts; (2) 500 contracts if deliverable supplies are between 2,000 and 2,399 contracts; (3) 400 contracts if deliverable supplies are between

| | | | |
|---|---|---|---|
| ICE Sugar No. 11 (SB) | 25,800 | n/a | 5,000 |
| ICE Sugar No. 16 (SF) | 6,400 | n/a | n/a[612] |
| **Metals Contracts** | | | |
| COMEX Gold (GC) | 6,000 | n/a | 6,000 |
| COMEX Silver (SI) | 3,000 | n/a | 1,500 |
| COMEX Copper (HG) | 1,000 | n/a | 1,000 |
| NYMEX Platinum (PL) | 500 | n/a | 500 |
| NYMEX Palladium (PA) | 50 | n/a | 50 |
| **Energy Contracts** | | | |
| NYMEX Light Sweet Crude Oil (CL) | 6,000/5,000/4,000 [613] | n/a | 3,000 |
| NYMEX NYH ULSD Heating Oil (HO) | 2,000 | n/a | 1,000 |
| NYMEX NYH RBOB Gasoline (RB) | 2,000 | n/a | 1,000 |
| NYMEX Henry Hub Natural Gas (NG) | 2,000[614] | n/a | 1,000[615] |

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1,600 and 1,999 contracts; (4) 300 contracts if deliverable supplies are between 1,200 and 1,599 contracts; and (5) 220 contracts if deliverable supplies are below 1,200 contracts.

609 The proposed Federal spot month position limit levels for CME Live Cattle (LC) would feature step-down limit levels similar to the CME's existing Live Cattle (LC) step-down exchange-set limit levels. The proposed Federal spot month step down limit level is: (1) 600 contracts at the close of trading on the first business day following the first Friday of the contract month; (2) 300 contracts at the close of trading on the business day prior to the last five trading days of the contract month; and (3) 200 contracts at the close of trading on the business day prior to the last two trading days of the contract month.

610 CME's existing exchange-set limit for Live Cattle (LC) has the following step-down spot month position limit levels: (1) 600 contracts at the close of trading on the first business day following the first Friday of the contract month; (2) 300 contracts at the close of trading on the business day prior to the last five trading days of the contract month; and (3) 200 contracts at the close of trading on the business day prior to the last two trading days of the contract month.

611 CBOT's existing exchange-set spot month position limit level for Rough Rice (RR) is 600 contracts for all contract months. However, for July and September, there are step-down limit levels from 600 contracts. In the last five trading days of the expiring futures month, the speculative spot month position limit for the July futures month steps down to 200 contracts from 600 contracts and the speculative position limit for the September futures month steps down to 250 contracts from 600 contracts.

612 IFUS technically does not have an exchange-set spot month position limit level for ICE Sugar No. 16 (SF). However, it does have a single-month position limit level of 1,000 contracts, which effectively operates as a spot month position limit.

613 NYMEX recommended implementing the following step-down Federal spot month position limit levels with respect to its Light Sweet Crude Oil (CL) core referenced futures contract: (1) 6,000 contracts as of the close of trading three business days prior to the last trading day of the contract; (2) 5,000 contracts as of the close of trading two business days prior to the last trading day of the contract; and (3) 4,000 contracts as of the close of trading one business day prior to the last trading day of the contract.

614 In Proposed § 150.3(a)(4), the Commission also proposed an exemption that provided a Federal conditional spot month position limit for NYMEX Henry Hub Natural Gas (NG) (''NYMEX NG'') that permits a market participation that does not hold any positions in the physically-settled NYMEX NG referenced contract to hold: (1) 10,000 NYMEX NG equivalent-sized referenced contracts per exchange that lists a cash-settled NYMEX NG referenced contract; and (2) an additional position in cash-settled economically equivalent swaps with respect to NYMEX NG that has a notional amount equal to 10,000 contracts.

615 Currently, the cash-settled natural gas contracts are subject to an exchange-set spot month position limit level of 1,000 equivalent-sized contracts *per exchange*. Currently, there are three exchanges that list cash-settled natural gas contracts—NYMEX, IFUS, and Nodal. As a result, a market participant may hold up to 3,000 equivalent-sized cash-settled natural gas contracts. The exchanges also have a conditional position limit framework for natural gas. The conditional position limit permits up to 5,000 cash-settled equivalent-sized natural gas contracts *per exchange* that lists such contracts, provided that the market participant does not hold a position in the physically-settled NYMEX NG contract.

The proposed Federal spot month position limit levels for all referenced contracts were set at 25% or less of updated EDS and were derived from the recommendations by CME Group,[616] IFUS,[617] and MGEX[618] for each of their respective core referenced futures contracts. Federal spot month position limit levels for any contract with a proposed level above 100 contracts were rounded up to the nearest 100 contracts from the exchange-recommended limit level or from 25% of updated EDS, as applicable.

As discussed in the 2020 NPRM, the existing Federal spot month position limit levels have remained constant for decades, but the markets have changed significantly during that time period.[619] As a result, some of the deliverable supply estimates on which the existing Federal spot month position limits were originally based were decades out of date.[620]

ii. Summary of the Commission Determination—Federal Spot Month Position Limit Levels

a. Federal Spot Month Position Limit Levels Adopted as Proposed, Except for ICE Cotton No. 2 (CT) and NYMEX Henry Hub Natural Gas (NG)

The Commission is adopting the Federal spot month position limit levels as proposed, except for modifications with respect to ICE Cotton No. 2 (CT) and NYMEX NG. Specifically, the Federal spot month position limit levels for all 25 core referenced futures contracts are set at or below 25% of EDS, except for the cash-settled NYMEX NG referenced contracts.

With respect to ICE Cotton No. 2 (CT), the Commission is adopting a lower Federal spot month position limit level of 900 contracts instead of the proposed 1,800 contracts. The reasons for this change are discussed in Section II.B.3.v.

With respect to NYMEX NG, the Final Rule is adopting the same Federal spot month position limit level as proposed in the 2020 NPRM, but the Final Rule is applying the cash-settled portion of the Federal spot month position limit for NYMEX NG separately for each exchange that lists a cash-settled NYMEX NG referenced contract, as well as the cash-settled NYMEX NG OTC swaps market, rather than on an aggregate basis across all exchanges and the OTC swaps market as it does for each of the other core referenced futures contracts. The reasons for this change are discussed in Section II.B.3.vi.

(1) The Final Rule Achieves the Four Statutory Objectives in CEA Section 4a(a)(3)(B)

Before summarizing and addressing comments below regarding the proposed Federal spot month position limit levels, the Commission states at the outset that the final Federal spot month position limit levels, in conjunction with the rest of the Federal position limits framework, will achieve the four policy objectives in CEA section 4a(a)(3)(B). Namely, they will: (1) Diminish, eliminate, or prevent excessive speculation; (2) deter and prevent market manipulation, squeezes, and corners; (3) ensure sufficient market liquidity for bona fide hedgers; and (4) ensure that the price discovery function of the underlying market is not disrupted.[621]

In achieving these four statutory objectives, the Commission first believes that the Federal spot month position limit levels are low enough to prevent excessive speculation and also protect price discovery. Setting the Federal spot month position limit levels at or below 25% of EDS is critically important because it would be difficult, in the absence of other factors, for a market participant to corner or squeeze a market if the participant holds less than or equal to 25% of deliverable supply.[622] This is because, among other things, any potential economic gains resulting from the manipulation may be insufficient to justify the potential costs, including the costs of acquiring and ultimately offloading the positions used to effectuate the manipulation.[623] By restricting positions to a proportion of the deliverable supply of the commodity, the Federal spot month position limits require that no one speculator can hold a position larger than 25% of deliverable supply, reducing the possibility that a market participant can use derivatives, including referenced contracts, to affect the price of the cash commodity (and vice versa). Limiting a speculative position based on a percentage of deliverable supply also restricts a speculative trader's ability to establish a leveraged position in cash-settled derivative contracts, reducing that trader's incentive to manipulate the cash settlement price. Further, by finalizing levels that are sufficiently low to prevent market manipulation, including corners and squeezes, the levels also help ensure that the price discovery function of the underlying market is not disrupted, because markets that are free from corners, squeezes, and other manipulative activity reflect fundamentals of supply and demand, rather than artificial pressures.

The Commission also believes that the Federal spot month position limit levels adopted herein are high enough to ensure that there is sufficient market liquidity for bona fide hedgers.[624] The

[616] *See* Summary DSE Proposed Limits, CME Group Comment Letter (Nov. 26, 2019), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596). CME Group formally provided recommended Federal spot month position limit levels for each of its core referenced futures contracts.

[617] *See* IFUS—Estimated Deliverable Supply—Softs Methodology, IFUS Comment Letter (May 14, 2019) and Reproposal—Position Limits for Derivatives (RIN 3038–AD99) and ICE Comment Letter (Feb. 28, 2017) (attached Sept. 28, 2016 comment letter), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596 and Proposed Rule 81 FR 96704, respectively). IFUS did not formally provide recommended Federal spot month position limit levels for each of IFUS's core referenced futures contracts. However, ICE had previously recommended setting Federal spot month position limit levels for IFUS's core referenced futures contracts at 25% of EDS in its comment letter in connection with the 2016 Reproposal and Commission staff also confirmed with ICE/IFUS's representatives that ICE/IFUS's position has remained the same with respect to the Federal spot month position limit levels since the 2016 Reproposal. The Commission notes, however, with respect to ICE Cotton No. 2 (CT), that IFUS has submitted a supplemental comment letter recommending that the Federal spot month position limit level be set at 900 contracts, instead of at 25% of EDS. *See* IFUS—Estimated Deliverable Supply—Cotton Methodology, August 2020, IFUS Comment Letter (August 27, 2020), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[618] *See* Updated Deliverable Supply Data—Potential Position Limits Rulemaking, MGEX Comment Letter (Aug. 31, 2018), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596). MGEX did not formally provide a recommended Federal spot month position limit level for its core referenced futures contract (MGEX Hard Red Spring Wheat (MWE)) because it was opposed to providing a static number for the Federal spot month position limit level that was based on a fixed formula. Instead, MGEX sought to be able to adjust the Federal spot month position limit level based on updated EDS figures and market conditions. However, MGEX stated that the Federal spot month position limit level for MGEX Hard Red Spring Wheat (MWE) should be no lower than 1,000 contracts and also submitted calculations for setting the Federal spot month position limit level at 25% of EDS. Furthermore, MGEX supported setting the Federal spot month position limit level for MGEX Hard Red Spring Wheat (MWE) at 25% of EDS level in its comment letter. MGEX at 3.

[619] 85 FR at 11625.

[620] *Id.*

[621] 7 U.S.C. 6a(a)(3)(B).

[622] 85 FR at 11625–11626.

[623] *Id.*

[624] CEA section 4a(a)(1) requires the Commission to address ''[e]xcessive speculation . . . causing sudden or unreasonable fluctuations or unwarranted [price] changes . . . .'' Speculative activity that is not ''excessive'' in this manner is not a focus of CEA section 4a(a)(1). Rather, speculative activity may generate liquidity, including liquidity for bona fide hedgers, by enabling market participants with bona fide hedging positions to trade more efficiently. Setting position limits too

Commission has not observed a general lack of liquidity for bona fide hedgers in the markets for the 25 core referenced futures contracts, which are some of the most liquid markets overseen by the Commission.[625] By generally increasing the existing Federal spot month position limit levels for the nine legacy agricultural contracts based on updated data, and by adopting Federal spot month position limit levels that are generally equal to or higher than existing exchange-set levels for the 16 non-legacy core referenced futures contracts, the Commission does not expect the final Federal position limit levels to reduce liquidity for bona fide hedgers.[626]

Furthermore, the Commission has previously stated that ''there is a range of acceptable limit levels,'' [627] and continues to believe that is true.[628] There is no single ''correct'' spot month position limit level for a given contract, and it is likely that a number of limit levels within a certain range could effectively achieve the four policy objectives in CEA section 4a(a)(3)(B).[629] The Commission believes that the spot month position limit levels adopted herein fall within a range of acceptable levels.[630] This determination is based on the Commission's experience in administering its own Federal position limits regime, overseeing exchange-set position limits, and being closely involved in determining the EDS figures underlying the position limit levels, as well as the fact that the Federal spot month position limit levels are generally set at or below 25% of EDS.[631]

In addition, the Federal spot month position limit levels are properly calibrated to account for differences between markets. For example, the Commission considered the unique delivery mechanisms for CME Live Cattle (LC) and the NYMEX metals core referenced futures contracts in calibrating the Federal spot month position limit levels for those contracts.[632] The Commission also considered the volatility of the EDS for COMEX Copper (HG) in determining its limit level.[633] Furthermore, with respect to NYMEX NG, the Commission, in fine-tuning the proposed limits, considered: the underlying natural gas infrastructure vis-à-vis commodities underlying other energy core referenced futures contracts; the relatively high liquidity in the cash-settled markets; and the public comments received in response to the 2020 NPRM.[634]

(2) Federal Position Limit Levels Operate as Ceilings

Finally, consistent with the 2020 NPRM and the Final Rule's position limits framework that leverages existing exchange-level programs and expertise, the Federal position limit levels operate as ceilings. This framework, with Federal spot month limits layered over exchange-set limits, achieves the Commission's objectives in preventing market manipulation, squeezes, corners, and excessive speculation while also ensuring sufficient market liquidity for bona fide hedgers and avoiding a disruption of the price discovery function of the underlying market. This is, in part, because a layered approach facilitates more expedited responses to rapidly evolving market conditions through exchange action. Under the Final Rule, exchanges are required to set their own spot month position limit levels at or below the respective Federal spot month position limit levels.[635] They are also permitted to adjust those levels based on market conditions as long as they are set at or below the Federal spot month position limit levels. Exchanges may also impose liquidity and concentration surcharges to initial margin if they are vertically integrated with a derivatives clearing organization.[636] All of these exchange actions can be implemented significantly faster than Commission action, and an immediate response is critical in managing rapidly evolving market conditions. As a result, by having the Federal position limit levels function as ceilings, the position limits framework adopted in this Final Rule will allow exchanges to lower or raise their position limit levels across a greater range of acceptable Federal position limit levels, which will facilitate a faster response to more varied market conditions than if the Federal position limit levels did not operate as ceilings.

iii. Comments and Discussion of Final Rule—Federal Spot Month Position Limit Levels

Many commenters supported the proposed Federal spot month position limit levels and the method by which the Commission determined those limit levels.[637] However, some commenters raised concerns or otherwise commented with respect to: (1) The proposed Federal spot month position limit levels and the methodology used to arrive at those levels generally; (2) the Commission's review of exchanges' EDS figures and their recommended spot month position limit levels; (3) a lack of a phase-in for Federal spot month position limit levels; (4) the proposed spot month position limit level for ICE Cotton No. 2 (CT); (5) the proposed spot month position limit level for NYMEX NG and other issues relating to NYMEX NG; and (6) the issue of parity among the proposed Federal spot month position limit levels for the three wheat core referenced futures contracts. The Commission will discuss each of these issues, the related comments, and the Commission's corresponding determination in greater detail below.

a. Federal Spot Month Position Limit Levels and the Commission's Underlying Methodology, Generally

(1) Comments—Federal Spot Month Position Limit Levels and the Commission's Underlying Methodology, Generally

Better Markets objected to the Commission's proposed Federal spot month position limit levels and

low could result in reduced liquidity, including for bona fide hedgers. 85 FR at 11626.

[625] 85 FR at 11626. The Commission notes that it has observed a brief period of illiquidity during the early part of the spot month for ICE Cotton No. 2 (CT), which is discussed in Section II.B.3.v.

[626] *Id.* Eighteen of the core referenced futures contracts will have Federal spot month position limit levels that are higher than current exchange-set spot month position limit levels. CME Live Cattle (LC), COMEX Gold (GC), COMEX Copper (HG), CBOT Oats (O), NYMEX Platinum (PL), and NYMEX Palladium (PA) will have Federal spot month position limit levels that are equal to the current exchange-set spot month position limit levels. Finally, although currently there is technically no exchange-set spot month position limit for ICE Sugar No. 16 (SF), this contract is subject to a single month position limit level of 1,000 contracts, which effectively serves as its spot month position limit level. As a result, the Federal spot month position limit level for ICE Sugar No. 16 (SF) will effectively be higher than its current exchange-set spot month position limit level.

[627] *See, e.g.,* Revision of Federal Speculative Position Limits, 57 FR 12766, 12770 (Apr. 13, 1992).

[628] 85 FR at 11627.

[629] *Id.*

[630] *Id.*

[631] The exception to this is the cash-settled NYMEX NG referenced contracts, which is discussed in detail in Section II.B.3.vi.

[632] 85 FR at 11627.

[633] *Id.* at 11628.

[634] *Id.*

[635] Final § 150.5(a). For the nine legacy agricultural contracts, the Final Rule also requires exchanges to set their own non-spot month position limit levels at or below the respective Federal non-spot month position limit level. For the 16 non-legacy core referenced futures contracts, final § 150.5(b)(2) requires exchanges to implement either position limits or position accountability during the non-spot month for physical commodity derivatives that are not subject to Federal position limits ''at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.''

[636] 85 FR at 11633.

[637] *See* ASR at 2; CCI at 2; Shell at 3; EEI/EPSA at 3; Suncor at 2, CEWG at 3; COPE at 2, 4; SIFMA AMG at 3–4; MGEX at 1; 3; MFA/AIMA at 1; AFIA at 1; CMC at 6; NGFA at 3; PIMCO at 6; CME Group at 4–6; NOPA at 1; FIA at 2; and AQR at 8–10.

suggested that there should be a presumption that the Federal spot month position limit levels be set at 10% of EDS, which could be adjusted as needed.[638] Another commenter, PMAA, requested Federal spot month position limit levels of less than 25% of EDS, but did not provide a specific level or a range of levels.[639] Other commenters believed that the proposed spot month levels were generally too high merely because they were higher than existing levels.[640]

In support of its suggestion, Better Markets claimed that, ''speculative trading has been sufficient to accommodate legitimate hedging at currently permissible levels,'' noting that the Commission has previously stated that ''open interest and trading volume have reached record levels'' and ''the 25 [core referenced futures contracts] represent some of the most liquid markets overseen by the [CFTC].'' [641] Better Markets also claimed that, if the Commission conducted a study as to whether the increase in open interest for ''particular [core referenced futures contracts] would warrant lower speculative position limits,'' those studies would have shown that substantially lower position limit levels would be warranted.[642] Better Markets also took issue with the Commission's 25% or less of EDS formula as a basis for determining Federal spot month position limit levels by stating, ''while deliverable supply must be one key measure for constraining speculation, it is not sufficient to address all statutory objectives for Federal position limits.'' [643]

(2) Discussion of Final Rule—Federal Spot Month Position Limit Levels and the Commission's Underlying Methodology, Generally

The Commission declines to adopt a 10% of EDS across-the-board Federal spot month position limit level, or a general reduction in Federal spot month position limit levels to a level below 25% of EDS for those core referenced futures contracts with a proposed position limit level set at 25% of EDS.

In response to Better Markets' suggestion to adopt Federal spot month position limit levels set at 10% of EDS, the Commission first notes that, although Better Markets provided some arguments for why the Commission should consider lower Federal position limit levels, Better Markets did not provide any support for the 10% level that it suggested, including any support for the comment letter's implication that setting limits at or below 25% of EDS is insufficient to prevent corners and squeezes. Likewise, PMAA did not provide any support for adopting Federal spot month position limit levels of less than 25% of EDS, other than claiming that a ''spot month limit of 25 percent of deliverable supply is not sufficiently aggressive to deter excessive speculation'' and ''prevent market manipulation.'' [644]

The 25% or less of EDS formula that the Commission is utilizing, and has utilized for many years, is a longstanding methodology that was adopted to address corners and squeezes based on the Commission's experience.[645] Also, as described in detail above, the Commission believes that the position limits framework in both the 2020 NPRM and the Final Rule that incorporates the 25% or less of EDS formula achieves the Commission's statutory objectives in preventing market manipulation, squeezes, corners, and excessive speculation while also ensuring sufficient market liquidity for bona fide hedgers and avoiding a disruption of the price discovery function of the underlying market.

In addition, the Final Rule's position limits framework further addresses the statutory objectives of CEA section 4a(a)(3)(B) by utilizing the Federal position limit levels as a ceiling and leveraging the exchanges' expertise and experience in determining and adjusting exchange-set position limit levels for their referenced contracts as appropriate, as long as they are under the Federal position limit levels.[646] This exchange action can be effectuated significantly faster than a Federal position limit level adjustment, which requires the Commission to engage in a rulemaking process that includes a notice-and-comment period. As a result, compared to the alternative approaches suggested by commenters, this framework will generally facilitate a more expedited response to a more varied set of market conditions, because the exchanges can lower or raise their position limit levels across a greater range of acceptable Federal position limit levels.

In response to Better Markets' claim that the Federal spot month position limit levels should not be adjusted upward as a result of the higher open interest levels and trading volumes that exist today because they demonstrate that there are sufficient levels of speculation and liquidity under the current rules, the Commission first notes that Better Markets did not provide a methodology based on open interest and/or trading volume that the Commission should consider as an alternative to the Commission's 25% or less of EDS approach.

Regardless, the Commission believes that EDS is the more appropriate basis by which the Commission should adjust Federal spot month position limit levels, rather than open interest and/or trading volume, because the likelihood of a corner or squeeze occurring in the spot month is more closely correlated with the percentage of deliverable supply that a market participant controls. Corners and squeezes are possible in the spot month only because of the imminent prospect of making or taking delivery in the physically-settled contract. Therefore, understanding the amount of deliverable supply in the spot month is critically important.[647] Accordingly, the Commission, in consultation with the exchanges, estimated the amount of the underlying commodity available at the specified delivery points in the core referenced futures contract that meet the quality standards set forth in the core referenced futures contract's terms and conditions in order to understand the size of the relevant commodity market underlying each core referenced futures contract. Once the Commission determined that information in the form of an EDS figure, the Commission was able to determine whether a Federal spot month position limit level would advance the statutory objectives of CEA section 4a(a)(3)(B), including preventing corners and squeezes.

A spot month position limit methodology based on open interest and/or trading volume does not take into account the central factors that make corners and squeezes possible (*i.e.,* the imminent prospect of delivery on a physically-settled contract and the deliverable supply of an underlying

[638] Better Markets at 41.

[639] PMAA at 2.

[640] AFR at 2 and Rutkowski at 2.

[641] Better Markets at 37–38.

[642] *Id.* at 38.

[643] *Id.* at 37.

[644] PMAA at 2.

[645] *See e.g.,* Chicago Board of Trade Futures Contracts in Corn and Soybeans; Order To Change and To Supplement Delivery Specifications, 62 FR 60831, 60838 (Nov. 13, 1997) (''The 2,400-contract level of deliverable supplies constitutes four times the speculative position limit for the contract, a benchmark historically used by the Commission's staff in analyzing the adequacy of deliverable supplies for new contracts'').

[646] *See* 85 FR at 11629, 11633.

[647] Deliverable supply is the quantity of the commodity that meets contract specifications that is reasonably expected to be readily available to short traders and salable by long traders at its market value in normal cash-marketing channels at the contract's delivery points during the specified delivery period, barring abnormal movements in interstate commerce. 17 CFR part 38, Appendix C.

commodity). Also, open interest and trading volume in an expiring physically-settled contract generally declines as the contract nears expiration, as most traders are not looking to make or take delivery of the underlying commodity. As a result, they would likely not provide additional insights that would materially inform the Commission's determination of Federal spot month position limit levels in a way that is responsive to CEA section 4a(a)(3)(B).

Furthermore, the Commission did not adjust the Federal spot month position limit levels merely by applying a percentage to EDS. As discussed in further detail below, the Commission proposed Federal spot month position limit levels only after the Commission: (1) Extensively reviewed and verified the underlying methodology for each core referenced futures contract's EDS figure; and (2) reviewed the recommended Federal spot month position limit levels from exchanges that are thoroughly knowledgeable about their own respective core referenced futures contracts' markets in order to determine whether they advanced the policy objectives of CEA section 4a(a)(3)(B). Also, in adopting the final Federal spot month position limit levels, the Commission also considered comments from market participants, including comments from the end-users of these markets.

On a related note, Better Markets and PMAA appear to have misunderstood the proposed Federal spot month position limit levels and the methodology on which they were based.[648] The Commission did not propose an across-the-board Federal level set at 25% of EDS. As noted above, the Commission's methodology sets Federal spot month position limit levels at *or below* 25% of EDS for each particular commodity.[649] As a result, under the Final Rule, only seven of 25 core referenced futures contracts have Federal spot month position limit levels at 25% of EDS. With respect to the 18 remaining core referenced futures contracts, all 18 are set below 20% of EDS, 14 are below 15% of EDS, and eight are already below the 10% of EDS threshold recommended by Better Markets.[650] With respect to the petroleum core referenced futures contracts with which PMAA is most likely concerned (*i.e.,* NYMEX Light Sweet Crude Oil (CL), NYMEX NYH ULSD Heating Oil (HO), and NYMEX RBOB Gasoline (RB)), all three levels are at or below 11.16% of EDS.

b. Commission Review of Exchanges' EDS Figures and Recommended Federal Spot Month Position Limit Levels

(1) Additional Background Information—Commission Review of Exchanges' EDS Figures and Recommended Federal Spot Month Position Limits

In connection with the 2020 NPRM, the Commission received deliverable supply estimates and recommended Federal spot month position limit levels from CME Group, ICE, and MGEX for their respective core referenced futures contracts.[651] Commission staff reviewed these recommendations and conducted its own analysis of them using its own experience, observations, and knowledge.[652] This included closely and independently assessing the EDS figures upon which the recommended limit levels were based.[653] In reviewing the recommended spot month position limit levels, the Commission considered the four policy objectives in CEA section 4a(a)(3)(B) and preliminarily determined that none of the recommended levels appeared improperly calibrated such that they might hinder liquidity for bona fide hedgers or invite excessive speculation, manipulation, corners, or squeezes, including activity that could impact price discovery.[654] As a result, the Commission proposed to adopt each of the exchange-recommended spot month position limit levels as Federal spot month position limit levels.[655]

(2) Comments—Commission Review of Exchanges' EDS Figures and Recommended Federal Spot Month Position Limit Levels

The Commission received several comments concerning the Commission's review and verification of the EDS figures and the rationale used by the Commission in accepting the spot month position limit levels that were recommended by exchanges.

One commenter, EPSA, supported adopting CME Group's EDS figures for energy commodities, stating that exchanges are in the ''best position to provide accurate and current information on the markets.'' [656] However, other commenters expressed concerns. Better Markets commented that the Commission failed to ''explain the means by which the DCM-provided data was collected and later 'verified' in arriving at proposed spot month position limits, nor the dependencies of the DCM methodologies employed to arrive at those estimates.'' [657] Similarly, IATP commented that the 2020 NPRM provided insufficient detail about how the Commission concluded that the exchange-recommended spot month position limit levels were appropriate and how the Commission determined that the EDS figures submitted by the exchanges were reasonable.[658] On a related note, PMAA commented that the exchanges should not be providing EDS figures and that the Commission instead should ''retain exclusive discretion in determining 'deliverable supply' for the purposes of establishing speculative position limits'' and ''consult with . . . market experts when determining 'deliverable supply' and formulating limits.'' [659] Furthermore, CME Group recommended ''that the Commission not adopt final spot month position limit levels at 25% of deliverable supply as a rigid formula and . . . work with the exchange to determine an appropriate limit based on the market dynamics.'' [660] Likewise, MGEX commented that it ''fundamentally disagrees with the 25% formulaic calculation for the spot month position, especially if a limit is codified by rule and does not allow for adjustments as deliverable supply changes.'' [661]

Finally, Better Markets also raised concerns about the incentives of exchanges as public, for-profit enterprises, presumably, in part, because the exchanges submitted the EDS figures, upon which the Federal spot month position limit levels are

[648] *See* Better Markets at 39–40 and PMAA at 2.

[649] 85 FR at 11624.

[650] For CME Live Cattle (LC) and NYMEX Light Sweet Crude Oil (CL), which have step-down Federal spot month position limit levels, these percentages were calculated using the first and highest step.

[651] *See supra* n.616, n.617, and n.618.

[652] 85 FR at 11625.

[653] *Id.* at 11625–11626.

[654] *Id.* at 11625.

[655] *Id.* Also, a more detailed discussion about the methodology employed by the Commission in determining proposed Federal spot month position limit levels can be found at 85 FR at 11625–11628.

[656] EPSA at 3.

[657] Better Markets at 36.

[658] IATP at 9.

[659] PMAA at 2–3 (these market experts include governmental entities, such as the Department of Energy's Energy Information Administration and the U.S. Department of Agriculture, academics, and representatives of industries that produce, refine, process, store, transport, market, and consume the underlying commodity).

[660] CME Group at 5–6. Specifically, CME Group believed that using a 25% of EDS formula ''as a fixed formula for establishing recommended limits . . . is unsound as a matter of policy and incompatible with the Commission's statutory authority to determine that a specific position limit is necessary and set it at an appropriate level.''

[661] Updated Deliverable Supply Data—Potential Position Limits Rulemaking, MGEX Comment Letter (Aug. 31, 2018) at 2, available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

based.[662] Specifically, Better Markets stated that exchanges ''must balance the interests of their shareholders against the public interest and their commercial interests in market integrity'' and, as a result, may be incentivized to permit ''speculation—even excess speculation,'' because it ''is a key revenue driver.'' [663]

(3) Discussion of Final Rule—Commission Review of Exchanges' EDS Figures and Recommended Federal Spot Month Position Limit Levels

The Commission declines to utilize a different methodology and process for determining EDS figures and Federal spot month position limit levels.

(i) Determination of EDS Figures

In response to comments concerning the Commission's EDS determinations, the Commission notes that its process for reviewing and verifying the EDS figures provided by exchanges entailed extensive independent review and analysis of each EDS figure and its underlying methodology, and the Commission retained exclusive discretion to determine the reasonableness of the EDS figures. This review and analysis by Commission staff occurred prior to the exchanges' formal EDS submissions, during which time Commission staff verified that each exchange's EDS figure for each commodity underlying a core referenced futures contract was reasonable. In doing so, Commission staff confirmed that the methodology and the data [664] for the underlying commodity for each core referenced futures contract reflected the commodity characteristics [665] described in the core referenced futures contract's terms and conditions, while also recognizing that more than one methodology and one set of assumptions, allowances, and data sources could result in a reasonable EDS figure for a commodity. In addition, Commission staff replicated the exchanges' EDS figures using the methodology provided. For some commodities, Commission staff also determined the reasonableness of an exchange's EDS by constructing an alternate EDS using an alternate methodology using other available data and comparing that internal EDS with the exchange's EDS. In some cases, Commission staff consulted industry experts and market participants to verify that the assumptions and allowances used by the EDS methodology were reasonable and that the EDS figure itself was reasonable.

When Commission staff identified any issues during the review process, they raised those concerns with the exchanges in order to revise the methodologies, including the assumptions, allowances, and data sources used therein. As a result, when the exchanges formally submitted their EDS figures, both the EDS figures and the methodologies underlying their calculations had been thoroughly reviewed and analyzed by Commission staff, and some had been refined based on input from Commission staff. The EDS figures and the methodologies used were published in the comment section of the 2020 NPRM on the Commission's website and have been available for review by the public.[666]

Additionally, for the past 10 years, commenters to previous Federal position limits rule proposals have consistently recommended that the EDS figures should be supplied by exchanges, given the exchanges' expertise with their own contract markets and because of the experience they have in producing such figures.[667] The Commission has agreed and continues to agree with those comments. As a result, Commission staff has also previously worked in collaboration with the exchanges as part of an iterative process to review and refine the methodologies, assumptions, allowances, and data sources used in calculating the EDS figure for each commodity underlying a core referenced futures contract.

(ii) Determination of Federal Spot Month Position Limit Levels

In response to comments concerning the Commission's determination of the Federal spot month position limit levels, the Commission first notes that exchanges were invited to submit their recommended Federal spot month position limit levels for their respective core referenced futures contracts. In response, CME Group,[668] ICE,[669] and MGEX [670] provided recommended levels for their core referenced futures contracts.

When deciding whether to adopt, reject, or modify the exchange-recommended position limit levels, the Commission considered a variety of factors, including whether the recommended level: (i) Was consistent with the 25% or less of EDS formula, as provided in the guidance in Appendix C to part 38; (ii) reflected changes in the EDS of the underlying commodity and trading activity in the core referenced futures contract; and (iii) achieved the four policy objectives in CEA section 4a(a)(3)(B). Furthermore, as described in detail above, the Commission also thoroughly reviewed the methodologies for determining the EDS figures upon which the exchange-recommended spot month position limit levels are based.

Finally, the Commission also considered input from market participants concerning the EDS figures and the exchange-recommended Federal position limit levels in recalibrating the Federal position limit levels, as it has done for ICE Cotton No. 2 (CT) and NYMEX Henry Hub Natural Gas (NG) in this Final Rule, as discussed further below.

[662] Better Markets at 22.

[663] *Id.* at 22–23. Better Markets referenced CME Group Inc.'s Form 10–K filings, which stated that ''[t]he adoption and implementation of position limits rules . . . could have a significant impact on our commodities business if Federal rules for position limit management differ significantly from current exchange-administered rules.''

[664] The data underlying the EDS figures are from sources that Commission staff had determined as accurately representing the underlying commodity. These were typically from publicly available sources. For example, these include data published by the U.S. Department of Energy for NYMEX Light Sweet Crude Oil (CL), data published by the U.S. Department of Agriculture for CBOT Soybeans (S), data published by the Florida Department of Citrus for ICE FCOJ–A (OJ), and data published by CME Group concerning the gold inventories at its approved depositories for COMEX Gold (GC). Furthermore, most data sources were also adjusted based on interviews with market experts and market participants in order to better reflect the actual deliverable supply by taking into consideration the amount of time it takes to move the commodity to/from the delivery points, quality standards, and supplies that are not readily available due to being tied up in long-term contracts.

[665] These characteristics are provided in the guidance in section (b)(1)(i) of Appendix C to part 38, and include, among other things, the commodity's quality and grade specifications, delivery points (including storage capacity), historic storage levels, processing capacity, and adjustments to remove supply that is committed for long-term contracts and not available to underlie a futures contract. The verified EDS for each commodity reflects the quantity of the commodity that can be reasonably expected to be readily available to short traders and salable by long traders at its market value in normal cash-marketing channels at the contract's delivery points during the specified delivery period, barring abnormal movements in interstate commerce.

[666] *See* IFUS—Estimated Deliverable Supply—Softs Methodology, IFUS Comment Letter (May 14, 2019); Updated Deliverable Supply Data—Potential Position Limits Rulemaking, MGEX Comment Letter (Aug. 31, 2018); and Summary DSE Proposed Limits, CME Group Comment Letter (Nov. 26, 2019) (CME Group also provided separate EDS methodology submissions for each of its 18 core referenced futures contracts, which can also be found in the comment file), all available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[667] *See e.g.* 81 FR at 96754, n.495 (listing the commenters that expressed the view that exchanges are best able to determine appropriate spot month position limits and that the Commission should defer to their expertise).

[668] *See supra* n.616.

[669] *See supra* n.617.

[670] *See supra* n.618.

(iii) Concern Over Exchanges' Conflict of Interest and Improper Incentives in Maintaining Their Markets

In response to Better Markets' concern about the incentives of exchanges as public, for-profit businesses, as a preliminary matter, the Commission acknowledges that exchanges have a financial interest in increased trading volume, whether speculative or hedging, and, as a result, may be incentivized to increase EDS figures and recommend higher position limit levels. However, as previously discussed, the Commission independently assessed and verified the exchanges' EDS estimates. Specifically, the Commission: (1) Worked closely with the exchanges to independently verify that all EDS methodologies and figures were reasonable; [671] and (2) reviewed each exchange-recommended level for compliance with the requirements established by the Commission and/or by Congress, including those in CEA section 4a(a)(3)(B).[672] Also, as discussed at length above, the Commission conducted its own analysis of the exchange-recommended Federal spot month position limit levels and determined that the levels adopted herein: (1) Are low enough to diminish, eliminate, or prevent excessive speculation and also protect price discovery; (2) are high enough to ensure that there is sufficient market liquidity for bona fide hedgers; (3) fall within a range of acceptable limit levels; and (4) are properly calibrated to account for differences between markets. Thus, the Commission believes that the impact, if any, of such financial incentives were sufficiently mitigated through the Commission's close review of the methodology underlying the EDS figures, the EDS figures themselves, and the recommended Federal position limit levels.

The Commission also notes that exchanges have significant incentives and obligations to maintain well-functioning markets as self-regulatory organizations that are themselves subject to regulatory requirements. Specifically, the DCM and SEF Core Principles, as applicable, require exchanges to, among other things, list contracts that are not readily susceptible to manipulation, and surveil trading on their markets to prevent market manipulation, price distortion, and disruptions of the delivery or cash-settlement process.[673] Exchanges also have significant incentives to maintain well-functioning markets to remain competitive with other exchanges. Market participants may choose exchanges that are less susceptible to sudden or unreasonable fluctuations or unwarranted changes caused by excessive speculation or corners, squeezes, and manipulation, which could, among other things, harm the price discovery function of the commodity derivative contracts and negatively impact the delivery of the underlying commodity, bona fide hedging strategies, and market participants' general risk management.[674] Furthermore, several academic studies, including one concerning futures exchanges and another concerning demutualized stock exchanges, support the conclusion that exchanges are able to both satisfy shareholder interests and meet their self-regulatory organization responsibilities.[675]

iv. Phase-In of Federal Spot Month Position Limit Levels

a. Summary of the 2020 NPRM—Phase-In of Federal Spot Month Position Limit Levels

The 2020 NPRM did not include a phase-in mechanism in which the Commission would gradually adjust the Federal position limit levels over a period of time. As a result, under the 2020 NPRM, the proposed Federal spot month position limit levels for all core referenced futures contracts would immediately go into effect on the proposed effective date.

b. Summary of the Commission Determination—Phase-In of Federal Spot Month Position Limit Levels

The Commission declines to adopt a formal phase-in for the Federal spot month position limit levels, because it believes that the markets would operate in an orderly fashion with the Federal position limit levels adopted under this Final Rule. However, as a practical matter, the Commission notes that the operative spot month position limit levels for market participants trading in exchange-listed referenced contracts will be the exchange-set spot month position limit levels, which will continue to remain at their existing levels unless and until an exchange affirmatively modifies its exchange-set spot month position limit levels pursuant to part 40 of the Commission's regulations.[676]

c. Comments—Phase-In of Federal Spot Month Position Limit Levels

The Commission received comments requesting that the Commission "consider phasing in these adjustments for agricultural commodities to assess the impacts of increasing limits on contract performance." [677] CMC also noted that, "A phased approach could provide market participants, exchanges, and the Commission a way to build in scheduled pauses to evaluate the effects of increased limits, thereby fostering confidence and trust in the markets." [678]

d. Discussion of the Final Rule—Phase-In of Federal Spot Month Position Limit Levels

In response to comments, the Commission first notes that, although the Federal spot month position limit levels will generally be higher than existing Federal and/or exchange-set spot month position limit levels, the Commission believes that the referenced contract markets will be able to function in an orderly fashion when the final Federal spot month position limit levels

[671] As discussed in detail above, the verification involved: Confirming that the methodology and data for the underlying commodity reflected the commodity characteristics described in the core referenced futures contract's terms and conditions; replicating exchange EDS figures using the methodology provided by the exchange; and working with the exchanges to revise the methodologies as needed.

[672] *See* Section II.B.3.iii.b.(3).

[673] 17 CFR 38.200; 17 CFR 38.250; 17 CFR 37.300; and 17 CFR 37.400.

[674] Kane, Stephen, *Exploring price impact liquidity for December 2016 NYMEX energy contracts,* n.33, available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_priceimpact.pdf.*

[675] *See* David Reiffen and Michel A. Robe, *Demutualization and Customer Protection at Self-Regulatory Financial Exchanges,* Journal of Futures Markets, Vol. 31, 126–164, Feb. 2011 (in many circumstances, an exchange that maximizes shareholder (rather than member) income has a greater incentive to aggressively enforce regulations that protect participants from dishonest agents); and Kobana Abukari and Isaac Otchere, *Has Stock Exchange Demutualization Improved Market Quality? International Evidence,* Review of Quantitative Finance and Accounting, Dec 09, 2019, *https://doi.org/10.1007/s11156–019–00863-y* (demutualized exchanges have realized significant reductions in transaction costs in the post-demutualization period).

[676] 17 CFR part 40.

[677] AFIA at 2 and CMC at 6.

[678] CMC at 6. Although commenters did not provide specific details about what they meant by "phase-in," the Commission understands these comments to mean that they are requesting a gradual, step-up increase in Federal spot month and non-spot month position limit levels over time for agricultural core referenced futures contracts, instead of having an abrupt change to the new Federal position limit levels. This section only addresses the Commission's response to commenters' request for phased-in Federal spot month position limit levels. The Commission separately addresses commenters' request for phased-in Federal non-spot month position limit levels below in Section II.B.4.iv.a.(2)(v).

go into effect.[679] This is because, among other things, these final Federal spot month position limit levels are supported by the updated EDS figures and are set at or below 25% of EDS.[680]

However, as a practical matter, the operative spot month position limit level for market participants with respect to exchange-listed referenced contracts is not the Federal spot month position limit levels, but the exchange-set spot month position limit levels, which must be set at or below the corresponding Federal spot month position limit levels. As a result, despite the changes in the Federal spot month position limit levels (or the imposition of a Federal spot month position limit level for the first time) in this Final Rule, there will be no practical impact on market participants trading in exchange-listed referenced contracts unless and until an exchange affirmatively modifies its exchange-set spot month position limit levels through a rule submission to the Commission pursuant to part 40 of the Commission's regulations.[681]

v. ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level

a. Summary of the 2020 NPRM—ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level

The Commission proposed to increase the Federal spot month position limit level for ICE Cotton No. 2 (CT) from the existing Federal position limit of 300 contracts to 1,800 contracts. Like all of the Federal spot month position limit levels, the Commission's proposed level for ICE Cotton No. 2 (CT) was based on Commission staff's review, analysis, and verification of IFUS's updated EDS figure and Commission staff's review and analysis of IFUS's initial recommended Federal spot month position limit level.[682]

b. Summary of the Commission Determination—ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level

In the Final Rule, the Commission is adopting a Federal spot month position limit level of 900 contracts instead of the proposed level of 1,800 contracts for ICE Cotton No. 2 (CT). The reasons for this change are based on the comments received in response to the 2020 NPRM.

c. Comments—ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level

The Commission received numerous comments objecting to the higher proposed Federal spot month position limit level for ICE Cotton No. 2 (CT) in the 2020 NPRM.[683] The commenters requested that the Commission either maintain the current 300 contract limit level or drastically lower the limit from the proposed 1,800 contract limit level.[684] In doing so, commenters argued that they disagreed with the EDS figure for ICE Cotton No. 2 (CT) because it does ''not reflect the cotton industry's historical ability to deliver the physical commodity.'' [685] AMCOT similarly noted that the ''methodology used in determining the limits is flawed and lacks consideration of the industry's intricacies including the non-fungible quality as well as warehousing, location, and logistical challenges.'' [686] Furthermore, AMCOT believed that the Federal spot month position limit level ''would likely be disruptive to orderly market flows.'' [687] Likewise, ACSA noted that, ''[i]n a smaller market like cotton, such a drastic increase and high limit will cause excessive volatility and hinder convergence in the spot month.'' [688]

In addition to the market participants, IFUS also submitted a comment letter with respect to ICE Cotton No. 2 (CT), in which it provided an updated recommended Federal spot month position limit level of 900 contracts.[689]

d. Discussion of Final Rule—ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level

As a preliminary matter, and as discussed previously, the Commission believes that there is a range of acceptable Federal position limit levels that will achieve the objectives of CEA section 4a(a)(3)(B). Thus, the Commission acknowledges that there may be other acceptable Federal spot month position limit levels in addition to the proposed 1,800 contract level for ICE Cotton No. 2 (CT). Commenters to the 2020 NPRM suggested three alternatives to the proposed Federal spot month position limit level for ICE Cotton No. 2 (CT): (1) 300 contracts; (2) 900 contracts; or (3) a level ''drastically lower'' than 1,800 contracts. All of these alternatives are below 25% of EDS. The Commission considered the two specifically enumerated levels (*i.e.,* 300 contracts and 900 contracts) and the proposed 1,800 contract level, and has determined that the 900 contract level is the most appropriate among the three for ICE Cotton No. 2 (CT).

(1) ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level Should Be Above 300 Contracts

The Commission believes that it is more appropriate to raise the Federal spot month position limit level than to maintain its existing level of 300 contracts, as long as that level is set at or below 25% of EDS. One reason is because the current 300 contract Federal spot month position limit level for ICE Cotton No. 2 (CT) has been in place since at least 1987 while the size of the ICE Cotton No. 2 (CT) market has significantly increased over the years, as evidenced by the material increases in deliverable supply and open interest.[690]

[679] A phase-in is unnecessary with respect to the Federal spot month position limit level for CBOT Oats (O), because the Federal spot month position limit level for the contract remains at the current level.

[680] The final Federal spot month position limit levels for cash-settled NYMEX NG referenced contracts may exceed 25% of EDS because the Federal spot month position limit level is being applied separately for each exchange and OTC swaps market, but the Commission believes that this approach will not cause any issues, in part, because of the highly liquid nature of that particular market. For additional details concerning the NYMEX NG market, *see* Section II.B.3.vi.a.

[681] 17 CFR part 40.

[682] *See* IFUS—Estimated Deliverable Supply—Softs Methodology, IFUS Comment Letter (May 14, 2019) and Reproposal—Position Limits for Derivatives (RIN 3038–AD99); ICE Comment Letter (Feb. 28, 2017) (attached Sept. 28, 2016 comment letter), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596 and Proposed Rule 81 FR 96704, respectively). IFUS did not formally provide recommended Federal spot month position limit levels for each of its core referenced futures contracts. However, ICE had previously recommended setting Federal spot month position limit levels for IFUS's core referenced futures contracts at 25% of EDS in its comment letter in connection with the 2016 Reproposal and Commission staff also confirmed with ICE/IFUS's representatives that ICE/IFUS's position has remained the same with respect to the Federal spot month position limit levels since the 2016 Reproposal. The Commission notes, however, with respect to ICE Cotton No. 2 (CT), IFUS submitted an updated recommended Federal spot month position limit level recommending a Federal spot month position limit level of 900 contracts. *See* IFUS—Estimated Deliverable Supply—Cotton Methodology, August 2020, IFUS Comment Letter (August 27, 2020), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[683] AMCOT at 1–2; ACSA at 8; Ecom at 1; Southern Cotton at 2; NCC at 1; Mallory Alexander at 2; Canale Cotton at 2; IMC at 2; Olam at 3; DECA at 2; Moody Compress at 1; ACA at 2; Choice at 1; East Cotton at 2; Jess Smith at 2; McMeekin at 2; Memtex at 2; NCC at 2; Omnicotton at 2; Toyo at 2; Texas Cotton at 2; Walcot at 2; White Gold at 1; LDC at 1; SW Ag at 2; NCTO at 2; and Parkdale at 2.

[684] *Id.*

[685] *See, e.g.,* ACA at 2.

[686] AMCOT at 1.

[687] *Id.*

[688] ACSA at 8.

[689] IFUS—Estimated Deliverable Supply—Cotton Methodology, August 2020, IFUS Comment Letter (Aug. 14, 2020), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[690] For example, between the periods of 1994–1999 and 2015–2018, the maximum open interest in ICE Cotton No. 2 (CT) increased from 122,989 contracts to 344,302 contracts. Also, the EDS for ICE Cotton No. 2 (CT) increased from 6,005 contracts to 6,948 contracts between 2016 and 2019.

A second reason why the Commission believes that it is appropriate to raise the Federal spot month position limit level above the existing level of 300 contracts for ICE Cotton No. 2 (CT) is because of potential liquidity concerns. At 300 contracts, the Federal spot month position limit level for ICE Cotton No. 2 (CT) would be set at 4.32% of EDS, which would be the lowest Federal spot month position limit level, by far, in terms of percentage of EDS among all core referenced futures contracts.[691] At such a low level, the Commission is concerned that this could hamper liquidity in the market, especially if the ICE Cotton No. 2 (CT) market continues to grow as it has done over the years. This concern is supported by the Commission's observation that there has been a lack of liquidity at the start of the spot month period in recent years as speculative traders exited the market or reduced their positions to the Federal spot month position limit level of 300 contracts. The Commission's observation is based on its assessment of the daily price impact liquidity in basis points with the gauge: [692]

$$BP_d = \sum_{i=2}^{N_d} \frac{Q_i}{TV_d} \left| \frac{P_i - P_{i-1}^*}{P_{i-1}^*} \right|.$$

Raising the limit level above 300 contracts to a higher level, such as 900 contracts, should help alleviate some of the liquidity problems that market participants have experienced because they will not have to reduce their positions to such a low level (*i.e.,* 300 contracts).

A third reason for raising the Federal spot month position limit level above its existing level of 300 contracts is because a 300 contract level may not provide adequate headroom under which exchanges may set and adjust their own position limit levels, up or down, in response to market conditions within this position limits framework. This is an especially acute issue because, as noted above, a Federal spot month position limit level of 300 contracts is extremely low in terms of percentage of EDS when compared to other core referenced futures contracts, and there is no market-based reason (*e.g.,* higher susceptibility for corners and squeezes) for why the level should be set so low.

A final reason for supporting a Federal spot month position limit level higher than 300 contracts is because IFUS, which is the exchange that lists ICE Cotton No. 2 (CT), has recommended a level higher than 300 contracts.[693] This is significant because exchanges have deep knowledge about their markets and are particularly well-positioned to recommend position limit levels for the Commission's consideration.[694]

The Commission recognizes that the comments from the end-users of ICE Cotton No. 2 (CT) unanimously requested that the Commission consider, among other options, maintaining the 300 contract Federal position limit level. The main justifications underlying this request are that: (1) The ICE Cotton No. 2 (CT) market is small; and (2) the EDS figure is extremely high. In response to commenters' claim about the size of the market, the Commission notes that the market for ICE Cotton No. 2 (CT) is not as small as suggested. Open interest data indicate that the ICE Cotton No. 2 (CT) futures market had a larger average notional open interest in 2019 than nine other core referenced futures contracts.[695] Six of these contracts have higher Federal position limit levels in terms of percentage of EDS in this Final Rule.[696]

In response to commenters' issue with the EDS, the Commission notes that the cotton merchants may have focused on too narrow of a scope in their comment letters. The commenters appear to focus on the actual cotton that was delivered pursuant to holding the physically-settled ICE Cotton No. 2 (CT) core referenced futures contract to expiration, and they use that data as evidence that the EDS is extremely high.[697] The Commission's EDS figures are not meant to reflect the actual commodity delivered. Rather, as the term estimated *deliverable supply* indicates, it is the quantity of the commodity that meets contract specifications that is reasonably expected to be readily available to short traders and salable by long traders at its market value in normal cash-marketing channels at the contract's delivery points during the specified delivery period, barring abnormal movements in interstate commerce.[698] The Commission believes that limiting a speculative trader from controlling more than 25% of this supply, and not the actual commodity delivered, is critical for ensuring that corners and squeezes do not happen.[699]

[691] CBOT KC HRS Wheat (KW) generally has the lowest Federal spot month position limit level in terms of percentage of EDS at 6.82%, which is 58% higher than 4.32%. However, following the close of trading on the business day prior to the last two trading days of the contract month, CME Live Cattle (LC) has the lowest Federal spot month position limit level in terms of percentage of EDS at 5.29%, which is 22% higher than 4.32%.

[692] $P_i$ is the price of trade i. $P_i$* is the proxy for the current market price (the price of the last trade, $P_{i-1}$). $Q_I$ is the quantity traded (the number of futures contracts traded in trade i). See Kane, Stephen, *Exploring price impact liquidity for December 2016 NYMEX energy contracts,* p.5–6, available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_priceimpact.pdf.*

[693] IFUS—Estimated Deliverable Supply—Cotton Methodology, August 2020, IFUS Comment Letter (Aug. 14, 2020), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[694] 85 FR at 11598. However, as noted before, the Commission independently reviewed and analyzed the exchange-recommended levels, including the EDS figures that support such levels.

[695] These are CBOT Oats (O), CBOT KC HRW Wheat (KW), MGEX HRS Wheat (MWE), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE FCOJ–A (OJ), ICE Sugar No. 16 (SF), NYMEX Platinum (PL), and NYMEX Palladium (PA). *See* Section III.C.

[696] These are CBOT Oats (O), MGEX HRS Wheat (MWE), ICE Cocoa (CC), ICE FCOJ–A (OJ), ICE Sugar No. 16 (SF), and NYMEX Platinum (PL).

[697] *See* ACSA at 7–8.

[698] 17 CFR part 38, Appendix C.

[699] Generally, only a small percentage of futures contracts actually go to delivery. Basing a speculative position limit on past deliveries for a futures contract would be far too limiting for a speculative position limit and would not reasonably achieve the four policy objectives of CEA section 4a(a)(3)(B).

Furthermore, commenters did not provide specific issues with respect to the methodology used to determine EDS for ICE Cotton No. 2 (CT), which has been available for review by the public since the 2020 NPRM was published.[700] As a result, the Commission believes that the EDS for ICE Cotton No. 2 (CT) is appropriate and reasonable based on its review and analysis of the methodology used.[701]

(2) ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level Should Be Below 1,800 Contracts

However, the Commission believes that it is appropriate to lower the Federal spot month position limit for ICE Cotton No. 2 (CT) from the proposed 1,800 contract level. First, as noted previously, the Commission received an updated recommended Federal spot month position limit level from IFUS that is lower than 1,800 contracts.[702] Second, although the Commission believes that there are issues with the cotton industry commenters' justifications for lowering the Federal spot month position limit level, the Commission still believes that their comments are informative. Specifically, the Commission believes that the unanimous comments from the end-users of the ICE Cotton No. 2 (CT) core referenced futures contract suggest that lowering the Federal spot month position limit level from 1,800 contracts will not have a material detrimental effect on liquidity for bona fide hedgers in the market. All things being equal, a lower spot month position limit level will better protect the markets against corners and squeezes, but at the expense of a reduction in liquidity for bona fide hedgers as positions held by speculators will be more constrained. However, in this instance, the Commission believes that it could improve protections against corners and squeezes without materially impacting liquidity for bona fide hedgers by adopting a Federal spot month position limit level that is lower than 1,800 contracts, based on the comments received.[703]

(3) ICE Cotton No. 2 (CT) Federal Spot Month Position Limit Level Should Be Set at 900 Contracts

Given that the Commission believes that it is preferable to set a Federal spot month position limit level higher than 300 contracts but lower than 1,800 contracts for the aforementioned reasons, the Commission believes that a Federal position limit level of 900 contracts is preferable to those alternatives. Specifically, the Commission notes that IFUS, which has deep knowledge about the ICE Cotton No. 2 (CT) market and is particularly well-positioned to recommend the position limit level for the Commission's consideration, has recommended a Federal spot month position limit level of 900 contracts. This is also supported by commenters who requested a ''drastically lower'' Federal spot month position limit level as an alternative to maintaining a Federal spot month position limit level of 300 contracts.

The Commission also believes that a level of 900 contracts is sufficiently high to address concerns about a lack of liquidity. This is, in part, because a Federal spot month position limit level of 900 contracts would result in a level that is set at 12.95% of EDS, which would coincidentally place ICE Cotton No. 2 (CT) exactly at the median among the legacy agricultural contracts and all core referenced futures contracts in terms of percentage of EDS. Finally, based on the comments received and because, all things being equal, lower spot month position limit levels provide better protection against corners and squeezes, the Commission believes that a level of 900 contracts will provide stronger protection against corners and squeezes without materially impacting liquidity for bona fide hedgers vis-à-vis a level of 1,800 contracts.[704]

vi. NYMEX Henry Hub Natural Gas (NG)

This section will address the following issues concerning NYMEX NG: (i) The Federal spot month position limit level for NYMEX NG; (ii) the conditional spot month position limit exemption for positions in natural gas referenced contracts, which is located in final § 150.3(a)(4); and (iii) NYMEX NG penultimate referenced contracts. The Commission is addressing the latter two issues in this section in order to allow the reader to review all discussions regarding natural gas in one place in this Final Rule.

a. NYMEX Henry Hub Natural Gas (NG) Federal Spot Month Position Limit Level

(1) Summary of the 2020 NPRM and Additional Background Information—NYMEX NG Federal Spot Month Position Limit Level

Under the existing Federal position limits framework, there are no Federal position limits for NYMEX NG in either the spot month or the non-spot month. There is, however, an exchange-set spot month position limit for NYMEX NG, which is set at 1,000 contracts for the physically-settled NYMEX NG contract and 1,000 contracts *per exchange* for cash-settled equivalent-sized natural gas contracts. Because there are three exchanges that list such cash-settled natural gas contracts (NYMEX, IFUS, and Nodal), a market participant can currently hold up to 3,000 such cash-settled contracts during the spot month.

In the 2020 NPRM, the Commission proposed a Federal spot month position limit level of 2,000 contracts for NYMEX NG. The 2,000 contract level was determined based on 25% of updated EDS and was recommended by CME Group. Consistent with the other core referenced futures contracts, the proposed netting and aggregation requirements permitted a market participant to hold up to 2,000 physically-settled NYMEX NG referenced contracts and another 2,000 cash-settled NYMEX NG referenced contracts across all exchanges and in the OTC swaps market.[705]

(2) Summary of the Commission Determination—NYMEX NG Federal Spot Month Position Limit Level

The Commission is adopting its proposed approach with respect to physically-settled NYMEX NG referenced contracts, but is modifying its proposed approach with respect to cash-settled NYMEX NG referenced contracts, as discussed below.

[700] IFUS—Estimated Deliverable Supply—Softs Methodology, IFUS Comment Letter (May 14, 2019), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[701] Specifically, the estimate took into account cotton certified stocks, which are reported daily for the five delivery points specified in the contract specifications, as well as the exchange estimated deliverable stocks close to the delivery points that are not included as certified stocks based on the USDA's Weekly Bales Made Available to Ship (''BMAS'') Summary report. The exchange estimated the deliverable stocks contained in or near exchange warehouses, both certified and non-certified, during notice and delivery periods for the futures contract. BMAS deliverable stocks data was also adjusted to exclude cotton at locations that were far away from the delivery points.

[702] IFUS—Estimated Deliverable Supply—Cotton Methodology, August 2020, IFUS Comment Letter (Aug. 14, 2020), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[703] However, for the reasons discussed previously, the Commission does not believe that lowering the Federal spot month position limit level to 300 contracts is appropriate, given the observed issues in liquidity during the early part of the spot month period.

[704] The Commission recognizes that this will limit the range through which an exchange may set and adjust its own exchange-set position limit level. However, based on the comments received, the Commission believes that the stronger protections against corners and squeezes is appropriate.

[705] For further discussion of netting and aggregation, *see* Section II.B.10. (Application of Netting and Related Treatment of Cash-settled Referenced Contracts).

(3) Comments—NYMEX NG Federal Spot Month Position Limit Level

With respect to the proposed NYMEX NG Federal spot month position limit level, NGSA requested that the Commission ''increase the spot month limit on the NG Contract by recognizing the transportation capacity available now at Henry Hub provided by displacement and the increasing capacity which is coming from future but imminent displacement.'' [706] In support, NGSA noted that CME Group's EDS figure has ''incorporated displacement into its estimate of deliverable supply at Henry Hub for years.'' [707]

MFA/AIMA, Citadel, and SIFMA AMG requested that the Commission raise the Federal spot month position limit level for NYMEX NG referenced contracts to at least 3,000 contracts, because the 2020 NPRM effectively decreases the total number of exchange-traded cash-settled NYMEX NG referenced contracts that a market participant may hold in the spot month from the current level of 3,000 contracts to 2,000 contracts.[708] In support of this request, MFA/AIMA argued that the 2020 NPRM ''could adversely affect the ability of traders to optimize the proportion of physically-settled and cash-settled natural gas contracts that they wish to hold in their portfolio.'' [709] SIFMA AMG argued that the 2020 NPRM ''would disrupt existing trading practices and business models without any corresponding regulatory or policy benefit.'' [710]

(4) Discussion of Final Rule—NYMEX NG Federal Spot Month Position Limit Level

Under the Final Rule, market participants may hold up to 2,000 cash-settled NYMEX NG referenced contracts *per exchange* during the spot month and an additional 2,000 cash-settled economically equivalent OTC swaps, rather than being subject to an aggregate position limit level of 2,000 cash-settled NYMEX NG referenced contracts across all exchanges and the OTC swaps market as proposed under the 2020 NPRM. Because there are currently three exchanges that list natural gas referenced contracts, this will allow market participants to hold a total of 8,000 cash-settled NYMEX NG referenced contracts between positions held in cash-settled futures and in cash-settled economically equivalent OTC swaps.[711] This is in addition to the 2,000 physically-settled NYMEX NG referenced contracts a market participant may hold during the spot month. These amendments to the proposal are reflected in a revised Appendix E to part 150 that the Commission is adopting in this Final Rule.

(i) Request To Increase the Federal Spot Month Position Limit Level To Account for Displacement

In response to NGSA's request, the Commission first notes that CME Group provided the EDS figure that was used as a basis for determining its exchange-recommended Federal spot month position limit level, which the Commission ultimately used as a basis for its own proposed Federal spot month position limit level for NYMEX NG after independently reviewing and assessing the methodology underlying the EDS figure and the EDS figure itself.[712] As NGSA noted, CME Group's EDS has ''incorporated displacement into its estimate of deliverable supply at Henry Hub for years,'' [713] which means that the EDS figure on which the proposed Federal spot month position limit level was based already ''recogniz[ed] the transportation capacity available now at Henry Hub provided by displacement.'' [714] As a result, the proposed Federal spot month position limit level took this into account as well. With respect to future increases in EDS based on ''future but imminent displacement,'' [715] in the event that this occurs, CME Group may submit an updated EDS figure pursuant to § 150.2(f), at which time the Commission would consider whether to modify the Federal spot month position limit level.

(ii) Request To Increase the Cash-Settled Federal Spot Month Position Limit Level

As previewed above, in response to comments from MFA/AIMA, Citadel, and SIFMA AMG, the Commission is modifying the proposed NYMEX NG Federal spot month position limit level for cash-settled NYMEX NG referenced contracts, so that the Federal spot month position limit applies separately per each exchange and the OTC swaps market, rather than across exchanges and the OTC swaps market.

The Commission believes that this modification is warranted in order to avoid disrupting the well-developed, unique liquidity characteristics of the natural gas derivatives markets. As detailed below, the cash-settled natural gas market is significantly more liquid than the physically-settled natural gas market during the spot month. This is in contrast with typical commodity markets, in which the physically-settled contracts are generally more liquid than the cash-settled contracts during the spot month.[716]

The unique nature of the natural gas markets is reflected in the current exchange-set natural gas position limit framework, in which market participants may hold up to 1,000 cash-settled natural gas contracts per exchange, which can result in a position of up to 3,000 cash-settled natural gas contracts (instead of 1,000 cash-settled natural gas contracts altogether), despite only being able to hold up to 1,000 physically-settled NYMEX NG contracts. The Commission believes that, absent the modification adopted herein to apply the spot month limit to NYMEX NG on a per exchange basis, the proposed Federal spot month position limit level could disrupt the cash-settled natural gas markets, in part, because, as commenters have noted: (1) Market participants would be able to hold fewer cash-settled NYMEX NG referenced contracts (*i.e.,* 2,000 contracts) than they were previously permitted under the exchange-set position limit framework (*i.e.,* 3,000 contracts); and (2) some market participants may not be able to hold the same proportion of physically-settled to cash-settled NYMEX NG referenced contracts that they are

[706] NGSA at 10–11.

[707] *Id.* at 11.

[708] MFA/AIMA at 11–12; Citadel at 7–8; and SIFMA AMG at 10–11 (SIFMA AMG supported the 2,000 contract limit level for physically-settled NYMEX NG referenced contracts, but requested at least a 3,000 contract limit level for the cash-settled NYMEX NG referenced contracts).

[709] MFA/AIMA at 11–12.

[710] SIFMA AMG at 11.

[711] 2,000 cash-settled referenced contracts multiplied by three exchanges plus 2,000 cash-settled economically equivalent OTC swaps equals 8,000 cash-settled NYMEX NG referenced contracts.

[712] *Summary DSE Proposed Limits,* CME Group Comment Letter (Nov. 26, 2019), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[713] NGSA at 11.

[714] *Id.* at 10. Furthermore, CME Group's methodology for determining EDS for NYMEX NG explicitly states, ''Additionally, the Exchange has taken into consideration backhaul in estimating the deliverable supply.'' New York Mercantile Exchange, Inc., Analysis of Deliverable Supply Henry Hub Natural Gas Futures, December 2018 (Dec. 1, 2018), available at *https://comments.cftc.gov* (comment file for Proposed Rule 85 FR 11596).

[715] NGSA at 10.

[716] Typically, this is because the physically-settled contract is established first and the natural formation of liquidity in the physically-settled contract historically stays in the established contract due to first mover advantage. More liquid markets provide for better bid/ask spreads and can execute larger transaction sizes without substantial effects on the price of the contract. Thus, in the past, cash-settled look-alike contracts historically have not been as liquid as the original physically-settled futures contract.

currently able to hold if they wish to maximize their positions in physically-settled NYMEX NG referenced contracts. The Commission also believes that it is appropriate to maintain consistency vis-à-vis the exchange-set position limit framework in order to minimize disruptions, since the Commission has not observed any issues with the exchange-set position limit framework with respect to natural gas.

Accordingly, under the Final Rule, market participants (that are not availing themselves of the Federal spot month conditional position limit exemption for NYMEX NG, which is discussed below) may hold up to 2,000 cash-settled NYMEX NG referenced contracts on each exchange that lists a cash-settled NYMEX NG referenced contract (which is currently NYMEX, IFUS, and Nodal), a total position of 6,000 exchange-listed cash-settled NYMEX NG referenced contracts.[717] Furthermore, under the Final Rule, traders may also hold an additional position in cash-settled economically equivalent NYMEX NG OTC swaps that has a notional amount of up to 2,000 equivalent-sized contracts. The Commission is separately permitting up to 2,000 referenced contracts in the NYMEX NG OTC swaps market in order to avoid disruptions to that market, given that traders may be currently participating in that market as well. As a result, under the Final Rule, traders may hold up to a total of 8,000 cash-settled NYMEX NG referenced contracts [718] and 2,000 physically-settled NYMEX NG referenced contracts.[719]

The Commission notes that, as discussed further below, as an initial legal matter, the Commission interprets CEA section 4a(a)(6) as generally requiring aggregate Federal position limits across exchanges.[720] Notwithstanding the requirements of CEA section 4a(a)(6), the Commission is adopting this approach with respect to NYMEX NG referenced contracts pursuant to its exemptive authority in CEA section 4a(a)(7). In doing so, the Commission believes that, based on the foregoing reasons, applying the Federal spot month position limit level for cash-settled NYMEX NG referenced contracts separately per exchange and the OTC swaps market does not undermine the purposes of the Federal position limits framework pursuant to CEA section 4a.

b. NYMEX NG Federal Spot Month Conditional Position Limit Level

(1) Summary of 2020 NPRM and Additional Background Information—NYMEX NG Federal Spot Month Conditional Position Limit Level

In addition to the proposed 2,000 contract Federal spot month position limit level for NYMEX NG, proposed § 150.3(a)(4) also included a spot month conditional position limit exemption (''Federal conditional limit'') from the standard Federal spot month position limit level for NYMEX NG for market participants that do not hold a position in the physically-settled NYMEX NG referenced contract.[721] The proposed Federal conditional limit would allow, during the spot month, market participants that do not hold a position in the physically-settled NYMEX NG referenced contract to hold: (1) Up to 10,000 cash-settled NYMEX NG referenced contracts per exchange that lists a cash-settled NYMEX NG referenced contract; and (2) an additional position in cash-settled economically equivalent NYMEX NG OTC swaps that has a notional amount of up to 10,000 equivalent-sized contracts. As a result, the proposed Federal conditional limit would permit a market participant that does not hold a physically-settled NYMEX NG referenced contract to hold a total of 40,000 cash-settled NYMEX NG referenced contracts (up to 10,000 contracts on each of the three exchanges (NYMEX, IFUS, and Nodal) that lists a cash-settled NYMEX NG referenced contract and in the OTC swaps market) during the spot month.

The proposed framework for the Federal conditional limit was derived from the existing exchange-set spot month conditional position limit framework that has been in place for approximately a decade. This existing conditional position limit framework permits, during the spot month, up to 5,000 equivalent-sized cash-settled natural gas contracts per exchange that lists a cash-settled natural gas contract, provided that the market participant does not hold a position in the physically-settled NYMEX NG contract.[722] The 5,000 contract conditional spot month position limit level equals five-times the existing exchange-set 1,000 contract spot month position limit level for the physically-settled NYMEX NG contract.[723] Noting the unique circumstances of the natural gas futures markets, the Commission's proposed Federal conditional limit level applied the same multiplier of five to its proposed Federal spot month position limit level for the physically-settled NYMEX NG contract in order to arrive at the 10,000 contract Federal conditional limit level that applies for each exchange and OTC swaps market.

The 2020 NPRM included the Federal conditional limit to accommodate certain trading dynamics unique to the natural gas contracts.[724] For example, the Commission has observed that, as the physically-settled NYMEX NG core referenced futures contract approaches expiration, open interest tends to decline in NYMEX NG and tends to increase rapidly in ICE's cash-settled Henry Hub LD1 contract.[725] This is in contrast with other commodities in which the physically-settled markets are more liquid than the cash-settled markets during the spot month. These dynamics suggest that cash-settled natural gas contracts serve an important function for hedgers and speculators who wish to recreate and/or hedge the physically-settled NYMEX NG contract price during the spot month without being required to make or take

[717] The Commission notes that market participants are not permitted to net cash-settled NYMEX NG referenced contract positions across exchanges or the OTC swaps market for Federal spot month position limit purposes.

[718] 2,000 cash-settled NYMEX NG referenced contracts multiplied by three exchanges plus 2,000 cash-settled economically equivalent NYMEX NG OTC swaps equals 8,000 cash-settled NYMEX NG referenced contracts.

[719] CME Group also commented that it ''objects to any disparities in the spot-month limits and would rigorously disagree if the Commission adopts any other disparities in treatment between physically-settled and cash-settled contracts,'' in the context of the proposed Federal conditional limit, which is discussed in the section below. CME Group at 6. This comment could also be viewed as an objection to the Final Rule's Federal spot month position limit level for cash-settled NYMEX NG referenced contracts. The Commission believes that the rationale set forth in this section and the Federal conditional limit section below is responsive to CME Group's possible concern with respect to the Final Rule's Federal spot month position limit level for cash-settled NYMEX NG referenced contracts.

[720] For further discussion of the Commission's aggregation and netting rules, *see* Section II.B.10. (application of netting section).

[721] The Commission is adopting the Federal conditional limit pursuant to its exemptive authority in CEA section 4a(a)(7). 7 U.S.C. 6a(a)(7).

[723] *See* IFUS Rule 6.20(c), NYMEX Rule 559.F, and Nodal Rule 6.5.7. The spot month for such contracts is three days. *See also* Position Limits, CMG Group website, available at *https://www.cmegroup.com/market-regulation/position-limits.html* (NYMEX position limits spreadsheet); Market Resources, IFUS website, available at *https://www.theice.com/futures-us/market-resources* (IFUS position limits spreadsheet). NYMEX rules establish an exchange-set spot month limit of 1,000 contracts for its physically-settled NYMEX NG core referenced futures contract and a separate spot month limit of 1,000 contracts for its cash-settled Henry Hub Natural Gas Last Day Financial Futures contract. IFUS's natural gas contract is one quarter the size of the NYMEX contract. IFUS thus has rules in place establishing an exchange-set spot month limit of 4,000 contracts (equivalent to 1,000 NYMEX NG contracts) for its cash-settled Henry Hub LD1 Fixed Price Futures contract.

[724] 85 FR at 11641.

[725] *Id.*

delivery.[726] In addition, the Commission also proposed the divestiture requirement in the Federal conditional limit in order to address historical concerns over the potential for manipulation of physically-settled natural gas contracts during the spot month in order to benefit positions in cash-settled natural gas contracts.[727]

(2) Summary of the Commission Determination—NYMEX NG Federal Spot Month Conditional Position Limit Level

The Commission is adopting the Federal conditional limit as proposed.

(3) Comments—NYMEX NG Federal Spot Month Conditional Position Limit Level

With respect to the proposed Federal conditional limit, several commenters generally supported its adoption.[728] COPE believed that the proposed conditional limit ''permits market liquidity . . . without sacrificing the benefits of position limits.''[729] ICE supported the Federal conditional limit, noting that ''cash-settled contracts present a reduced potential for manipulation of the price of the physically-settled contract.'' [730] CME Group, on the other hand, objected to the proposal, arguing that it could ''drain liquidity for bona fide hedgers in the physically-settled market and could prevent physical delivery markets from serving the price discovery function that they have long provided'' and believed that it ''could incentivize the manipulation of a cash commodity price in order to benefit a position in a cash-settled contract.'' [731]

A number of commenters also requested that the Federal conditional limit levels be available to market participants that do not exit positions in the physically-settled NYMEX NG referenced contract during the spot month, which would effectively establish the Federal conditional limit level as the operative Federal spot month limit level for cash-settled NYMEX NG referenced contracts. In support of this request, several commenters argued that the 2020 NPRM's approach to the Federal conditional limit would result in liquidity leaving the physically-settled NYMEX NG referenced contract when it is needed the most.[732] EEI/EPSA also commented that the Federal conditional limit framework in the 2020 NPRM is ''excessive and is an overly rigid solution that may unnecessarily restrict legitimate trading activity.'' [733] NGSA commented that the 2020 NPRM ''removes important hedging optionality for physical market participants.'' [734] Citadel argued that the 2020 NPRM would limit flexibility and impair market efficiency by preventing ''market participants with a meaningful position in the cash-settled market from participating in the physically-settled market—limiting flexibility and impairing market efficiency.'' [735] CCI also believed that the 2020 NPRM would ''impair price discovery'' and ''negatively impact price convergence.'' [736]

Finally, ICE requested that ''the Commission revert back to the five-time conditional limit for cash settled contracts . . . instead of the conditional limit of 10,000 contracts in the Proposed Rule,'' because ''[a]pplying a five-time multiplier versus a hard limit, would allow the conditional limit to track any changes in the spot month limits over time, which in turn will reflect changes in deliverable supply.'' [737]

(4) Discussion of Final Rule—NYMEX NG Federal Spot Month Conditional Position Limit Level

(i) Availability of the Federal Conditional Limit for NYMEX NG

In response to CME Group's comment supporting the elimination of the Federal condition limit, the Commission is concerned that eliminating the proposed conditional limit could result in potential market disruptions, given that a conditional limit framework for natural gas has been in place at the exchange level for many years. For example, eliminating the existing conditional limit structure could restrict the positions that market participants may hold in cash-settled NYMEX NG referenced contracts during the spot month, resulting in reduced liquidity, including for commercial hedgers seeking to offset price risks but not necessarily looking to make or take delivery. Additionally, since it was instituted approximately a decade ago, the exchange-set conditional limit framework has functioned well.[738] The Commission has not observed any of the concerns raised by CME Group come to fruition, and the physically-settled NYMEX NG referenced contract remains highly liquid. Furthermore, as discussed above, other commenters supported the availability of the Federal conditional limit.

(ii) Federal Conditional Limit's Divestiture Requirement

In response to comments requesting that the Federal conditional limit be available to market participants that do not exit the spot month physically-settled NYMEX NG referenced contract, the Commission first notes that the requirement that market participants exit the physically-settled NYMEX NG referenced contract has been reflected in exchange rulebooks for many years, in part because the requirement is critically important to discouraging manipulation.[739] Without this requirement, a trader could hold up to 40,000 cash-settled NYMEX NG referenced contracts (or more, if additional exchanges list cash-settled NYMEX NG referenced contracts in the future), which is at 500% of EDS, and 2,000 physically-settled NYMEX NG referenced contracts, which is at 25% of EDS. At these levels, it may not require much movement in the physically-settled markets to disproportionately benefit the cash-settled holdings. As a result, the requirement to exit the physically-settled contract is critical for reducing the market participant's incentive to manipulate the cash settlement price by, for example, banging-the-close or distorting physical delivery prices in the physically-settled contract to benefit leveraged cash-settled positions.[740]

With respect to commenters' concerns about removing flexibility and options for market participants, as well as a potential decrease in liquidity in the physically-settled NYMEX NG referenced contract, the Commission notes that the physically-settled NYMEX NG referenced contract remains highly liquid even in spite of the implementation of the exchange-set conditional limit framework instituted approximately a decade ago. Also, market participants should have more flexibility and options than before because the Federal spot month position limit level for NYMEX NG adopted herein will now permit up to 8,000 cash-settled NYMEX NG referenced contracts, even if the market participant holds 2,000 physically-settled NYMEX

[726] *Id.*

[727] *Id.*

[728] COPE at 2–3; EEI/EPSA at 4; and ICE at 13.

[729] COPE at 2–3.

[730] ICE at 13 (referencing a sentiment previously expressed by the Commission).

[731] CME Group at 6.

[732] ISDA at 8; SIFMA AMG at 10–11; FIA at 7–8; NGSA at 12–14; Citadel at 7; and CCI at 4.

[733] EEI/EPSA at 4.

[734] NGSA at 12.

[735] Citadel at 7.

[736] CCI at 4.

[737] ICE at 13.

[738] 85 FR at 11640.

[739] 85 FR at 11641.

[740] *See* 85 FR 11626, 11641.

NG referenced contracts.[741] Finally, the Commission reiterates that Federal position limit levels only apply to speculative positions and, as a result, bona fide hedging positions will continue to be allowed to exceed the Federal position limit levels, including the Federal conditional limit level, from the Federal position limits perspective.[742]

(iii) Application of a Five-Times Multiplier for the Federal Conditional Limit Level

The Commission clarifies that, in accordance with historical practice, if the Federal spot month position limit level for the physically-settled NYMEX NG referenced contract is updated in the future through rulemaking, the Commission expects to simultaneously adjust the Federal conditional limit in the same rulemaking, such that the Federal conditional limit level is set at a multiple of five of the new Federal spot month position limit level for NYMEX NG, provided that the Commission does not observe any issues in the markets.

c. NYMEX NG Penultimate Referenced Contracts

(1) Summary of the 2020 NPRM and Additional Background Information—NYMEX NG Penultimate Referenced Contracts

With respect to NYMEX NG, the Commission proposed that penultimate contracts, which are cash-settled contracts that settle on the trading day immediately preceding the final trading day of the corresponding referenced contract, are also considered referenced contracts that are subject to Federal spot month position limits.[743] The Commission also proposed a slightly broader economically equivalent swap definition for natural gas, so that swaps with delivery dates that diverge by less than two calendar days (instead of one calendar day) from an associated referenced contract could still be deemed economically equivalent and therefore subject to Federal position limits. The Commission made these adjustments to: Recognize the active and vibrant penultimate natural gas contract markets; prevent and disincentivize manipulation and regulatory arbitrage; and prevent volume from shifting away from non-penultimate cash-settled NYMEX NG markets to penultimate NYMEX NG contract futures and/or penultimate NYMEX NG swaps markets in order to avoid Federal position limits.[744]

(2) Comments—NYMEX NG Penultimate Referenced Contracts

In response to this part of the 2020 NPRM, ICE requested ''that the Commission continue to allow exchanges to impose spot month accountability levels which expire during the period when spot month limits for the Henry Hub core-referenced futures contract are in effect and to not aggregate penultimate options into the Henry Hub LD1 cash-settled limit.'' [745] One of the ways in which ICE supported this request was by claiming that, ''The Commission states that penultimate contracts are economically the same as the last day contract, however, empirically, this statement is not correct as settlement prices have demonstrated.'' [746]

(3) Discussion of Final Rule—NYMEX NG Penultimate Referenced Contracts

The Commission declines to exclude NYMEX NG penultimate contracts from Federal position limits for the reasons set forth in this Final Rule's section addressing ''Referenced Contract.'' [747] In doing so, the Commission notes, in particular, that ICE's specific assertion that penultimate natural gas contracts are not economically the same as last day contracts based on settlement prices runs counter to the Commission's review of a sample of the daily settlement prices for NYMEX NG (the physically-settled natural gas contract), ICE Henry Hub LD1 (the ICE natural gas contract cash-settled to NYMEX NG), and ICE Henry Hub Penultimate (the ICE penultimate natural gas contract cash-settled to NYMEX NG).[748]

vii. Wheat Core Referenced Futures Contracts' Federal Spot Month Position Limit Levels

a. Summary of the 2020 NPRM and Additional Background Information—Wheat Federal Spot Month Position Limit Levels

The Commission proposed to increase the Federal spot month position limit levels for all three wheat core referenced futures contracts (CBOT Wheat (W), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE)) from 600 contracts to 1,200 contracts. The proposed Federal limit levels were based on the underlying EDS figures for each wheat core referenced futures contract and CME's and MGEX's recommended Federal spot month position limit levels of 1,200 contracts for each of their respective wheat core referenced futures contracts.

b. Summary of the Commission Determination—Wheat Federal Spot Month Position Limit Levels

The Commission is adopting the Federal spot month position limit levels for all three wheat core referenced futures contracts as proposed.

c. Comments—Wheat Federal Spot Month Position Limit Levels

The Commission received one comment, from MGEX, fully supporting

[741] Under the Final Rule's Federal spot month position limit level for NYMEX NG, a trader may hold 2,000 physically-settled NYMEX NG referenced contracts, 2,000 cash-settled NYMEX NG referenced contracts per exchange that lists such contracts, and 2,000 cash-settled economically equivalent NYMEX NG OTC swaps. Currently, there are three exchanges that list cash-settled NYMEX NG referenced contracts—NYMEX, IFUS, and Nodal. As a result, a trader may hold up to 6,000 exchange-listed cash-settled NYMEX NG referenced contracts and 2,000 cash-settled economically equivalent NYMEX NG OTC swaps, which brings the total number of cash-settled NYMEX NG referenced contracts a trader may hold to 8,000 under the Federal spot month position limit level.

[742] This also answers EEI/EPSA's request to confirm ''that a participant may rely upon the conditional limit in the first instance but may also utilize a hedge exemption to exceed the conditional limit.'' EEI/EPSA at 4. However, the Commission notes that exchanges have rarely, if ever, allowed a market participant to exceed the exchange-set natural gas conditional limit by layering a bona fide hedge position on top of the cash-settled natural gas contract position permitted under the natural gas conditional limit. Similar to this existing practice, the Commission expects that, under the Final Rule, a market participant will rarely be permitted to hold: (1) A bona fide hedge position in the physically-settled NYMEX NG referenced contract while taking advantage of the conditional limit for cash-settled NYMEX NG referenced contracts; or (2) a bona fide hedge position in cash-settled NYMEX NG referenced contracts on top of the maximum position permitted under the conditional limit for cash-settled NYMEX NG referenced contracts.

[743] Such penultimate contracts include: ICE's Henry Financial Penultimate Fixed Price Futures (PHH) and options on Henry Penultimate Fixed Price (PHE), and NYMEX's Henry Hub Natural Gas Penultimate Financial Futures (NPG).

[744] The Commission proposed a relatively narrow ''economically equivalent swap'' definition in order to prevent market participants from inappropriately netting positions in core referenced futures contracts against swap positions further out on the curve. The Commission acknowledges that liquidity could shift to penultimate swaps as a result, but believes that, with the exception of natural gas, this concern is mitigated since certain constraints exist that militate against this from occurring, including basis risk between the penultimate swap and the core referenced futures contract. However, this constraint does not necessarily apply to the natural gas futures markets, because natural gas has a relatively liquid penultimate futures market that enables a market participant to hedge or off-set its penultimate swap positions. As a result, the Commission believes that liquidity may be incentivized to shift from NYMEX NG to penultimate natural gas swaps in order to avoid Federal position limits in the absence of the Commission's exception for natural gas in the ''economically equivalent swap'' definition.

[745] ICE at 14.

[746] *Id.*

[747] For further discussion of the Commission's determination to include penultimate contracts within the Federal position limits framework, *see* Section II.A.16.iii.a.(2)(iii).

[748] *Id.*

the 2020 NPRM's Federal spot month parity among the three wheat core referenced futures contracts.[749]

4. Federal Non-Spot Month Position Limit Levels

i. Background—Federal Non-Spot Month Position Limit Levels

The Commission most recently updated the Federal non-spot month position limit levels in 2011.[750] At that time, the Commission utilized a formula that was called the ''10/2.5% formula,'' [751] which calculated the Federal non-spot month position limit levels by multiplying the first 25,000 contracts in open interest by 10% and multiplying the remaining contracts by 2.5% and adding the two numbers together.[752] The 10/2.5% formula was first adopted in 1999 based on two primary factors: Growth in open interest and the size of large traders' positions.[753] The existing Federal non-spot month position limit levels that were adopted in 2011 have not been updated to reflect changes in open interest data in over a decade.[754]

ii. Summary of the 2020 NPRM—Federal Non-Spot Month Position Limit Levels

Proposed § 150.2(e) provided that Federal non-spot month position limit levels were set forth in proposed Appendix E to part 150 and were as follows: [755]

| Core Referenced Futures Contract | 2020 Proposed Federal Single Month and All-Months-Combined Position Limit Level | Existing Federal Single Month and All-Months-Combined Position Limit Level | Existing Exchange-Set Single Month and All-Months-Combined Position Limit Level |
|---|---|---|---|
| CBOT Corn (C) | 57,800 | 33,000 | 33,000 |
| CBOT Oats (O) | 2,000 | 2,000 | 2,000 |
| CBOT Soybeans (S) | 27,300 | 15,000 | 15,000 |
| CBOT Soybean Meal (SM) | 16,900 | 6,500 | 6,500 |
| CBOT Soybean Oil (SO) | 17,400 | 8,000 | 8,000 |
| CBOT Wheat (W) | 19,300 | 12,000 | 12,000 |
| CBOT KC HRW Wheat (KW) | 12,000 | 12,000 | 12,000 |
| MGEX HRS Wheat (MWE) | 12,000 | 12,000 | 12,000 |
| ICE Cotton No. 2 (CT) | 11,900 | 5,000 | 5,000 |

[749] MGEX at 3.

[750] The Commission notes that the 2011 Final Rulemaking that adopted the most recent Federal non-spot month position limit levels was vacated by an order of the U.S. District Court for the District of Columbia on September 28, 2012. However, that order did not apply with respect to the 2011 Final Rulemaking's amendments to the Federal non-spot month position limit levels in § 150.2. *ISDA,* 887 F.Supp.2d 259 (2012).

[751] *See, e.g.,* Revision of Federal Speculative Position Limits and Associated Rules, 64 FR at 24038 (May 5, 1999) (increasing deferred-month limit levels based on 10% of open interest up to an open interest of 25,000 contracts, with a marginal increase of 2.5% thereafter). Prior to 1999, the Commission had given little credence to the size of open interest in the contract in determining the position limit level. Instead, the Commission's traditional standard was to set limit levels based on the distribution of speculative traders in the market. *See, e.g.,* 64 FR at 24039; Revision of Federal Speculative Position Limits and Associated Rules, 63 FR at 38525, 38527 (July 17, 1998).

[752] For example, assume a commodity contract has an aggregate open interest of 200,000 contracts over the past 12 month period. Applying the 10/2.5% formula to an aggregate open interest of 200,000 contracts would yield a non-spot month position limit level of 6,875 contracts. That is, 10% of the first 25,000 contracts would equal 2,500 contracts (25,000 contracts × 0.10 = 2,500 contracts). Then add 2.5% of the remaining 175,000 of aggregate open interest or 4,375 contracts (175,000 contracts × 0.025 = 4,375 contracts) for a total non-spot month position limit level of 6,875 contracts (2,500 contracts + 4,375 contracts = 6,875 contracts).

[753] *See* 64 FR at 24038. See also 63 FR at 38525, 38527 (The 1998 proposed revisions to non-spot month levels, which were eventually adopted in 1999, were based upon two criteria: ''(1) The distribution of speculative traders in the markets; and (2) the size of open interest.'').

[754] In setting the Federal non-spot month position limit levels in 2011, the Commission used open interest data from 2009. 76 FR at 71642.

[755] 85 FR at 11624. As discussed above, the proposed Federal non-spot month position limits would apply to only the nine legacy agricultural contracts and any associated referenced contracts. All other referenced contracts subject to Federal position limits would be subject to Federal position limits only during the spot month, as specified above, and would only be subject to exchange-set position limits or position accountability levels outside of the spot month.

In generally calculating the above levels, the Commission proposed to maintain the existing 10/2.5% formula for non-spot month position limit levels, but with the following limited changes: (1) The 10% rate would apply to the first 50,000 contracts of open interest (instead of the first 25,000 contracts); (2) the 2.5% rate would apply to open interest above 50,000 contracts (rather than above the current level of 25,000 contracts); and (3) the modified 10/2.5% formula would apply to updated open interest data for the applicable futures and delta-adjusted options for the periods from July 2017 to June 2018 and July 2018 to June 2019.[756] All Federal non-spot month position limit levels that were calculated based on the 10/2.5% formula (*i.e.,* all legacy agricultural contracts, with the exception of CBOT Oats (O), CBOT KC HRW Wheat (KW), MGEX HRS Wheat (MWE), and the single month position limit level for ICE Cotton No. 2 (CT)) were rounded up to the nearest 100 contracts.

As outlined in the table above, the proposed Federal non-spot month position limit levels are generally higher than the existing Federal non-spot month position limit levels, with the exception of CBOT Oats (O), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE), for which the proposed limit levels would remain at existing levels. As described in detail below, this proposed general increase is primarily due to the increases in open interest that have occurred since the Federal non-spot month position limit levels were last updated approximately a decade ago.[757]

iii. Summary of the Commission Determination—Federal Non-Spot Month Position Limit Levels

The Commission is adopting each of the Federal non-spot month position limit levels as proposed in § 150.2(e) and Appendix E to part 150, with the exception of setting a lower single month position limit for ICE Cotton No. 2 (CT). The Commission will first describe the general rationale for the final Federal non-spot month position limit levels that are being adopted. Next, the Commission will describe the comments it received in connection with the proposed Federal non-spot month position limit levels. Finally, the Commission will provide responses to such comments, including further rationale for the Commission's position concerning the final Federal non-spot month position limit levels.

a. Rationale for the Final Federal Non-Spot Month Position Limit Levels

As explained below, the Commission believes that the final Federal non-spot month position limit levels, in conjunction with the rest of the Federal position limits framework, will achieve the four policy objectives in CEA section 4a(a)(3)(B). Namely, they will: (1) Diminish, eliminate, or prevent excessive speculation; (2) deter and prevent market manipulation, squeezes, and corners; (3) ensure sufficient market liquidity for bona fide hedgers; and (4) ensure that the price discovery function of the underlying market is not disrupted.[758]

As a preliminary matter, the Commission continues to believe that a formula based on a percentage of open interest, such as the 10/2.5% formula, will permit position limit levels to better reflect the changing needs and composition of the futures markets.[759] Open interest is a measure of market activity that reflects the number of contracts that are ''open'' or live, where each contract of open interest represents both a long and a short position.[760] The Commission believes that limiting positions to a percentage of open interest: (1) Helps ensure that positions are not so large relative to observed market activity that they risk disrupting the market; (2) allows speculators to hold sufficient contracts to provide a healthy level of liquidity for bona fide hedgers; and (3) allows for increases in position limits and position sizes as markets expand and become more active.[761]

(1) Modification of the 10/2.5% Formula

However, the Commission believes that the current 10/2.5% formula should be updated based on market developments since it was adopted in 1999. As a result, the Commission proposed modifying the 10/2.5% formula by adjusting the inflection point between the 10% rate and the 2.5% rate from 25,000 contracts to 50,000 contracts.[762] The Commission also proposed applying updated open interest data to the modified 10/2.5% formula.

The Commission is adopting these changes as proposed because: (1) Open interest has increased significantly since the 10/2.5% formula was originally adopted in 1999; and (2) futures market composition has changed significantly since 1999. The Commission discusses both developments in turn below.

(i) Increases in Open Interest

As noted in the 2020 NPRM, there has generally been a significant increase in maximum open interest for each of the legacy agricultural contracts (except for CBOT Oats (O)) since the existing 10/2.5% formula was first adopted in 1999.[763] Under the existing 10/2.5% formula, because the 2.5% incremental increase applies after the first 25,000 contracts of open interest, limit levels with respect to contracts with open interest above 25,000 contracts (*i.e.,* all applicable core referenced futures contracts other than CBOT Oats (O)) continue to increase at the much slower rate of 2.5% rather than the 10% rate that's applicable for the first 25,000 contracts. As a result, the existing 10/2.5% formula has become proportionally more restrictive as the percentage of open interest above 25,000 contracts increased.

The table below provides data that describes the market environment during the period prior to, and subsequent to, the adoption of the existing 10/2.5% formula by the Commission in 1999. The data includes futures contracts and the delta-adjusted options on futures open interest.[764] The first column of the table provides the maximum open interest in the nine legacy agricultural contracts over the five year period ending in 1999. The CBOT Corn (C) contract had a maximum open interest of approximately 463,000 contracts, and the CBOT Soybeans (S) contract had a maximum open interest

[756] The 12-month period yielding the higher open interest level is selected as the basis for the Federal non-spot month position limit level.

[757] *See* 85 FR at 11630. The 2020 NPRM's proposed modification to the 10/2.5% formula from 25,000 to 50,000 contracts results in a modest increase in the Federal non-spot month position limit level of 1,875 contracts over what the limit level would be if the 10/2.5% formula were applied at 25,000 contracts, assuming that the market for the core referenced futures contract has an open interest of at least 50,000 contracts.

[758] 7 U.S.C. 6a(a)(3)(B).

[759] 85 FR at 11630.

[760] *Id.*

[761] *Id.*

[762] This results in a modest increase in the Federal non-spot month position limit level of 1,875 contracts over what the limit level would be if the 10/2.5% formula were applied at 25,000 contracts, assuming that the market for the core referenced futures contract has an open interest of at least 50,000 contracts.

[763] 85 FR at 11631.

[764] Delta is a ratio comparing the change in the price of an asset (a futures contract) to the corresponding change in the price of its derivative (an option on that futures contract) and has a value that ranges between zero and one. In-the-money call options get closer to 1 as their expiration approaches. At-the-money call options typically have a delta of 0.5, and the delta of out-of-the-money call options approaches 0 as expiration nears. The deeper in-the-money the call option, the closer the delta will be to 1, and the more the option will behave like the underlying asset. Thus, delta-adjusted options on futures will represent the total position of those options as if they were converted to futures.

of approximately 227,000 contracts. The other seven contracts had maximum open interest figures that ranged from less than 20,000 contracts for CBOT Oats (O) to approximately 172,000 for CBOT Soybean Oil (SO). Hence, when adopting the 10/2.5% formula in 1999, the Commission's experience in these markets was of aggregate futures and options on futures open interest well below 500,000 contracts.

Table: Maximum Futures and Options on Futures Open Interest, 1994—2018

| | 1994-1999 | 2000-2004 | 2005-2009 | 2010-2014 | 2015-2018 |
|---|---|---|---|---|---|
| **CBOT Corn (C)** | 463,386 | 828,176 | 1,897,484 | 2,052,678 | 2,201,990 |
| **ICE Cotton No. 2 (CT)** | 122,989 | 140,240 | 388,336 | 296,596 | 344,302 |
| **CBOT Oats (O)** | 18,879 | 17,939 | 16,860 | 15,375 | 11,313 |
| **CBOT Soybeans (S)** | 227,379 | 327,276 | 672,061 | 991,258 | 997,881 |
| **CBOT Soybean Meal (SM)** | 155,658 | 183,255 | 241,917 | 392,265 | 544,363 |
| **CBOT Soybean Oil (SO)** | 172,424 | 191,337 | 328,050 | 395,743 | 547,784 |
| **CBOT Wheat (W)** | 163,193 | 187,181 | 507,401 | 576,333 | 621,750 |
| **CBOT Wheat: Kansas City Hard Red Winter (KW)** | 76,435 | 87,611 | 159,332 | 189,972 | 311,592 |
| **MGEX Wheat: Minneapolis Hard Red Spring (MWE)** | 24,999 | 36,155 | 57,765 | 68,409 | 80,635 |

The table also displays the maximum open interest figures for subsequent periods up to, and including, 2018. The maximum open interest for all legacy agricultural contracts, except for CBOT Oats (O), generally increased over the period. By the 2015–2018 period covered in the last column of the table, five of the contracts had maximum open interest greater than 500,000 contracts. Also, the contracts for CBOT Corn (C), CBOT Soybeans (S), and CBOT Hard Red Winter Wheat (KW) saw maximum open interest increase by a factor of four to five times the maximum open interest observed during the 1994–1999 period when the Commission adopted the 10/2.5% formula in 1999.

As open interest has increased, the current Federal non-spot month position limit levels have become significantly more restrictive over time. In particular, as discussed above, because the 2.5% incremental increase applies after the first 25,000 contracts of open interest under the existing 10/2.5% formula, Federal non-spot month position limit levels on legacy agricultural contracts with open interest above 25,000 contracts (*i.e.,* all contracts other than CBOT Oats (O)) continue to increase at a much slower rate of 2.5% rather than the 10% that applies for the first 25,000 contracts.

The existing 10/2.5% formula's inflection point of 25,000 contracts was less of a problem in the latter part of the 1990s, for example, when open interest in each of the nine legacy agricultural contracts was below 500,000, and in many cases below 200,000. More recently, however, open interest has grown above 500,000 for a majority of the legacy agricultural contracts. The existing 10/2.5% formula has thus become more restrictive for market participants, including, as discussed immediately below, certain banks and dealers with positions that may not be eligible for a bona fide hedging exemption, but who might otherwise provide valuable liquidity to commercial firms.

(ii) Changes in Market Composition

The potentially restrictive nature of the existing Federal non-spot month position limit levels has become more problematic over time because dealers play a much more significant role in the market today than at the time the Commission adopted the 10/2.5% formula. Prior to 1999, the Commission regulated physical commodity markets where the largest participants were often large commercial interests who held short positions. The offsetting positions were often held by small, individual traders, who tended to be long.[765]

Several years after the Commission adopted the 10/2.5% formula, the composition of futures market participants changed as dealers began to enter the physical commodity futures market in larger size. These dealers, including ones affiliated with banks or large financial institutions that are now provisionally registered and regulated as swap dealers, sometimes held significant positions in these markets by acting as aggregators or market makers and providing swaps to commercial hedgers and to other market participants.[766] The existing 10/2.5% formula has thus become particularly restrictive for dealers, including those with positions that may not be eligible for a bona fide hedging exemption, but

[765] Stewart, Blair, *An Analysis of Speculative Trading in Grain Futures,* Technical Bulletin No. 1001, U.S. Department of Agriculture (Oct. 1949). *See also* Draper, Dennis, ''The Small Public Trader in Futures Markets'', pp. 211–269, Futures Markets: Regulatory Issues (ed. Anne Peck, 1985): American Enterprise Institute.

[766] *Staff Report on Commodity Swap Dealers & Index Traders with Commission Recommendations,* U.S. Commodity Futures Trading Commission (Sept. 2008), available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf.*

that might otherwise provide valuable liquidity to commercial firms.[767]

The table below demonstrates the trend of increased dealer participation by presenting data from the Commission's publicly available ''Bank Participation Report'' (''BPR''), as of the December report for 2002–2018.[768] The table displays the number of banks holding reportable positions for the seven futures contracts for which Federal position limits apply and that were reported in the BPR.[769] The report presents data for every market where five or more banks hold reportable positions. The BPR is based on the same large-trader reporting system database used to generate the Commission's Commitments of Traders (''COT'') report.[770]

No data was reported for the seven futures contracts in December 2002, indicating that fewer than five banks held reportable positions at the time of the report. The December 2003 report shows that five or more banks held reportable positions in four of the commodity futures. The number of banks with reportable positions generally increased in the early to mid-2000s, which included dealers that operated in the swaps markets by acting as aggregators or market makers, providing swaps to commercial hedgers and to other market participants while using the futures markets to hedge their own exposures.[771] When the Commission adopted the 10/2.5% formula in 1999, it had limited experience with physical commodity derivatives markets in which such banks were significant participants.

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Table: Number of Reporting Commercial Banks with Long Futures Positions

| Year | Corn | Cotton | Soybeans | Soybean Meal | Soybean Oil | Wheat | Wheat KCBT |
|---|---|---|---|---|---|---|---|
| 2002 | NR | NR | NR | NR | NR | NR | NR |
| 2003 | 5 | 6 | 7 | NR | NR | 5 | NR |
| 2004 | 5 | 10 | 7 | NR | NR | 7 | NR |
| 2005 | 10 | 8 | 6 | NR | 5 | 9 | 9 |
| 2006 | 11 | 11 | 9 | NR | 7 | 14 | 7 |
| 2007 | 13 | 8 | 12 | NR | 6 | 14 | 6 |
| 2008 | 17 | 13 | 16 | NR | 6 | 14 | 9 |
| 2009 | 8 | 8 | 8 | NR | NR | 13 | NR |
| 2010 | 7 | 7 | 7 | NR | NR | 11 | NR |
| 2011 | 10 | 11 | 9 | 5 | 5 | 10 | NR |
| 2012 | 8 | 10 | 11 | 6 | 6 | 13 | 5 |
| 2013 | 11 | 11 | 13 | 10 | 6 | 11 | 5 |
| 2014 | 15 | 12 | 15 | 10 | 9 | 15 | 6 |
| 2015 | 12 | 13 | 13 | 12 | 9 | 16 | 9 |
| 2016 | 15 | 14 | 15 | 12 | 10 | 15 | 6 |
| 2017 | 16 | 13 | 12 | 11 | 9 | 16 | 8 |
| 2018 | 16 | 15 | 18 | 15 | 13 | 18 | 12 |

NR = "Not Reported"

For 2003, which was the first year in the report with reported data on the futures for these physical commodities, the BPR showed, as displayed in the table below, that the reporting banks held modest positions, totaling 3.4% of futures long open interest for CBOT Wheat (W) and smaller positions in other futures. The positions displayed in the table below increased over the next several years, generally peaking around 2005/2006 as a percentage of the long open interest.

[767] The Commission notes that this issue with respect to swap dealers is being addressed through a combination of a modification of the 10/2.5% formula and the pass-through swap provision, the latter of which is described in Section II.A.1.x. (Pass-Through Swap and Pass-Through Swap Offset Provisions).

[768] Bank Participation Reports, available at *https://www.cftc.gov/MarketReports/BankParticipationReports/index.htm.*

[769] The term ''reportable position'' is defined in § 15.00(p) of the Commission's regulations. 17 CFR 15.00(p).

[770] Commitments of Traders, available at *www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm.* Commitments of Traders reports indicate that there are generally still as many large commercial traders in the markets today as there were in the 1990s.

[771] *Staff Report on Commodity Swap Dealers & Index Traders with Commission Recommendations,* U.S. Commodity Futures Trading Commission (Sept. 2008), available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf.*

Table: Percent of Futures Long Open Interest Held by Commercial Banks

| Year (Dec.) | Corn | Cotton | Soybeans | Soybean Meal | Soybean Oil | Wheat | Wheat KCBT |
|---|---|---|---|---|---|---|---|
| 2002 | NR | NR | NR | NR | NR | NR | NR |
| 2003 | 1.5% | 1.4% | 0.8% | NR | NR | 3.4% | NR |
| 2004 | 7.0% | 6.5% | 3.6% | NR | NR | 14.5% | NR |
| 2005 | 12.5% | 13.8% | 8.3% | NR | 6.8% | 20.2% | 5.2% |
| 2006 | 9.4% | 14.2% | 7.7% | NR | 6.7% | 17.0% | 6.9% |
| 2007 | 9.2% | 9.7% | 6.7% | NR | 6.5% | 13.5% | 5.5% |
| 2008 | 8.9% | 18.2% | 10.0% | NR | 6.4% | 18.7% | 7.1% |
| 2009 | 4.3% | 6.5% | 3.6% | NR | NR | 9.3% | NR |
| 2010 | 3.7% | 2.5% | 4.7% | NR | NR | 6.9% | NR |
| 2011 | 4.1% | 3.3% | 4.9% | 1.9% | 4.4% | 7.7% | NR |
| 2012 | 4.7% | 9.9% | 3.7% | 5.8% | 5.5% | 7.4% | 3.5% |
| 2013 | 5.3% | 9.1% | 4.4% | 7.0% | 4.1% | 6.2% | 6.4% |
| 2014 | 9.7% | 10.0% | 6.3% | 6.7% | 6.5% | 7.7% | 10.1% |
| 2015 | 8.1% | 10.1% | 5.0% | 5.9% | 6.4% | 7.8% | 4.3% |
| 2016 | 8.1% | 8.5% | 7.1% | 10.7% | 6.6% | 7.3% | 5.2% |
| 2017 | 5.5% | 9.5% | 4.3% | 9.1% | 7.3% | 7.7% | 4.8% |
| 2018 | 5.8% | 8.3% | 5.9% | 9.2% | 7.6% | 10.2% | 7.0% |

NR = "Not Reported"

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The Commission believes that the application of the modified 10/2.5% formula adopted herein to updated open interest data will prevent the Federal non-spot month limits from becoming overly restrictive by providing an appropriate increase in the non-spot month position limit levels for most contracts to better reflect the above-described changes in market dynamics observed since the late 1990s.

(2) Non-Spot Month Position Limit Levels for CBOT Oats (O), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE)

The Commission is adopting the proposed Federal non-spot month position limit levels with respect to CBOT Oats (O), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE). These remain at the current Federal non-spot month position limit levels, which are 2,000 contracts for CBOT Oats (O) and 12,000 contracts for both CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE). These Federal non-spot month position limit levels are higher than the levels that would have been determined using the modified 10/2.5% formula and updated open interest data, which would have resulted in 700 contracts for CBOT Oats (O), 11,900 contracts for CBOT KC HRW Wheat (KW), and 5,700 contracts for MGEX HRS Wheat (MWE). However, the Commission saw no reason to reduce these Federal non-spot month position limit levels in accordance with the 10/2.5% formula because the Commission has observed that the existing limit levels have functioned well for these core referenced futures contracts and the Commission believes that strictly following the 10/2.5% formula to determine Federal non-spot month position limit levels could harm liquidity in those markets.

(3) Single Month Position Limit Level for ICE Cotton No. 2 (CT)

The Commission is adopting a modified single month Federal position limit level for ICE Cotton No. 2 (CT). The Commission proposed a uniform single month and all-months-combined position limit for the ICE Cotton No. 2 (CT) contract, as well as uniform single month and all-months-combined position limits for the eight other legacy agricultural contracts. However, in the 2020 NPRM the Commission requested comments from the public concerning whether the Commission should adopt a lower single month position limit level for ICE Cotton No. 2 (CT) compared to the all-months-combined position limit level.[772]

The Commission received numerous comments from the end users of ICE Cotton No. 2 (CT) in the cotton industry, including growers and merchants, who requested that the Commission establish a lower Federal single month position limit level for ICE Cotton No. 2 (CT) compared to the all-months-combined position limit level, including establishing the single month position limit level at 50% of the all-months-combined position limit level.[773] The Commission did not receive any comments from commercial end-users opposing a lower Federal single month position limit level for ICE Cotton No. 2 (CT) compared to the all-months-combined position limit level. In response to the comments received, the Commission is adopting a lower Federal single month position limit level of 5,950 contracts for ICE Cotton No. 2 (CT), which is 50% of the proposed Federal non-spot month position limit level. However, the Commission is adopting the proposed all-months-

[772] 85 FR 11637 (Request for Comment #26).

[773] ACSA at 2, 8; LDC at 2; Olam at 2; Ecom at 1; ACA at 2; Canale Cotton at 2; Choice at 2; Jess Smith at 2; East Cotton at 2; Memtex at 2; NCC at 1–2; Southern Cotton at 2–3; Texas Cotton at 2; Toyo Cotton Co. at 2; WCSA at 2; and Omnicotton at 2.

combined position limit level of 11,900 contracts, which is based on the modified 10/2.5% formula. This change is discussed further below.

(4) The Final Rule's Federal Non-Spot Month Position Limits Achieve the Four Statutory Objectives in CEA Section 4a(a)(3)(B)

As noted above, in the Final Rule, the Commission is not reducing Federal non-spot month position limit levels for any of the legacy agricultural contracts and will be raising them for six of the nine such contracts in accordance with the updated open interest data and the modified 10/2.5% formula.[774] As a result, the Commission believes that the final Federal non-spot month position limit levels will generally improve liquidity for bona fide hedgers and, at the very least, not harm liquidity compared to the status quo.

The Commission also believes that the final Federal non-spot month position limit levels remain low enough to diminish, eliminate, or prevent excessive speculation, and to deter and prevent market manipulation. This is because, as discussed above, by taking into account the amount of observed market activity through open interest, the modified 10/2.5% formula adopted herein helps ensure, among other things, that positions are not so large relative to observed market activity that they risk disrupting the market.[775] This, in turn, also helps ensure that the price discovery function of the underlying market is not disrupted, because markets that are free from manipulative activity reflect fundamentals of supply and demand rather than artificial pressures. The Commission also notes that the 10/2.5% formula has functioned well, based on the Commission's decades of experience administering the formula.[776]

The Commission reiterates that the modified 10/2.5% formula provided in this Final Rule is generally a continuation of the same approach the Commission has taken for decades. The increased levels adopted herein are primarily driven by utilizing updated open interest figures. With respect to the slight modification to the 10/2.5% formula, the Commission does not believe that the modification will negatively impact the formula's effectiveness in ensuring that the Federal non-spot month position limit levels remain low enough to diminish, eliminate, or prevent excessive speculation, and to deter and prevent market manipulation. This is because the difference between utilizing the existing 10/2.5% formula and the modified 10/2.5% formula results in a modest increase in Federal non-spot month position limit level of 1,875 contracts, which is generally counterbalanced by the increased amount of open interest that is subject to the 2.5% rate.[777] Additionally, the Commission has previously studied prior increases in Federal non-spot month position limit levels and concluded that the overall impact was modest, and that any changes in market performance were most likely attributable to factors other than changes in the Federal position limit rules.[778] The Commission has since gained additional experience which supports that conclusion, including by monitoring amendments to position limit levels by exchanges. Further, given the significant increases in open interest and changes in market composition that have occurred since the 1990s, the Commission is comfortable that the Federal non-spot month position limit levels adopted herein will adequately address each of the policy objectives set forth in CEA section 4a(a)(3)(B), including preventing manipulation and excessive speculation.

(5) Federal Non-Spot Month Position Limits as Ceilings

The Commission reiterates that, under this position limits framework, the Federal non-spot month position limit levels serve as ceilings. Exchanges are required to establish their own non-spot month position limit levels with respect to the nine legacy agricultural contracts pursuant to final § 150.5(a)(1). A discussion of the implications of this approach is provided above in Section II.B.3.ii.a(2).

iv. Comments and Discussion of Final Rule—Federal Non-Spot Month Position Limit Levels

Most commenters did not express concerns with respect to the proposed Federal non-spot month position limit levels and the method by which the Commission determined those levels.[779] However, some commenters raised concerns with respect to: (1) The Federal non-spot month position limit levels, generally; (2) the proposed non-spot month position limit level for ICE Cotton No. 2 (CT); and (3) the issue of partial parity for the three wheat core referenced futures contracts with respect to their Federal non-spot month position limit levels. The Commission will discuss each of these issues, the related comments, and the Commission's corresponding determination in greater detail below.

a. Federal Non-Spot Month Position Limit Levels, Generally

(1) Comments—Federal Non-Spot Month Position Limit Levels, Generally

Several commenters raised concerns about the proposed Federal non-spot month position limit levels generally. Two commenters, NGFA and LDC, advocated for lowering the Federal non-spot month position limit levels for the nine legacy agricultural contracts.[780] NGFA stated that the proposed increases are ''very large'' and that the Commission should not view increasing non-spot month position limit levels as a ''tradeoff'' for eliminating the risk management exemption, but should instead establish limits that ''will telescope down to relatively much-smaller spot-month limits in an orderly fashion.''[781] LDC and several others

[774] As noted previously, the Commission is not following the modified 10/2.5% formula for determining the single month position limit level for ICE Cotton No. 2 (CT). However, the Final Rule still increases that limit level compared to its existing limit level.

[775] 85 FR at 11630.

[776] *Id.* at 11675.

[777] When the Commission adopted the existing Federal non-spot month position limit levels in 2011, the Federal non-spot month position limit levels for four of the nine legacy agricultural contracts were based on the existing 10/2.5% formula and utilized open interest data from 2009. These were CBOT Corn (C), CBOT Soybeans (S), CBOT Wheat (W), and CBOT Soybean Oil (SO). For those four contracts, the ratio of Federal non-spot month position limit level to open interest changes as follows: CBOT Corn (C) (the ratio increases from 0.026 to 0.027); CBOT Soybeans (S) (the ratio increases from 0.028 to 0.029); CBOT Wheat (W) (the ratio increases from 0.029 to 0.031); and CBOT Soybean Oil (SO) (the ratio increases from 0.030 to 0.032).

The other five legacy agricultural contracts' Federal non-spot month position limit levels deviated from the 10/2.5% formula. The ratio changes for these five contracts are as follows (based on 2009 open interest data): ICE Cotton No. 2 (CT) (the ratio increases from 0.025 to 0.037 for the all-months-combined and decreases from 0.025 to 0.018 for the single month); CBOT Soybean Meal (SM) (the ratio decreases from 0.038 to 0.032); CBOT Oats (O) (the ratio increases from 0.130 to 0.291); MGEX Hard Red Spring Wheat (MWE) (the ratio decreases from 0.323 to 0.162); and CBOT KC Hard Red Winter Wheat (KW) (the ratio decreases from 0.113 to 0.037).

[778] 64 FR at 24039.

[779] *See, e.g.,* COPE at 2; CMC at 6; CCI at 2; and CHS at 2.

[780] NGFA at 3 and LDC at 2.

[781] NGFA at 3. NGFA also commented that, ''NGFA still is not completely convinced that open interest is the best yardstick for this exercise,'' because ''[a]s volume and open interest grow, Federal non-spot limits expand correspondingly . . . which leads to yet higher volume and open interest. . .which again prompts expanded Federal non-spot limits . . . and so on.'' However, NGFA did not provide any alternatives to utilizing open interest for determining Federal non-spot month position limit levels. As discussed previously, the Commission believes that open interest is an appropriate means of measuring market activity for a particular contract and that a formula based on open interest, such as the 10/2.5% formula: (1)

believed that adopting lower Federal single month position limit levels would ''prevent speculative activity from concentrating in a single contract month and thus jeopardizing convergence.'' [782] NGFA and LDC also offered the following alternatives to the proposed Federal non-spot month position limit levels: (1) Set single-month limits at some percentage of the all-months-combined limit, such as 50%; or (2) maintain existing single-month limits while adopting the proposed all-months-combined limits.[783] NGFA also offered a third alternative, which was to adopt a phased-in approach to the higher non-spot month position limits, ''together with very active monitoring of contract performance, though NGFA does not favor this option.'' [784]

On the other hand, ISDA requested higher Federal non-spot month position limit levels.[785] ISDA stated that the proposed levels ''for the legacy agricultural contracts are not high enough to provide [ ] significant liquidity to these markets based on the experience of market participants and anticipated growth in these markets.'' [786] ISDA also appeared to suggest that higher levels could ''help markets offset any liquidity that may be lost if the risk management exemption is not retained.'' [787] Finally, ISDA also provided a table with suggested Federal non-spot month position limit levels that ranged from 18% to 191% higher than the proposed levels, except for CBOT Oats (O), which remained the same.[788]

Another commenter, MGEX, disagreed with the 10/2.5% formula, stating that ''a formulaic approach is too rigid and inflexible'' and that the ''Commission needs to be flexible in the future and should not preclude further limits or discussion.'' [789]

(2) Discussion of Final Rule—Federal Non-Spot Month Position Limit Levels, Generally

With the exception of ICE Cotton No. 2 (CT), as discussed below, the Commission declines to modify the proposed Federal non-spot month position limit levels or the general methodology underlying the determination of those levels for the remaining legacy agricultural contracts, and also declines to adopt a phase-in for Federal non-spot month position limit levels.

(i) Request To Generally Lower Federal Non-Spot Month Position Limits

In response to these comments, the Commission believes that the modified 10/2.5% formula is generally an appropriate way to calculate Federal non-spot month position limit levels. The Commission also believes that the final non-spot month position limit levels are supported by updated open interest data, some of which have increased significantly since 2009.

The Commission continues to believe that a formula based on a percentage of open interest, such as the 10/2.5% formula, is appropriate for establishing limit levels outside of the spot month, as discussed above and in the 2020 NPRM.[790] The Commission believes that limiting positions to a percentage of open interest, such as through the 10/2.5% formula: (1) Helps ensure that positions are not so large relative to observed market activity that they risk disrupting the market; (2) allows speculators to hold sufficient contracts to provide a healthy level of liquidity for bona fide hedgers; and (3) allows for increases in position limits and position sizes as markets expand and become more active.[791] Furthermore, the 10/2.5% formula has functioned well for Federal non-spot month position limit purposes for many years.[792] Also, the Commission does not believe that the slight modification to the 10/2.5% formula materially impacts the formula's efficacy in determining an appropriate Federal non-spot month position limit level as well,[793] because the modification is modest and is supported by the general increase in open interest among the legacy agricultural contracts and the change in the composition of market participants in those markets, as discussed above.[794]

(ii) Request To Generally Lower Single Month Position Limit Levels

In response to comments generally requesting lower single month position limit levels, the Commission first acknowledges that it has set single-month position limit levels lower than all-months-combined position limit levels in the past. However, since the Commission set both single month and all-months-combined levels set at the same level in 2011, the Commission has not observed any issues with respect to the nine legacy agricultural contracts as a result of that change.

In response to commenters' concern about possible convergence issues from setting the single-month and all-months-combined levels set at the same level, the Commission notes that positions in the non-spot months have minimal impact on convergence. This is because convergence occurs in the spot month, and, specifically, at the expiration of the physically-settled spot month contract.[795]

Furthermore, the Commission notes that an important benefit of having a single Federal non-spot month limit level for both the single-month and all-months-combined is the ability for market participants to enter into calendar spread transactions that would normally be constrained by the lower single month position limit level. However, the Commission notes that, in response to comments received, it is adopting a lower Federal single month position limit level for ICE Cotton No. 2 (CT), the reasons for which is discussed below.

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Helps ensure that positions are not so large relative to observed market activity that they risk disrupting the market; (2) allows speculators to hold sufficient contracts to provide a healthy level of liquidity for hedgers; and (3) allows for increases in position limits and position sizes as markets expand and become more active. Furthermore, the Commission notes that under the Final Rule, Federal non-spot month position limit levels do not automatically increase with higher open interest levels. In order to make any amendments to the Federal position limit levels, the Commission is required to engage in notice-and-comment rulemaking.

[782] LDC at 2. *See also e.g.,* Moody Compress at 1; ACA at 2; Jess Smith at 2; McMeekin at 2; Memtex at 2; Mallory Alexander at 2; Walcot at 2; and White Gold at 1.

[783] NGFA at 4 and LDC at 2.

[784] NGFA at 4. IATP also provided a similar suggestion, by stating that, ''it is prudent to phase in new non-spot month limit levels so that the Commission can acquire data and experience with how the new Federal non-spot limits are working for the commercial hedging of those legacy contracts.'' IATP at 11.

[785] ISDA at 7.

[786] *Id.*

[787] *Id.*

[788] *Id.*

[789] MGEX at 3.

[790] *See* 85 FR at 11630–11633.

[791] *Id.*

[792] *See id.* at 11675.

[793] The Commission notes, as discussed elsewhere in this Final Rule, that CBOT KC HRW Wheat (KW), MGEX HRS Wheat (MWE), CBOT Oats (O), and ICE Cotton No. 2 (CT) (single month limit only) are subject to unique circumstances or other factors that counsel in favor of deviating from the 10/2.5% formula.

[794] The modification results in a modest increase in the Federal non-spot month position limit level of 1,875 contracts over what the limit level would be if the inflection point for the 10/2.5% formula was set at 25,000 contracts, assuming that the market for the core referenced futures contract has an open interest of at least 50,000 contracts.

[795] The Commission, however, recognizes that it is possible that unusually large positions in contracts outside of the spot month could distort the natural spread relationship between contract months. For example, if traders hold unusually large positions outside of the spot month, and if those traders exit those positions immediately before the spot month, that could cause congestion and also affect the pricing of the spot month contract. While such congestion or price distortion cannot be ruled out, exchange-set position limits and position accountability function to mitigate against such risks.

(iii) Request To Increase Federal Non-Spot Month Position Limit Levels

In response to ISDA's comment that the proposed Federal non-spot month position limit levels should be higher to compensate for the proposed loss of risk management exemptions for swap dealers, the Commission believes that any potential impact on existing risk management exemption holders may be mitigated by the finalized pass-through swap provision, to the extent swap dealers can utilize it.[796] The Commission believes that this is a preferable approach to either a hypothetical alternative formula or ISDA's own suggested Federal non-spot month position limit levels that would allow higher limit levels beyond those adopted in this Final Rule for all market participants. This is because, while the pass-through swap provision adopted herein is narrowly-tailored to enable liquidity providers to continue providing liquidity to bona fide hedgers, higher limit levels beyond those adopted in this Final Rule for all market participants could also permit excessive speculation and increase the possibility of market manipulation or harm to the underlying price discovery function.[797]

(iv) Concern With the Commission's ''Formulaic'' Approach

In response to MGEX's concern that the Commission's approach is too formulaic and rigid, the Commission notes that the Federal non-spot month position limit levels will operate as ceilings within a broader Federal position limits framework in which exchanges, including MGEX, are always free to determine their own exchange-set position limit levels and position accountability levels below the Federal position limit levels as they see fit based on market conditions. In fact, by having the Federal position limit levels operate as ceilings, this framework will enable exchanges to respond to market conditions through a greater range of acceptable position limit levels than if the Federal position limit levels did not operate as ceilings.

In addition, as described further below, the Commission has deviated from the 10/2.5% formula with respect to CBOT Oats (O), ICE Cotton No. 2 (CT) (single month only), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE) based on the unique circumstances concerning those core referenced futures contracts. Furthermore, the Commission also notes that this Final Rule does not ''preclude further limits or discussion.'' [798] The Commission is also continually monitoring market conditions to evaluate whether different Federal position limit levels may be warranted.

(v) Request To Implement a Phase-In Period

The Commission declines to adopt a formal phase-in period for Federal non-spot month position limits, in which the Commission gradually implements the Federal non-spot month position limit levels over a period of time. The Commission believes that the markets will operate in an orderly fashion with the Federal position limit levels adopted under this Final Rule, because the final Federal non-spot month position limit levels are supported by increased open interest and are generally set pursuant to the modified 10/2.5% formula, which, as discussed above, achieves the policy objectives set forth in CEA section 4a(a)(3)(B).[799]

However, as noted in the Federal spot month position limit level phase-in discussion above, as a practical matter, the Commission emphasizes that the operative non-spot month position limit levels for a market participant trading in exchange-listed referenced contracts is not the Federal non-spot month position limit levels, but the exchange-set non-spot month position limit levels. As a result, despite the changes in the Federal non-spot month position limit levels in this Final Rule, there will be no practical impact on market participants trading in exchange-listed referenced contracts unless and until an exchange affirmatively modifies its exchange-set non-spot month position limit levels through a rule submission to the Commission pursuant to part 40 of the Commission's regulations.[800]

c. ICE Cotton No. 2 (CT) Federal Non-Spot Month Position Limit Level

(1) Summary of the 2020 NPRM and Additional Background Information—ICE Cotton No. 2 (CT) Federal Non-Spot Month Position Limit Level

In the 2020 NPRM, the Commission proposed to increase both the Federal single month and all-months-combined position limit levels for ICE Cotton No. 2 (CT) from the existing Federal level of 5,000 contracts to 11,900 contracts by applying the updated open interest data into the proposed modified 10/2.5% formula. The Commission also solicited comments asking whether the Commission should consider lowering the Federal single month position limit level to a percentage of the Federal all-months-combined position limit level for ICE Cotton No. 2 (CT), and if so, what percentage of the all-months-combined position limit level should be used.[801]

(2) Comments—ICE Cotton No. 2 (CT) Federal Non-Spot Month Position Limit Level

In response to the 2020 NPRM, numerous commenters from the cotton industry, including growers and merchants, requested that the Commission ''maintain its single-month limit, particularly for smaller markets like cotton,'' [802] or, in the alternative, set a Federal single month position limit level of 50% of the all-months-combined limit (*i.e.,* 5,950 contracts).[803] In support, commenters also noted that the proposed non-spot month position limit level for ICE Cotton No. 2 (CT) was ''not in line with historical limits.'' [804] One commenter also stated, ''Experience with modern trading has shown a propensity by speculators to focus too heavily on the nearest futures contract, leaving later months with poor liquidity from time to time.'' [805] In contrast, ISDA argued that the proposed Federal non-spot month position limit levels, including that for ICE Cotton No. 2 (CT), were too low and asserted that the level for ICE Cotton No. 2 (CT) should be increased to 24,000 contracts to make up for the elimination of the risk management exemption.[806]

(3) Discussion of Final Rule—ICE Cotton No. 2 (CT) Federal Non-Spot Month Position Limit Level

The Commission is adopting the proposed all-months-combined position limit level of 11,900 contracts, but is

[796] *See* 85 FR at 11676. *See also* Section II.A.1.x. (Pass-Through Swap and Pass-Through Swap Offset Provisions).

[797] *See* 85 FR at 11676.

[798] MGEX at 3.

[799] A phase-in is not necessary with respect to the Federal non-spot month position limit levels for CBOT Oats (O), KC HRW Wheat (KW), and MGEX HRS Wheat (MWE), because the Federal non-spot month position limit levels will remain at the current levels.

[800] 17 CFR part 40.

[801] 85 FR at 11637 (Request for Comment #26).

[802] *See e.g.,* East Cotton at 2; Omnicotton at 2; Choice at 2; Canale Cotton at 2; Ecom at 1; Olam at 2; Texas Cotton at 2; Toyo Cotton at 2; Walcot Trading at 2; White Gold at 2; and NCTO at 2. *See also* ACA at 2; Gerald Marshall at 1–2; Jess Smith at 2; LDC at 2; Mallory Alexander at 2; McMeekin at 2; MemTex at 2; Moody Compress at 2; Parkdale at 2; Southern Cotton at 2–3; SW Ag at 2; and ACSA at 8.

[803] ACSA at 8; LDC at 2; and Olam at 2. The following commenters also supported ACSA's comment letter: ACA at 2; Ecom at 1; East Cotton at 2; Jess Smith at 2; IMC at 2; Mallory Alexander at 2; McMeekin at 2; Memtex at 2; Moody Compress at 2; Omnicotton at 2; Canale Cotton at 2; SW Ag at 2; Texas Cotton at 2; Toyo Cotton at 2; Walcot at 2; and White Gold at 2.

[804] AMCOT at 1–2 and Parkdale at 2.

[805] Gerald Marshall at 2.

[806] ISDA at 7 (providing specific alternative levels).

adopting a modified single month position limit level of 5,950 contracts for ICE Cotton No. 2 (CT).

The Commission is adopting the proposed 11,900 contract Federal all-months-combined position limit level for ICE Cotton No. 2 (CT) because, as discussed earlier, the Commission believes that a formula based on a percentage of open interest—specifically the modified 10/2.5% formula—is an appropriate tool for establishing limits outside of the spot month. However, the Commission does not believe that it is appropriate to raise either the Federal single month or all-months-combined position limit level for ICE Cotton No. 2 (CT) to 24,000 contracts as suggested by ISDA, because the open interest levels do not support such a drastic increase and there is no other reason to deviate so significantly upward from the modified 10/2.5% formula.[807]

On the other hand, the Commission believes that it is appropriate to adopt a lower Federal single month position limit level at this time. As noted in the Commission's request for comment in the 2020 NPRM, the Commission believed that there could be concerns with respect to the Federal single month position limit level for ICE Cotton No. 2 (CT), especially from the commercial end-users of the core referenced futures contract.[808] In response to the Commission's request for comment, the Commission received approximately 25 comment letters from the cotton industry (out of approximately 75 comment letters on the 2020 NPRM from all commenters) unanimously requesting a lower Federal single month position limit level compared to the Federal all-months-combined position limit level for ICE Cotton No. 2 (CT). The Commission believes that these unanimous comments from the commercial end-users of the ICE Cotton No. 2 (CT) core referenced futures contract are informative, because they suggest that lowering the 2020 NPRM's Federal single month position limit level from the proposed 11,900 contract level to either the existing 5,000 contract level or a 5,950 contract level (which is 50% of the all-months-combined position limit level of 11,900 contracts) may not have a material detrimental effect on liquidity for bona fide hedgers in the market.

All things being equal, a lower single month position limit level will better protect the markets against manipulation and price distortion,[809] but at the expense of reduced liquidity for bona fide hedgers. However, in this instance, in light of the comments received, the Commission believes that it could improve protections against manipulation and price distortion without materially impacting liquidity for bona fide hedgers by adopting a lower Federal single month position limit level of either 5,000 contracts or 5,950 contracts. Of these two suggested levels, the Commission believes that it is more appropriate to adopt the 5,950 contract level over the existing 5,000 contract level to account, in part, for the increase in open interest levels since the single month position limit level of 5,000 contracts was adopted in 2011.[810]

d. Wheat Core Referenced Futures Contracts' Federal Non-Spot Month Position Limit Levels

(1) Summary of the 2020 NPRM and Additional Background Information—Wheat Federal Non-Spot Month Position Limit Levels

There are three wheat contracts: CBOT Wheat (W), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE). Currently, the Federal non-spot month position limit levels for all three are set at 12,000 contracts. This has been referred to as ''full wheat parity.''

In the 2020 NPRM, the Commission proposed ''partial wheat parity'' by increasing the Federal non-spot month position limit level for CBOT Wheat (W) from 12,000 contracts to 19,300 based on the application of the modified 10/2.5% formula and updated open interest levels, while maintaining the existing levels of 12,000 contracts for CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE). The 12,000 contract Federal non-spot month position limit levels for CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) are above the levels that would be calculated based on the application of the modified 10/2.5% formula and recent open interest levels, which would be 11,900 contracts for CBOT KC HRW Wheat (KW) and 5,700 contracts for MGEX HRS Wheat (MWE).

The Commission proposed partial wheat parity between CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) at 12,000 contracts for two reasons. First, both contracts provide exposure to hard red wheats. As a result, the Commission believed that drastically decreasing the Federal non-spot month position limit level for MGEX HRS Wheat (MWE) vis-à-vis CBOT KC HRW Wheat (KW) by following the 10/2.5% formula could impose liquidity costs on the MGEX HRS Wheat (MWE) market and harm bona fide hedgers, which could further harm liquidity for bona fide hedgers in the related CBOT KC HRW Wheat (KW) market.[811] Second, the existing Federal non-spot month position limit levels for CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) appear to have functioned well, and the Commission saw no market-based reason to reduce those levels based on recent open interest data.[812]

(2) Comments—Wheat Federal Non-Spot Month Position Limit Levels

The Commission received several comments concerning the proposed Federal non-spot month position limit levels with respect to the three wheat core referenced futures contracts. One commenter, MGEX, stated that it ''supports maintaining partial wheat parity by keeping the existing non-spot month limits for [MGEX HRS Wheat (MWE)] and CBOT KC Hard Red Wheat at 12,000.'' [813] Another commenter agreed ''with the increase in the non-spot month for CBOT Wheat (W).'' [814]

However, other commenters requested that the Federal non-spot month position limit level for CBOT KC HRW Wheat (KW) be at least the same as CBOT Wheat (W) (*i.e.,* raise it to 19,300 contracts).[815] In support, commenters contended that the ''physical market for the wheat crop that is deliverable under [CBOT KC HRW Wheat (KW)] is much larger than the wheat crop that is deliverable under [CBOT Wheat (W)].'' [816] Also, commenters stated that the ''characteristics of the physical wheat that is deliverable under [CBOT KC HRW Wheat (KW)] is more similar to the global wheat crop than the wheat that is deliverable under [CBOT Wheat

[807] The Commission acknowledges ISDA's comment that the proposed Federal non-spot month position limit levels should be higher to compensate for the proposed loss of risk management exemptions for swap dealers. However, as noted previously, the Commission believes that any potential impact on existing risk management exemption holders may be mitigated by the pass-through swap provision adopted herein, and that this is a preferable and more tailored approach than increasing the non-spot month position limit levels for all market participants.

[808] 85 FR 11637 (Request for Comment #26).

[809] Specifically, the Commission is referring to the price distortion that could be caused by a speculative trader who, after amassing a large position during the non-spot month, exits the entire position immediately before the spot month.

[810] The maximum open interest for ICE Cotton No. 2 (CT) was 197,191 contracts in 2009, 161,582 contracts in 2011, and 324,952 contracts in 2019.

[811] 85 FR at 11633.

[812] *Id.* at 11632.

[813] MGEX at 3.

[814] MFA/AIMA at 12.

[815] SIFMA AMG at 3–4; ISDA at 12; PIMCO at 4–5; MFA/AIMA at 12; and Citadel at 6–7.

[816] PIMCO at 4. *See also* ISDA at 12 and SIFMA AMG at 3–4.

(W)].'' [817] As a result, commenters stated that, ''[CBOT KC HRW Wheat (KW)] may be important for hedging for many market participants.'' [818] Similarly, MFA/AIMA stated that ''open interest data and supply data published by the USDA for hard red winter wheat, which is the underlying commodity for [CBOT KC HRW Wheat (KW)], would also justify an increase in the [CBOT KC HRW Wheat (KW)] non-spot month limit.'' [819]

(3) Discussion of Final Rule—Wheat Federal Non-Spot Month Position Limit Levels

The Commission declines to raise the proposed 12,000 contract Federal non-spot month position limit level for CBOT KC HRW Wheat (KW) to match the final Federal non-spot month position limit level of CBOT Wheat (W) at 19,300 contracts.

First, as noted earlier, the Federal non-spot month position limit level for CBOT KC HRW Wheat (KW) is already set higher, albeit slightly, than the limit level calculated under the updated open interest figure and 10/2.5% formula, which, as discussed previously, is a formula that the Commission believes is generally proper for determining Federal non-spot month position limit levels.[820] Raising the Federal non-spot month position limit level for CBOT KC HRW Wheat (KW) to 19,300 contracts would be a drastic increase over the existing level that is not supported by the 10/2.5% formula or by the Commission's observations of how that market has functioned under the 12,000 contract Federal non-spot month position limit level. As a result, the Commission is concerned that this could result in excessive speculation and increase the possibility of market manipulation or harm to the underlying price discovery function with respect to that contract.

Second, the Commission believes that maintaining partial wheat parity between CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) is appropriate because the commodities underlying both of those wheat core referenced futures contracts are hard red wheats that, together, represent the majority of the wheat grown in both the United States and Canada, which results in those markets being closely intertwined.[821] This is in contrast with CBOT Wheat (W), which typically sees deliveries of soft white wheat varieties (even though it allows for delivery of hard red wheat).[822]

Finally, the Commission reiterates that bona fide hedging positions will continue to be allowed to exceed the Federal position limit levels. Intermarket spreading is also permitted as well, which should address any concerns over the potential for loss of liquidity in the spread trades among the three wheat core referenced futures contracts during the non-spot months.[823]

5. Subsequent Spot and Non-Spot Month Limit Levels

i. Summary of the 2020 NPRM—Subsequent Spot and Non-Spot Month Limit Levels

Unlike in previous iterations of the position limit rules, the 2020 NPRM did not require the Commission to periodically review and revise EDS figures or adjust the Federal spot month position limit levels.[824] Instead, under proposed § 150.2(f), an exchange listing a core referenced futures contract would be required to provide EDS figures only if requested by the Commission. Proposed § 150.2(j) delegated the authority to make such requests to the Director of the Division of Market Oversight.[825] The 2020 NPRM also allowed exchanges to voluntarily submit EDS figures to the Commission at any time, and encouraged them to do so.[826] When submitting EDS figures, exchanges would be required to provide a description of the methodology used to derive the EDS figures, as well as all data and data sources used to calculate the estimate, so that the Commission could verify that the EDS figures are reasonable.[827]

Likewise, the 2020 NPRM also did not require the Commission to periodically review the open interest data and update the non-spot month position limit levels for the legacy agricultural core referenced futures contracts, unlike in previous iterations of the position limit rules.[828]

ii. Summary of the Commission Determination—Subsequent Spot and Non-Spot Month Limit Levels

The Commission is adopting § 150.2(f) as proposed and will not include a formal mechanism to periodically renew or revise EDS figures or otherwise review and update the Federal spot month or non-spot month position limit levels. The Commission is also adopting the delegation provision in § 150.2(j) as proposed.[829]

iii. Comments—Subsequent Spot and Non-Spot Month Limit Levels

The Commission received several comments concerning updates to the Federal position limit levels, with commenters requesting that the Commission periodically review the levels and revise them if appropriate.[830] One commenter was concerned that the Federal position limit levels could become too high over time,[831] while the rest were concerned that the levels could become too low.[832] In addition, CME Group also suggested that exchanges should update the EDS figures ''every two years [and] . . . DCMs should be provided the opportunity to submit data voluntarily to the Commission on a more frequent basis.'' [833]

iv. Discussion of Final Rule—Subsequent Spot and Non-Spot Month Limit Levels

The Commission declines to implement a periodic, predetermined schedule to review Federal position limits because the Commission believes that it is more appropriate to retain flexibility for both the exchanges and the Commission itself in updating the Federal position limit levels.

Reviewing and adjusting the Federal spot month position limit levels requires the Commission to review, among other things, updated EDS figures for the core referenced futures contracts. Having worked closely with

[817] SIFMA AMG at 3. *See also* ISDA at 12 and PIMCO at 4.

[818] SIFMA AMG at 4. *See also* ISDA at 12.

[819] MFA/AIMA at 12. *See also* Citadel at 6–7.

[820] 85 FR at 11630.

[821] *Id.* at 11632.

[822] *Id.*

[823] *Id.* at 11633.

[824] *See e.g.,* 81 FR at 96769–96771.

[825] 85 FR at 11633.

[826] *Id.* at 11633–11634.

[827] *Id.* at 11634.

[828] *See e.g.,* 81 FR at 96769, 96771–96773.

[829] The Commission did not receive any comments on proposed § 150.2(j).

[830] MFA/AIMA at 5 (''the Commission should direct exchanges to periodically monitor the proposed new position limit levels''); PIMCO at 6 (''we urge the CFTC to include . . . a mandatory requirement to regularly (and at least annually) review and update limits as markets grow and change''); SIFMA AMG at 10 (the Final Rule should require ''that the Commission regularly consult with exchanges and review and adjust position limits when it is necessary to do so based on relevant market factors''); ISDA at 10 (''the Commission must regularly convene and consult with exchanges on deliverable supply and, if appropriate, propose notice and comment rulemaking to adjust limit levels''); and IATP at 16–17 (the Commission should engage in ''an annual review of position limit levels to give [commercial hedgers] legal certainty over that period'' and also retain ''the authority to revise position limits . . . if data monitoring and analysis show that those annual limit levels are failing to prevent excessive speculation and/or various forms of market manipulation'').

[831] IATP at 16–17.

[832] MFA/AIMA at 5–6; PIMCO at 6; SIFMA AMG at 10; and ISDA at 10.

[833] CME Group at 5.

exchanges to analyze and independently verify the methodology underlying the EDS figures and the EDS figures themselves, the Commission recognizes that estimating deliverable supply can be a time and resource consuming process for both the exchanges and the Commission.[834] Furthermore, periodic, predetermined review intervals may not always align with market changes or other events resulting in material changes to deliverable supply that would warrant adjusting Federal spot month position limit levels. As a result, the Commission believes that it would be more efficient, timely, and effective to review the EDS figure and the Federal position limit level for a core referenced futures contract if warranted by market conditions, including changes in the underlying cash market, which the Commission and exchanges continually monitor.

Reviewing and adjusting the Federal non-spot month position limit levels requires the Commission to review, among other things, open interest data for the relevant core referenced futures contracts. Unlike EDS figures, open interest is easily obtainable because it is regularly updated by the exchanges. As a result, the output of the 10/2.5% formula can be quickly calculated. However, the Commission does not believe that it is appropriate to update the Federal non-spot month position limit levels separately from the Federal spot month position limit levels. The Commission has historically reviewed all of the Federal position limit levels—spot month and non-spot month—together for a particular contract because all months of a particular contract are part of the same market. As a result, updating both the spot and non-spot month position limits levels at the same time provides a holistic and integrated position limit regime for each commodity contract because the limits are based upon updated data covering the same or overlapping time period.

Final § 150.2(f) provides flexibility and authority for the Commission to be able to request an updated EDS figure, along with the methodology and underlying data, for a core referenced futures contract whenever market conditions suggest that a change in Federal position limit levels may be warranted. The exchanges are also encouraged to submit such information at any time as well under final § 150.2(f).[835] Once the Commission receives the updated EDS figures, then the Commission can undertake the appropriate review and analysis of the EDS figures and any additional information, such as exchange recommendations, to adjust the Federal spot month position limit levels, if necessary, through rulemaking. At that time, the Commission would also review the open interest data for the core referenced futures contract and undertake the necessary analysis to ensure that the Federal non-spot month position limit levels are set at appropriate levels as well.

Finally, the Commission notes that, under this position limits framework, the exchanges always have the freedom to set their exchange-set position limit levels lower than the Federal position limit levels. Adjusting the Federal position limit levels necessarily requires the Commission to engage in rulemaking with notice-and-comment, which can take a significant amount of time.[836] Thus, an exchange may adjust its exchange-set position limit levels lower in response to market conditions, while waiting for the Commission to adjust the Federal position limit levels.[837]

6. Relevant Contract Month

Proposed § 150.2(c) clarified that the spot month and single month for any given referenced contract is determined by the spot month and single month of the core referenced futures contract to which that referenced contract is linked.

The Commission did not receive any comments and is adopting as proposed. Final § 150.2(c) requires that referenced contracts be linked to the core referenced futures contract in order to be netted for position limit purposes.

For example, for the NYMEX NY Harbor ULSD Heating Oil (HO) core referenced futures contract, the spot month period starts at the close of trading three business days prior to the last trading day of the contract. The spot month period for the NYMEX NY Harbor ULSD Financial (MPX) futures referenced contract would thus start at the same time—the close of trading three business days prior to the last trading day of the core referenced futures contract.

7. Limits on ''Pre-Existing Positions''

i. Summary of the 2020 NPRM—Pre-Existing Positions

Under proposed § 150.2(g)(1) Federal spot month position limits applied to ''pre-existing positions, other than pre-enactment swaps and transition period swaps,'' each defined in proposed § 150.1. Accordingly, Federal spot month position limits would not apply to any pre-existing positions in economically equivalent swaps. The 2020 NPRM defined ''pre-existing positions'' in proposed § 150.1 as positions established in good faith prior to the effective date of a final Federal position limits rulemaking.

In contrast, proposed § 150.2(g)(2) provided that Federal non-spot month limits would *not* apply to pre-existing positions, *including* pre-enactment swaps and transition period swaps, if acquired in good faith prior to the effective date of such limit. However, other than pre-enactment swaps and transition period swaps, any pre-existing positions held outside the spot month would be attributed to such person if the person's position is increased after the effective date of a final Federal position limits rulemaking.

The 2020 NPRM's disparate treatment of pre-existing positions during and outside the spot month was predicated on the concern that failing to apply spot month limits to such pre-existing positions could result in a large, preexisting position either intentionally or unintentionally causing a disruption to the price discovery function of the core referenced futures contract as positions are rolled into the spot month. In contrast, outside the spot month, large, pre-existing positions may have a relatively less disruptive effect given that physical delivery occurs only during the spot month.

ii. Summary of the Commission Determination—Pre-Existing Positions

The Commission is adopting § 150.2(g)(1) as proposed, and is adopting § 150.2(g)(2) with the following two changes:

First, the Commission is amending proposed § 150.2(g)(2) to provide that non-spot month limits shall apply to pre-existing positions, other than pre-enactment swaps and transition period swaps. As noted above, proposed § 150.2(g)(2) in the 2020 NPRM exempted pre-existing positions from the Final Rule's Federal non-spot month position limits. However, as discussed below, the nine legacy agricultural

[834] 85 FR at 11633.

[835] In providing an updated EDS figure, exchanges should consult the guidance concerning estimating deliverable supply set forth in section (b)(1)(i) (''Estimating Deliverable Supplies'') of 17 CFR part 38, Appendix C.

[836] Market participants may petition the Commission to adjust Federal position limit levels, subject to the Commission's notice-and-comment rulemaking, under existing § 13.1, which provides that any ''person may file a petition with . . . the Commission . . . for the issuance, amendment or repeal of a rule of general application.''

[837] However, an exchange cannot set its exchange-set position limit levels above the Federal position limit levels, even if market conditions may warrant raising the levels. Thus, in order to allow market participants to hold positions higher than the Federal position limit levels (absent an exemption), the Commission would need to raise the Federal position limit levels through rulemaking.

contracts currently are subject to the Commission's existing non-spot month position limits, and the Commission did not intend to exclude existing non-spot month positions in the nine legacy agricultural contracts that would otherwise qualify as ''pre-existing positions'' under the Final Rule. As discussed, the other 16 non-legacy core referenced futures contracts that are subject to Federal position limits for the first time under the Final Rule are not subject to Federal non-spot month position limits and therefore proposed § 150.2(g)(2) would not have applied to these contracts in any event.

The Commission based the language in proposed § 150.2(g) on similar language found in the 2016 Reproposal, which imposed Federal non-spot month position limits on all of the proposed core referenced futures contracts (as opposed to only on the nine legacy agricultural contracts under the Final Rule). In the context of the 2016 Reproposal, the Commission believed it made sense to exempt pre-existing positions in non-spot months in core referenced futures contracts that would have been subject to Federal position limits for the first time under the 2016 Reproposal. However, as noted above, such core referenced futures contracts that are subject to Federal position limits for the first time under the Final Rule are not subject to Federal non-spot month position limits. Accordingly, the Commission is modifying § 150.2(g) so that pre-existing positions in the nine legacy agricultural contracts remain subject to Federal non-spot month position limits under the Final Rule, as the Commission had originally intended.

Second, since the Commission is clarifying that pre-existing positions in the nine legacy agricultural contracts, other than pre-enactment swaps and transition period swaps, are subject to Federal non-spot month position limits under the Final Rule, the language in proposed § 150.2(g)(2) that would attribute to a person any increase in their non-spot month positions after the effective date of the Final Rule's non-spot month limits is no longer necessary. The Commission is therefore removing this language from final § 150.2(g)(2).

iii. Comments—Pre-Existing Positions

Commenters generally supported proposed § 150.2(g), although several commenters asked for additional clarity.[838] MGEX and FIA both argued that the provision could be simplified by creating only two categories: ''pre-existing swaps'' (exempt from all spot/non-spot Federal position limits) and ''pre-existing futures'' (exempt from all non-spot Federal position limits, provided there is no increase in such non-spot positions), stating that relying upon the proposed relief as structured will be ''operationally challenging'' for market participants.[839] MGEX and FIA also requested that the Commission clarify that a market participant is not required to rely upon the exemption so that its pre-existing positions could be netted, as applicable, with the market participant's other referenced contracts.[840] ISDA encouraged the Commission to provide that the Final Rule's new Federal position limits do not apply to any pre-existing positions, whether in futures contracts or swaps.[841] Finally, CHS encouraged the Commission to adopt a ''safe harbor'' provision where participants could demonstrate a ''good-faith'' effort at compliance so ''inadvertent'' violations would not trigger possible enforcement action.[842]

iv. Discussion of Final Rule—Pre-Existing Positions

As stated in the 2020 NPRM, the Commission believes that the absence of spot-month limits on pre-existing positions, other than pre-existing swaps and transition period swaps, could render the Federal spot month position limits ineffective. Failure to apply spot month limits to such pre-existing positions, particularly for the 16 commodities that are not currently subject to Federal position limits and where market participants may have pre-existing positions in excess of the spot-month position limits adopted herein, could result in a large, pre-existing position either intentionally or unintentionally causing a disruption to the price discovery function of the core referenced futures contract as positions are rolled into the spot month.[843] The Commission is particularly concerned about protecting the spot month in physically delivered futures contracts from price distortions or manipulation that would disrupt the hedging and price discovery utility of the futures contract.[844]

With respect to non-spot month position limits, only the nine legacy agricultural contracts are currently subject to such limits under the existing Federal position limits framework and will continue to be subject to Federal non-spot month position limits under the Final Rule. The Commission did not intend in the 2020 NPRM to exclude such pre-existing positions in the nine legacy agricultural contracts from non-spot month limits. Accordingly, for the Final Rule the Commission is modifying final § 150.2(g)(2) to make clear that Federal non-spot month position limits do apply to these pre-existing positions. However, as noted above, the 16 non-legacy core referenced futures contracts that are subject to Federal position limits for the first time under this Final Rule are not subject to Federal non-spot month position limits and so are not affected by the Commission's change in final § 150.2(g)(2).

The Commission agrees with MGEX's and FIA's comments that pre-existing positions can be netted. The Commission confirms that market participants may continue to net their pre-existing positions, as applicable, with market participants' post-effective date referenced contract positions. In the 2020 NPRM, the Commission made explicit in proposed § 150.3(a)(5) that market participants would be permitted to net pre-existing swap positions with post-effective date referenced contract positions (to the extent such pre-existing swap positions qualify as ''economically equivalent swaps'' under the Final Rule).[845] The Commission adopted this clarification in final § 150.3(a)(5) for the avoidance of doubt. The Commission believes this explicit clarification with respect to swaps is helpful to market participants since swaps are subject to Federal position limits for the first time under this Final Rule and since it may not otherwise be clear whether a market participant could net a pre-enactment swap or transition period swap given that such pre-enactment and transition period swaps are exempt from Federal position limits under final § 150.3(a)(5).

However, the Commission similarly intended that market participants also would be able to net pre-existing futures contracts and option on futures contracts against post-effective date positions. The Commission did not feel such a clarification was necessary since futures contracts and options thereon have been subject to the existing Federal position limits framework. Accordingly, for the avoidance of doubt, the Commission is affirming that market participants may continue to net pre-existing futures contracts and option on

[838] MGEX at 4; FIA at 9; ISDA at 8.

[839] FIA at 8–9; MGEX at 4.

[840] MGEX at 3–4; FIA at 8–9, 18–19.

[841] ISDA at 2, 8.

[842] CHS at 5.

[843] 85 FR at 11634.

[844] *Id.*

[845] Pre-existing swap positions (*i.e.,* pre-enactment swaps and transition period swaps) would otherwise be exempt from Federal position limits.

futures contracts with post-effective date positions in referenced contracts.

In response to ISDA's request for clarification, the Commission notes that Federal non-spot month position limits will apply to pre-existing positions in the nine legacy agricultural contracts (but not to the 16 non-legacy core referenced futures contracts). However, for the reasons articulated above, Federal position limits will apply during the spot month for futures contracts and options on futures contracts for all 25 core referenced futures contracts, other than pre-enactment swaps and transition period swaps.

While the Commission is not adopting a ''safe harbor'' provision, it is providing a transition period, as requested by CHS,[846] so that market participants will have until January 1, 2022 (or January 1, 2023 for economically-equivalent swaps or positions relying on the risk-management exemption) to comply with the Final Rule. The Commission believes this will provide sufficient time for market participants to implement and test new systems and processes that have been established to comply with the Final Rule.

8. Positions on Foreign Boards of Trade

i. Background

CEA section 4a(a)(6)(B) directs the Commission to establish limits on the aggregate number of positions in contracts based upon the same underlying commodity that may be held by any person across contracts traded on a foreign board of trade (''FBOT'') with respect to a contract that settles against any price of at least one contract listed for trading on a registered entity.[847]

ii. Summary of the 2020 NPRM—Foreign Boards of Trade

Proposed § 150.2(h) applied the proposed Federal position limits to a market participant's aggregate positions in referenced contracts executed on a DCM or SEF and on, or pursuant to the rules of, an FBOT, provided that (1) the referenced contracts settle against a price of a contract listed for trading on a DCM or SEF and (2) the FBOT makes such contract available in the United States through ''direct access.'' [848] In other words, a market participant's positions in referenced contracts listed on a DCM or SEF and on an FBOT registered to provide direct access would collectively have to stay below the Federal position limit for the relevant core referenced futures contract.

iii. Summary of the Commission Determination—Foreign Boards of Trade

The Commission is adopting § 150.2(h) as proposed.

iv. Comments—Foreign Boards of Trade

The Commission received comments from CEWG, Chevron, and Suncor regarding proposed § 150.2(h) and its possible effects with respect to certain contracts listed on ICE Futures Europe (''IFEU'') that are price-linked to the energy core referenced futures contracts.[849] Each of the commenters expressed concern that the extension of the proposed Federal position limits regime to referenced contracts listed for trading on IFEU could have unintended consequences, such as: (1) Requiring U.S.-based market participants to comply with potentially conflicting requirements of multiple regulators and position limits regimes; and (2) incentivizing foreign regulators to extend their reach into the Commission's jurisdictional markets.[850]

Chevron and Suncor requested that the Commission reconsider what they perceive to be the potential regulatory conflicts and burdens that could be imposed on market participants who transact referenced contracts listed on IFEU, and adopt a policy of substituted compliance to minimize such conflicts.[851] CEWG recommended that the Commission adopt an approach based on substituted compliance with respect to referenced contracts listed on FBOTs similar to that adopted for swaps under CEA section 2(i).[852]

v. Discussion of Final Rule—Foreign Boards of Trade

As stated above, the Commission is adopting § 150.2(h) as proposed. As stated in the 2020 NPRM,[853] CEA section 4a(a)(6)(B) requires the Commission to establish limits on the aggregate number or amount of positions in contracts based upon the same underlying commodity that may be held by any person across certain contracts traded on an FBOT with linkages to a contract traded on a registered entity. Final § 150.2(h) simply codifies requirements set forth in CEA section 4a(a)(6)(B), and will lessen regulatory arbitrage by eliminating a potential loophole whereby a market participant could accumulate positions on certain FBOTs in excess of limits in referenced contracts.[854]

Accordingly, the Commission believes that § 150.2(h) is consistent with the goal set forth in CEA section 4a(a)(2)(C) to ensure that liquidity does not move to foreign jurisdictions or place U.S. exchanges at a competitive disadvantage to foreign competitors. If the Commission did not attribute positions held in referenced contracts on FBOTs, the Commission inadvertently could incentivize market participants to shift trading and liquidity in referenced contracts to FBOTs in order to avoid Federal position limits.

9. Anti-Evasion

i. Summary of the 2020 NPRM—Anti-Evasion

Pursuant to the Commission's rulemaking authority in section 8a(5) of the CEA,[855] the Commission proposed § 150.2(i), which was intended to deter and prevent a number of potential methods of evading Federal position limits. The proposed anti-evasion provision provided: (1) A commodity index contract and/or location basis contract, which would otherwise be excluded from the proposed referenced contract definition, would be considered a referenced contract subject to Federal position limits if used to willfully circumvent position limits; (2) a bona fide hedge recognition or spread exemption would no longer apply if used to willfully circumvent speculative position limits; and (3) a swap contract used to willfully circumvent speculative position limits would be deemed an economically equivalent swap, and thus a referenced contract, even if the swap does not meet the economically equivalent swap definition set forth in proposed § 150.1.

ii. Summary of the Commission Determination—Anti-Evasion

The Commission is adopting § 150.2(i) as proposed with conforming changes that reflect revisions to the ''referenced contract'' definition adopted herein in

[846] CHS at 5.

[847] 7 U.S.C. 6a(a)(6)(B). The CEA's definition of ''registered entity'' includes DCMs and SEFs. 7 U.S.C. 1a(40).

[848] Commission regulation § 48.2(c) defines ''direct access'' to mean an explicit grant of authority by an FBOT to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the FBOT. 17 CFR 48.2(c).

[849] CEWG at 28–29; Chevron at 15–16; Suncor at 14–15.

[850] CEWG at 28; Chevron at 16; Suncor at 15.

[851] Chevron at 16; Suncor at 15.

[852] CEWG at 29.

[853] 85 FR at 11634.

[854] In addition, CEA section 4(b)(1)(B) prohibits the Commission from permitting an FBOT to provide direct access to its trading system to its participants located in the United States unless the Commission determines, in regards to any FBOT contract that settles against any price of one or more contracts listed for trading on a registered entity, that the FBOT (or its foreign futures authority) adopts position limits that are comparable to the position limits adopted by the registered entity. 7 U.S.C. 6(b)(1)(B).

[855] 7 U.S.C. 12a(5).

which the Final Rule additionally is excluding ''monthly average pricing contracts'' and ''outright price reporting agency index contracts'' from the ''referenced contract'' definition.[856] A discussion of these conforming changes appears immediately below, followed by a summary of the comments, which addressed different aspects of the proposed anti-evasion provision.

a. Discussion of Conforming Changes—Anti-Evasion

The Commission is revising proposed § 150.2(i)(1), which addressed evasion of Federal position limits by using commodity index contracts and location basis contracts, to also cover monthly average pricing contracts and outright price reporting agency index contracts. This change is needed to conform the anti-evasion provision to the ''referenced contract'' definition adopted herein. In particular, while the 2020 NPRM would exclude commodity index contracts and location basis contracts from the ''referenced contract'' definition, the Final Rule excludes those contracts as well as monthly average pricing contracts and outright price reporting agency index contracts from the ''referenced contract definition.'' [857]

Because contracts that are excluded from the final ''referenced contract'' definition are not subject to Federal position limits, the Commission intends that final § 150.2(i)(1) will prevent a potential loophole whereby a market participant who has reached its limits could otherwise utilize these contract types to willfully circumvent or evade speculative position limits. For example, a market participant could purchase a commodity index contract in a manner that allowed the participant to exceed limits when taking into account the weighting in the component commodities of the index contract. The Final Rule also will avoid creating what could otherwise be similar potential loopholes with respect to monthly average pricing contracts, outright price reporting agency index contracts, and location basis contracts.

Additionally, the Commission is adopting § 150.2(i)(2) as proposed. This provision provides that a bona fide hedge recognition or spread exemption will no longer apply if used to willfully circumvent speculative position limits. This provision is intended to help ensure that bona fide hedge recognitions and spread exemptions are granted and utilized in a manner that comports with the CEA and Commission regulations, and that the ability to obtain bona fide hedge recognitions and spread exemptions does not become an avenue for market participants to inappropriately exceed speculative position limits.

The Commission is also adopting § 150.2(i)(3) as proposed. Under this provision, a swap contract used to willfully circumvent speculative position limits is deemed an economically equivalent swap, and thus a referenced contract, even if the swap does not meet the economically equivalent definition set forth in final § 150.1. This provision is intended to deter and prevent the structuring of a swap in order to willfully evade speculative position limits.

iii. Comments—Anti-Evasion

Several commenters stated that the anti-evasion provision is prudent, but would be difficult to apply in practice, in part due to the subjective ''willful circumvention'' standard.[858] FIA recommended that, instead, the anti-evasion analysis should be based on the presence of ''deceit, deception, or other unlawful or illegitimate activity'' so market participants will be better equipped to evaluate the surrounding facts and circumstances in making an evasion determination.[859] FIA further expressed that, because markets evolve, it is inadvisable to consider ''historical practices behind the market participant and transaction in question.'' [860] FIA also asked the Commission to confirm that it is not evasion for a market participant to consider ''costs or regulatory burdens, including the avoidance thereof,'' if that participant has a legitimate business purpose for a transaction.[861]

Specific to swaps, ISDA encouraged the Commission to expressly acknowledge and confirm that an out-of-scope swap transaction would not be considered evasion under any set of circumstances.[862] FIA recommended that, for structured swaps, the anti-evasion analysis should ask whether the swap serves the market participant's commercial needs or objectives.[863] Finally, FIA suggested that the Final Rule should provide an automatic safe harbor from a retroactive evasion determination for all swaps entered into prior to the compliance date.[864]

iv. Discussion of Final Rule—Anti-Evasion

The Final Rule's anti-evasion provision is not intended to capture a trading strategy merely because the strategy may result in a smaller position size for purposes of position limits. Instead, the anti-evasion provision is intended to deter and prevent cases of willful evasion of speculative position limits, the specifics of which the Commission may be unable to anticipate. The Federal position limit requirements adopted herein will apply during the spot month for all referenced contracts subject to Federal position limits, while non-spot month Federal position limit requirements will only apply for the nine legacy agricultural contracts. Under this framework, and because the threat of corners and squeezes is the greatest in the spot month, the Commission anticipates that it may focus its attention on anti-evasion activity during the spot month.

The determination of whether particular conduct is intended to circumvent or evade requires a facts and circumstances analysis. In interpreting these anti-evasion rules, the Commission is guided by its interpretations of anti-evasion provisions appearing elsewhere in the Commission's regulations, including the interpretation of the anti-evasion rules that the Commission adopted in its rulemakings to further define the term ''swap'' and to establish a clearing requirement under section 2(h)(1)(A) of the CEA.[865]

Generally, consistent with those interpretations, in evaluating whether conduct constitutes evasion, the Commission will consider, among other things, the extent to which the person lacked a legitimate business purpose for structuring the transaction in that particular manner. For example, an analysis of how a swap was structured could reveal that a person or persons crafted derivatives transactions, structured entities, or conducted

[856] *See supra* Section II.A.16.iii.b. (explanation of proposed exclusions from the ''referenced contract'' definition).

[857] *See* Section II.A.16.iii.b.

[858] SIFMA AMG at 7, n.16 (noting that the anti-evasion provision makes the application of the proposed ''economically equivalent swap'' definition less clear because it incorporates a subjective measure of intent); *see also* FIA at 25 (questioning how a participant would distinguish a strategy that minimizes position size with an evasive strategy); Better Markets at 33 (describing the anti-evasion provision as a ''useful deterrent,'' but noting that the willful circumvention standard would be difficult to meet and partially turns on the Commission's consideration of the legitimate business purpose analysis).

[859] FIA at 25–26.

[860] *Id.*

[861] *Id.*

[862] ISDA at 5, n.7

[863] FIA at 25.

[864] *Id.*

[865] *See* Further Definition of ''Swap, ''Security-Based Swap,'' and ''Security-Based Swap Agreement;'' Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, 48297–48303 (Aug. 13, 2012); Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284, 74317–74319 (Dec. 13, 2012).

themselves in a manner without a legitimate business purpose and with the intent to willfully evade position limits by structuring one or more swaps such that such swap(s) would not meet the ''economically equivalent swap'' definition in final § 150.1.

In response to FIA's comment that the Commission should confirm that it is not evasion for a market participant with a legitimate business purpose for a transaction to consider ''costs or regulatory burdens,[866] the Commission acknowledges that it fully expects that a person acting for legitimate business purposes within its respective industry will naturally consider a multitude of costs and benefits associated with different types of financial transactions, entities or instruments, including the applicable regulatory obligations.[867] As stated in a prior rulemaking, a person's specific consideration of, for example, costs or regulatory burdens, including the avoidance thereof, is not, in and of itself, dispositive that the person is acting without a legitimate business purpose in a particular case.[868]

In response to FIA's comment [869] that an anti-evasion analysis of a structured swap should evaluate whether the transaction serves the market participant's commercial needs or objectives, as stated in the 2020 NPRM, the Commission will view legitimate business purpose considerations on a case-by-case basis in conjunction with all other relevant facts and circumstances. Additionally, the Commission disagrees with FIA's comment [870] that an historical practices inquiry is inadvisable. Because transactions and instruments are regularly structured, and entities regularly formed, in a particular way and for various, often times multiple, reasons, the Commission believes it is essential that all relevant facts and circumstances be considered, including historical practices.[871] While historical practice is a factor the Commission will consider as part of its facts and circumstances analysis, it is not dispositive in determining whether particular conduct constitutes evasion.

As part of its facts and circumstances analysis, the Commission will look at factors such as the historical practices behind the market participant and transaction in question. For example, with respect to § 150.2(i)(2) (*i.e.,* bona fide hedges or spreads used to evade), the Commission is adopting guidance in Appendix B to part 150 with respect to gross versus net hedging. As discussed elsewhere in this release, the Commission believes that measuring risk on a gross basis to willfully circumvent or evade speculative position limits would potentially run afoul of § 150.2(i)(2).[872] Use of gross or net hedging that is inconsistent with an entity's historical practice, or a change from gross to net hedging (or vice versa), could be an indication that an entity is seeking to evade position limits regulations.[873] With respect to § 150.2(i)(3) (*i.e.,* swaps used to evade), the Commission will consider whether a market participant has a history of structuring its swaps one way, but then starts structuring its swaps a different way around the time the participant risked exceeding a speculative position limit as a result of its swap position, such as by modifying the delivery date or other material terms and conditions such that the swap no longer meets the definition of an ''economically equivalent swap.''

Consistent with interpretive language in prior rulemakings addressing evasion,[874] when determining whether a particular activity constitutes willful evasion, the Commission will consider the extent to which the activity involves deceit, deception, or other unlawful or illegitimate activity. Although it is likely that fraud, deceit, or unlawful activity will be present where willful evasion has occurred, the Commission disagrees with FIA's comment [875] that these factors should be a prerequisite to an evasion finding. A position that does not involve fraud, deceit, or unlawful activity could still lack a legitimate business purpose or involve other indicia of evasive activity. The presence or absence of fraud, deceit, or unlawful activity is one fact the Commission will consider when evaluating a person's activity. That said, the final anti-evasion provision does require willfulness, *i.e.* ''scienter.'' In response to commenters [876] who expressed concern regarding the practical application of this intent standard, the Commission will interpret ''willful'' consistently with how the Commission has done so in the past, *i.e.,* that acting either intentionally or with reckless disregard constitutes acting ''willfully.'' [877]

In determining whether a transaction has been entered into or structured willfully to evade position limits, the Commission will not consider the form, label, or written documentation as dispositive. The Commission also is not requiring a pattern of evasive transactions as a prerequisite to prove evasion, although such a pattern may be one factor in analyzing whether evasion has occurred. In instances where one party willfully structures a transaction to evade but the other counterparty does not, § 150.2(i) will apply to the party who willfully structured the transaction to evade.

Further, entering into transactions that qualify for the forward exclusion from the swap definition, standing alone, shall not be considered evasive. However, in circumstances where a transaction does not, in fact, qualify for the forward exclusion, the transaction may or may not be evasive depending on an analysis of all relevant facts and circumstances.

The Commission declines to adopt ISDA's request [878] to carve out-of-scope swap transactions from the anti-evasion provision. This request was unsupported and did not address whether an out-of-scope swap could be used to evade position limits.

Finally, the Commission declines to adopt FIA's request [879] that all swaps entered into prior to the compliance date be granted an automatic safe harbor from a retroactive finding of evasion. This change is unnecessary given that under final § 150.3, pre-enactment swaps and transition period swaps will not be subject to Federal position limits at all during or outside the spot month.[880]

10. Application of Netting and Related Treatment of Cash-Settled Referenced Contracts

i. Background

Under the existing Federal framework, Federal position limits apply only to the nine legacy agricultural contracts, which are all physically-settled. However, existing part 150 does not include the equivalent concept of a ''referenced contract,'' and therefore existing Federal position limits do not apply to any cash-settled look-alike contracts as they would under the Final Rule. Accordingly, the issue of netting across look-alike contracts that may be located across

[866] FIA at 25.

[867] *See* 77 FR at 48301.

[868] *See* 77 FR at 74319.

[869] FIA at 25.

[870] *Id.* at 25–26.

[871] *See* 77 FR at 48302.

[872] *See* Section II.A.1.ix.

[873] *Id.*

[874] *See* 77 FR at 48297–48303; 77 FR at 74317–74319.

[875] FIA at 25.

[876] SIFMA AMG at 7, n.16; *see also* FIA at 25; Better Markets at 33.

[877] *See In re Squadrito,* [1990–1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,262 (CFTC Mar. 27, 1992) (adopting definition of ''willful'' in *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128 (1987)).

[878] ISDA at 5, n.7.

[879] FIA at 25.

[880] *See* final § 150.3(a)(5).

different exchanges is not addressed under the existing framework.

ii. Summary of the 2020 NPRM—Netting and Related Treatment of Cash-Settled Referenced Contracts

Under the 2020 NPRM, the referenced contract definition in proposed § 150.1 included, among other things, (i) cash-settled contracts that are linked, either directly or indirectly, to a core referenced futures contract, and (ii) ''economically equivalent swaps.'' [881]

Proposed § 150.2(a) provided that during the spot month, Federal position limits would apply ''separately'' to physically delivered referenced contracts and cash-settled referenced contracts. Under the 2020 NPRM, positions in a physically-settled core referenced futures contract would not be required to be added to, nor permitted to be netted down by, positions in corresponding cash-settled referenced contracts (and vice-versa).

Proposed § 150.2(b), in contrast, provided that during the non-spot months, including the single month and all-months-combined, Federal position limits would apply in the aggregate to both physically-delivered referenced contracts and cash-settled referenced contracts. This meant that for the purposes of determining whether a market participant complies with the Federal non-spot month position limits, a person's physically-settled and cash-settled referenced contract positions would be added together and could net against each other.

Under both proposed §§ 150.2(a) and (b), positions in referenced contracts would be aggregated across exchanges for purposes of determining one's net position for Federal position limit purposes.

iii. Summary of the Commission Determination—Netting and Related Treatment of Cash-Settled Referenced Contracts

The Commission is finalizing § 150.2(a) and (b) of the 2020 NPRM as proposed.[882]

iv. Comments—Netting and Related Treatment of Cash-Settled Referenced Contracts

PIMCO, SIFMA AMG, and ISDA contended that cash-settled referenced contracts should not be subject to Federal position limits at all because cash-settled contracts do not introduce the same risk of market manipulation. They argued that subjecting cash-settled referenced contracts to Federal position limits would reduce market liquidity and depth in these instruments.[883]

FIA and ICE argued that limits for cash-settled referenced contracts should be higher relative to Federal position limits for physically-settled referenced contracts. They similarly argued that cash-settled referenced contracts are ''not subject to corners and squeezes'' and will '' 'ensure market liquidity for *bona fide* hedgers.' '' [884] FIA and ICE further suggested that Federal position limits for cash-settled referenced contracts should apply per DCM (rather than in aggregate across DCMs).[885] FIA additionally suggested setting a separate Federal spot-month position limit for economically equivalent swaps.[886]

In contrast, CME Group supported the Commission's approach for spot-month parity for physically-settled and cash-settled referenced contracts across all commodity markets. CME Group explained that absent such parity, one side of the market could be vulnerable to: Artificial distortions from manipulations on the other side of the market; regulatory arbitrage; and liquidity drain to the other side of the market.[887] CME Group warned that, ultimately, a lack of parity could undermine the statutory goals of position limits.[888] NEFI agreed, arguing similarly that ''this move is essential to guard against manipulation by a trader who holds positions in both physically-settled and cash-settled contracts for the same underlying commodity.'' [889]

v. Discussion of Final Rule—Netting and Related Treatment of Cash-Settled Referenced Contracts

The Commission is finalizing §§ 150.2(a) and (b) as proposed. Under final § 150.2(a), Federal spot month limits apply to physical-delivery referenced contracts ''separately'' from Federal spot month limits applied to cash-settled referenced contracts, meaning that during the spot month, positions in physically-settled contracts may not be netted with positions in linked cash-settled contracts but also are not required to be added to linked cash-settled contracts for the purposes of determining compliance with Federal position limits. Specifically, all of a trader's positions (long or short) in a given physically-settled referenced contract (across all exchanges and OTC as applicable) [890] are netted and subject to the spot month limit for the relevant commodity, and all of such trader's positions in any cash-settled referenced contracts (across all exchanges and OTC as applicable) linked to such physically-settled core referenced futures contract are netted and independently (rather than collectively along with the physically-settled positions) subject to the Federal spot month limit for that commodity.[891]

Additionally, a position in a commodity contract that is not a referenced contract, and therefore is not subject to Federal position limits, as a consequence, cannot be netted with positions in referenced contracts for purposes of Federal position limits.[892] For example, a swap that is not a referenced contract because it does not meet the economically equivalent swap definition could not be netted with positions in a referenced contract.

[881] *See* Section II.A.16. (discussion of the proposed referenced contract definition).

[882] As discussed above, the Commission is making an exception for natural gas referenced contracts to the general netting rules discussed below. For further discussion on the Final Rule's treatment of natural gas referenced contracts, *see* Section II.B.3.vi.

[883] PIMCO at 3; SIFMA AMG at 4–7; ISDA at 3–5. These entities did not specifically argue that cash-settled contracts should be excluded from the ''referenced contract'' definition, but rather in general that such instruments should not be subject to Federal position limits. The Commission noted that this is technically a different argument since cash-settled instruments could be exempt from position limits while still technically qualifying as ''referenced contracts,'' but the end result is the same as a practical matter.

[884] ICE at 3, 15 (also arguing that cash-settled limits should apply per exchange, rather than across exchanges); FIA at 7–8.

[885] FIA at 7–8; ICE at 13.

[886] FIA 7–8.

[887] CME Group at 3–4.

[888] *Id.* at 6.

[889] NEFI at 3.

[890] In practice, the only physically-settled referenced contracts subject to the Final Rule will be the 25 core referenced futures contracts, none of which are listed on multiple DCMs, although there could potentially be physically-settled OTC swaps that would satisfy the ''economically equivalent swap'' definition and therefore would also qualify as referenced contracts. For further discussion on economically equivalent swaps, *see* Section II.A.4.

[891] Consistent with CEA section 4a(a)(6), this would include positions across exchanges. However, for the reasons discussed in Section II.B.3.vi., the Commission is exercising its exemptive authority under CEA section 4a(a)(7) to provide an exception for natural gas to the general aggregation rule in CEA section 4a(a)(6). As discussed above, the Commission has concluded that the natural gas market is well-established with contracts that currently trade across several exchanges, and is relatively liquid with significant open interest. Accordingly, the Commission is exercising its judgment to establish Federal position limits on a per-exchange (and OTC as applicable) basis in order to maintain the status quo rather than risk disturbing the existing natural gas market.

[892] Proposed Appendix C to part 150 provides guidance regarding the referenced contract definition, including that the following types of contracts are not deemed referenced contracts, meaning such contracts are not subject to Federal position limits and cannot be netted with positions in referenced contracts for purposes of Federal position limits: Location basis contracts; commodity index contracts; swap guarantees; trade options that meet the requirements of 17 CFR 32.3; monthly average pricing contracts; and outright price reporting agency index contracts.

Allowing the netting of linked physically-settled and cash-settled contracts during the spot month could lead to disruptions in the price discovery function of the core referenced futures contract or allow a market participant to manipulate the price of the core referenced futures contract. Absent separate spot month position limits for physically-settled and cash-settled contracts, the spot month position limit would be rendered ineffective, as a participant could maintain large positions in excess of limits in both the physically-settled contract and the linked cash-settled contract, enabling the participant to disrupt the price discovery function as the contracts go to expiration by taking large opposite positions in the physically-settled core referenced futures and cash-settled referenced contracts, or potentially allowing a participant to effect a corner or squeeze.[893] Consistent with current and historical practice, the Federal position limits adopted herein apply to positions throughout each trading session (*i.e.,* on an intra-day basis during each trading session), as well as at the close of each trading session.[894]

In response to the comments from PIMCO, SIFMA AMG, and ISDA that cash-settled referenced contracts should not be subject to position limits at all because such contracts do not introduce the same risk of market manipulation, as discussed above under Section II.A.16.iii.a., the Commission has concluded that cash-settled referenced contracts should be subject to Federal position limits since they form one market with their corresponding physically-settled core referenced futures contracts.[895]

In response to ISDA's recommendation that the Final Rule only include physically-settled referenced contracts and that the Commission apply Federal position limits on cash-settled referenced contracts at a later time, the Commission notes that as discussed under Section I.D., the Final Rule will be subject to a general compliance period until January 1, 2022. During this period, exchanges may choose to implement exchange-set position limits that provide for a different phased-in approach for cash-settled versus physically-settled referenced contracts as the exchanges may find appropriate for their respective markets. Additionally, the compliance period will be further extended until January 1, 2023 for economically equivalent swaps and positions held in reliance on a risk-management exemption, which in each case the Commission notes include mostly cash-settled positions. Accordingly, as a practical matter, many cash-settled contracts will be subject to a longer compliance period. However, as discussed further above under Section II.A.16.iii.a, the Commission has determined that it is appropriate to include cash-settled referenced contracts in Federal position limits under this Final Rule.[896]

FIA and ICE similarly argued that cash-settled referenced contracts should be subject to higher Federal position limits compared to the physically-settled core referenced futures contracts. Their arguments were predicated, in part, on their conclusions that market participants cannot use cash-settled contracts to effect a corner or squeeze.[897]

The Commission declines to adopt higher Federal position limits for cash-settled referenced contracts for several reasons. First, as an initial matter, the Commission acknowledges that preventing corners and squeezes is a crucial focus of the Commission. However, in response to FIA's and ICE's arguments that cash-settled referenced contracts should be subject to higher Federal position limits compared to physically-settled futures contracts because cash-settled contracts cannot be used to effect a corner or squeeze, the Commission notes that there are other forms of manipulation, such as ''banging'' or ''marking'' the close, that cash-settled referenced contracts can effect, and the Commission emphasizes that it endeavors to prevent all such market manipulation, consistent with CEA section 4a(a)(3)(B)(ii).[898] While CEA section 4a(a)(3)(B)(ii) specifically references corners and squeezes, the CEA section also references ''manipulation'' generally, and neither FIA nor ICE recognized the existence of other types of market manipulation, such as ''banging'' the close, in their analysis.

Second, the Commission believes that FIA's and ICE's arguments for higher Federal position limits for cash-settled referenced contracts is intrinsically related to the comments from PIMCO, SIFMA AMG, and ISDA discussed above arguing that cash-settled referenced contracts should not be subject to Federal position limits at all. That is, the higher the Federal position limits for cash-settled referenced contracts that FIA or ICE recommend establishing, the closer, as a practical matter, it is to having no Federal position limits for cash-settled referenced contracts.[899] As a result, the Commission believes that its general rationale for including cash-settled referenced contracts within the Federal position limits framework similarly supports parity between cash-settled and physically-settled referenced contracts.

Third, the Commission generally agrees with the reasons articulated in the comments from CME Group and NEFI that it is appropriate to establish spot-month parity for physically-settled and cash-settled referenced contracts across all commodity markets. While FIA argued that higher position limits for cash-settled referenced contracts could ensure liquidity for bona fide hedgers,[900] the Final Rule has established the Federal position limit levels in general for the 25 core referenced futures contracts (including increases for many of the nine legacy agricultural contracts) and has expanded the enumerated bona fide hedges and streamlined the related application process under final §§ 150.3 and 150.9 in order to ensure sufficient liquidity for bona fide hedgers.

FIA and ICE similarly argued that market participants should not be required to aggregate cash-settled positions across all exchanges but rather should be subject to a disaggregated Federal position limit that applies per-exchange. In other words, as the Commission understands FIA's and ICE's request, if the Federal position limit is 1,000 contracts, FIA and ICE believe that a market participant should be able to hold 1,000 cash-settled referenced contracts per exchange rather than being required to aggregate positions across all exchanges. Under this approach, a long position of 1,000 contracts on Exchange A would not be aggregated with a long position of 1,000 contracts on Exchange B. However, under this approach, a long position on Exchange A also would not net with a short position on Exchange B.

ICE specifically argued that a single, aggregate Federal position limit for all

[893] For example, absent such a restriction in the spot month, a trader could stand for 100 percent of deliverable supply during the spot month by holding a large long position in the physical-delivery contract along with an offsetting short position in a cash-settled contract, which effectively would corner the market.

[894] *See, e.g.,* Elimination of Daily Speculative Trading Limits, 44 FR 7124, 7125 (Feb. 6, 1979).

[895] For further discussion, *see* Section II.A.16.iii.a(2).

[896] For further discussion of the Commission's rationale for including cash-settled referenced contracts under the Final Rule, *see* Section II.A.16.iii.a.

[897] FIA at 7; ICE at 12–13.

[898] For further discussion, *see* Sections II.A.16., II.A.4.iii.d(2), and II.B.10.iv.

[899] *See* Section II.A.16.iii.a.

[900] FIA at 7–8.

referenced contracts across exchanges may make it difficult for an exchange to launch a new referenced contract since the hypothetical new referenced contract would be aggregated with an existing referenced contract for purposes of Federal position limits.[901] According to ICE, establishing new exchanges and/or new contracts is made more difficult under the Commission's aggregated approach, since it is purportedly more difficult to attract sufficient liquidity to establish a sustainable exchange or contract.[902] ICE also references the Commission's obligations under CEA section 15 to consider the public interest and antitrust laws.[903] ICE recommends a more flexible approach to allow an exchange to develop its own liquidity and establish its own limits, even for similar or look-alike cash-settled referenced contracts, to help develop robust and liquid markets while protecting against excessive speculation.[904]

In response to FIA and ICE, as discussed immediately below, the Commission believes that, as a general matter, establishing aggregate limits across exchanges promotes competition and innovation while also better addressing the statutory goals in CEA section 4a(a)(3) as compared to ICE's request to establish disaggregated, per-exchange position limits. However, before discussing the Commission's underlying policy rationale supporting aggregate Federal position limits, the Commission has determined that as an initial legal matter that CEA section 4a(a)(6)(B) requires the Commission to establish the ''*aggregate* number or amount of positions . . . that maybe held by any person . . . for each month *across* . . . contracts listed by [DCMs] . . . .'' (emphasis added).[905] While ICE cites CEA section 15 in its comment letter, ICE does not address CEA section 4a(a)(6)'s requirement that the Commission generally must establish aggregate position limits across exchanges. Accordingly, in addition to the policy rationale discussed immediately below, the Commission further has determined that the Final Rule's requirement to aggregate positions across exchanges does not on its face violate CEA section 15.[906]

As noted above, the Commission also believes it is appropriate to aggregate positions across exchanges for Federal position limit purposes for the same general reasons that the Commission has determined both to include cash-settled referenced contracts within the Federal position limits framework and also to maintain parity for Federal position limit levels between physically-settled and cash-settled referenced contracts. For example, applying a per-exchange Federal position limit, rather than aggregating across exchanges, effectively increases the applicable Federal position limit. Accordingly, the Commission likewise believes it generally is inappropriate to permit per-exchange Federal position limits for cash-settled referenced contracts.

In response to ICE's concern regarding liquidity formation and that aggregating cash-settled positions across exchanges would harm competitiveness and innovation by making it more difficult to attract enough liquidity to become sustainable on an ongoing basis,[907] the Commission believes that to the extent Federal position limit levels under the Final Rule have been correctly calibrated, the Federal position limits framework should promote—or at least not disincentivize—liquidity formation.

However, ICE's proposal to allow Federal position limits to apply on a disaggregated, per-exchange basis risks dividing liquidity among several liquidity pools, which itself could harm liquidity for bona fide hedgers and reduce price discovery. The Commission also observes that, as a practical matter, ICE's request to disaggregate positions across exchanges would significantly increase the applicable position limit (possibly by a multiple of two or three—or more—depending on the number of exchanges that list referenced contracts). Consequently, if the Commission assumes, *in arguendo,* that Federal position limit levels are reasonably calibrated under the Final Rule, then applying a per-exchange limit by definition would increase the potential risks of excessive speculation and possible manipulation as market participants are permitted to hold larger directional positions in referenced contracts. Moreover, to the extent Federal position limits under this Final Rule are not reasonably calibrated to ensure necessary liquidity for bona fide hedgers, then the Commission, as a general matter, would prefer to address the lack of liquidity by adjusting the Federal position limit levels to appropriate levels rather than applying Federal position limits on a per-exchange basis for the reasons discussed in the paragraphs above and as discussed in the paragraph immediately below.

Last, the Commission believes that ICE's approach could actually harm innovation since under ICE's rationale, Federal position limit levels would need to be set lower than the Federal levels adopted herein. For example, if the Commission were to allow disaggregated netting across exchanges as a general rule, then it would likely lead to increased excessive speculation and possible manipulation, as discussed above.

Accordingly, in order to avoid the threat of excessive speculation and manipulation, the Commission would be obligated to set Federal position limits sufficiently low in order to compensate for a per-exchange position limit disaggregated approach. However if the Commission were to establish Federal position limits sufficiently low to prevent these concerns from happening, then innovation could be adversely affected since it means that the concomitant lower Federal position limit levels likely would make it difficult for exchanges to develop sufficient liquidity for a new product—unless other competing exchanges offered linked contracts to add sufficient liquidity to the market. In such a case, the success of any new product offered by the initial exchange could be dependent upon competing exchanges offering competing look-alike contracts to allow for sufficient liquidity. In contrast, the Commission believes that the Final Rule's approach to make the full aggregated Federal position limit available to the contract is more responsive to the needs of the market compared to a disaggregated approach, and the Commission believes that the Final Rule's aggregated approach promotes innovation and competition in the marketplace. Accordingly, the Commission does not believe that applying netting on an aggregate basis harms competition and innovation. Rather, the Commission believes its approach supports healthy competition and innovation while ICE's approach could harm liquidity and innovation.

While the Commission believes the above rationale generally applies, the Commission notes that for the reasons discussed in Section II.B.3.vi., the Commission is exercising its exemptive authority under CEA section 4a(a)(7) to provide an exception for natural gas to the general aggregation rule in CEA section 4a(a)(6). The Commission does

[901] ICE at 12–13.

[902] ICE at 12–13.

[903] *Id.*

[904] *Id.*

[905] 7 U.S.C. 6a(a)(6); CEA 4a(a)(6).

[906] *See* Section IV.D. As discussed elsewhere in this release, the Commission is exercising its exemptive authority pursuant to CEA Section 4a(a)(7) to establish an exception to this rule in connection with, and based on the particular circumstances of the natural gas market. See Section II.B.3.iv (discussing natural gas).

[907] ICE at 12–13.

not believe that the rationale above necessarily applies to the natural gas market. As discussed above, the natural gas market has existing natural gas commodity derivatives contracts that are well-established with liquidity, trading, and open interest currently across several exchanges. Accordingly, the Commission is exercising its judgment to establish Federal position limits on a per-exchange basis in order to maintain the status quo rather than risk disturbing the structure of the existing natural gas market, which could harm liquidity for bona fide hedgers or price discovery.

In response to FIA's suggestion that economically equivalent swaps should be subject to separate Federal spot-month position limits, as discussed under Section II.A.4.iii., the Commission does not believe doing so would be appropriate.[908] As discussed above, the Commission believes that establishing separate class position limits for futures contracts and swaps could harm liquidity formation while establishing a single Federal position limit promotes integration between the futures and swaps markets.

11. ''Eligible Affiliates'' and Position Aggregation

i. Background

In 2016, the Commission amended § 150.4 to adopt new rules governing the aggregation of positions for purposes of compliance with Federal position limits.[909] These aggregation rules currently apply only to the nine legacy agricultural contracts previously subject to Federal position limits, but now will also apply to the 16 new contracts subject to Federal position limits for the first time under this Final Rule. Under the existing aggregation rules, unless an exemption applies, all of the positions held and trading done by the person must be aggregated with positions for which the person controls trading or for which the person holds a 10% or greater ownership interest. DMO has issued time-limited no-action relief through August 12, 2022 (''NAL 19–19'') from some of the aggregation requirements contained in that rulemaking.[910]

ii. Summary of the 2020 NPRM—Eligible Affiliates and Position Aggregation

Proposed § 150.2(k) addressed entities that would qualify as an ''eligible affiliate'' as defined in proposed § 150.1. Under the proposed definition, an ''eligible affiliate'' would include certain entities that, among other things, are required to aggregate their positions under § 150.4 and that do not claim an exemption from aggregation. There may be certain entities that would be eligible for an exemption from aggregation, but that prefer to aggregate rather than disaggregate their positions (such as when aggregation would result in advantageous netting of positions with affiliated entities). Proposed § 150.2(k) intended to address such a circumstance by making clear that an ''eligible affiliate'' may opt to aggregate its positions even though it is eligible to disaggregate.

iii. Summary of the Commission Determination—Eligible Affiliates and Position Aggregation

The Commission is adopting § 150.2(k) as proposed.

iv. Comments—Eligible Affiliates and Position Aggregation

Although the Commission did not receive any comments on this provision, it received a number of comments related to position aggregation in general. These commenters urged the Commission to amend the Federal position limits aggregation rules in existing § 150.4 by codifying existing NAL 19–19.[911] Some commenters further requested that the Commission revisit certain aspects of NAL 19–19 and the aggregation rules, such as the threshold ownership percentage set forth in existing § 150.4 that triggers the requirement to aggregate positions or rely upon an exemption.[912] Conversely, IATP argued that before applying the existing aggregation rules, and accompanying exemptions, to additional commodities, the Commission should study whether the existing exemptions from aggregation have resulted in increased speculation.[913]

v. Discussion of Final Rule—Eligible Affiliates and Position Aggregation

The Commission declines to codify NAL 19–19 [914] in this rulemaking since NAL 19–19's relief from some of the aggregation requirements contained in 2016 Final Aggregation Rulemaking [915] continues to apply until August 12, 2022. DMO extended this relief for three years to provide sufficient time to ''evaluate whether the relief granted is hindering Commission staff's ability to conduct surveillance; assess the impact of the relief; and consider long-term solutions that must, appropriately, be implemented by a notice and comment rulemaking.'' [916] Accordingly, the Commission believes it is appropriate to first monitor the application of the existing position aggregation requirements before considering amendments to those aggregation requirements, and the Commission will address the aggregation rules, including whether to codify NAL 19–19, as needed, after this Final Rule goes into effect.

*C. § 150.3—Exemptions From Federal Position Limits*

1. Background—Existing §§ 150.3, 1.47, and 1.48—Exemptions From Federal Position Limits

Existing § 150.3(a), which pre-dates the Dodd-Frank Act, lists positions that may, under certain circumstances, exceed Federal position limits, including: (1) Bona fide hedging transactions, as defined in the current bona fide hedging definition in § 1.3; and (2) spread or arbitrage positions, subject to certain conditions.[917] Existing § 150.3(b) provides that the Commission or certain Commission staff may make a ''call'' to demand certain information from exemption holders so that the Commission can effectively oversee the use of such exemption. Section § 150.3(b) also provides that any such call may request information relating to positions owned or controlled by that person, trading done pursuant to that exemption, the futures, options or cash-market positions that support the claimed exemption, and the relevant business relationships supporting a claim of exemption.[918]

The current bona fide hedge definition in existing § 1.3 requires applicants who wish to receive bona fide hedging recognition and exceed Federal position limits to apply for non-enumerated bona fide hedges under § 1.47 and to apply for anticipatory bona fide hedges under § 1.48 of the Commission's existing regulations. Under § 1.47, persons seeking recognition by the Commission of a non-

[908] FIA 7–8.

[909] *See* 81 FR at 91454.

[910] *See* CFTC Letter No. 19–19 (July 31, 2019), available at *https://www.cftc.gov/csl/19-19/download*. NAL 19–19 extends NAL 17–37 and provides an additional three-year period of no-action relief from compliance with certain position aggregation requirements under Commission Regulation 150.4 by streamlining the compliance requirements that must be satisfied for a person or entity to rely on an exemption from aggregation.

[911] FIA at 28; ISDA at 11; PIMCO at 6; CMC at 12–13; and SIFMA AMG at 2, 9.

[912] CMC at 12–13; FIA at 28.

[913] IATP at 18–19.

[914] *See* CFTC Letter No. 19–19 (July 31, 2019), available at *https://www.cftc.gov/csl/19-19/download*.

[915] 81 FR 91454 (December 16, 2016).

[916] *See* CFTC Letter No. 19–19 at 4.

[917] 17 CFR 150.3(a).

[918] 17 CFR 150.3(b).

enumerated bona fide hedging transaction or position must file certain initial statements with the Commission at least 30 days in advance of the date that such transaction or position would be in excess of Federal position limits.[919] Similarly, persons seeking recognition by the Commission of certain anticipatory bona fide hedges must submit their application 10 days in advance of the date that such transactions or positions would be in excess of Federal position limits.[920]

With respect to spread exemptions, the Commission's authority and existing regulation for exempting certain spread positions can be found in CEA section 4a(a)(1) and existing § 150.3(a)(3) of the Commission's regulations. In particular, CEA section 4a(a)(1) authorizes the Commission to exempt from Federal position limits transactions ''normally known to the trade as 'spreads' or 'straddles' or 'arbitrage.''' Similarly, in existing § 150.3(a)(3), the Commission exempts ''spread or arbitrage positions,'' and allows such exemptions to be self-effectuating for the nine legacy agricultural contracts currently subject to Federal position limits. The Commission does not specify a formal process, in § 150.3(a)(3), for granting spread exemptions.[921]

*2. Overview of Proposed § 150.3, Commenters' Views, and the Commission's Final Rule Determination*

This section provides a brief overview of proposed § 150.3, commenters' general views, and the Commission's determination. The Commission will summarize and address each sub-section of § 150.3 in greater detail further below. The Commission proposed several changes to § 150.3. First, the Commission proposed to update § 150.3 to conform to the proposed bona fide hedging definition in § 150.1 (described above) and the new streamlined process in proposed § 150.9 for recognizing non-enumerated bona fide hedging positions (described further below). The Commission also proposed to amend § 150.3 to include new exemption types not explicitly listed in existing § 150.3, including: (i) Exemptions for financial distress situations; (ii) conditional exemptions for certain spot month positions in cash-settled natural gas contracts; and (iii) exemptions for pre-enactment swaps and transition period swaps.[922] Proposed § 150.3(b)–(g) respectively addressed: Non-enumerated bona fide hedge and spread exemption requests submitted directly to the Commission; previously-granted risk management exemptions to Federal position limits; exemption-related recordkeeping and reporting requirements; the aggregation of accounts; and the delegation of certain authorities to the Director of the Division of Market Oversight.

The most substantive comments on proposed § 150.3 relate to the spread transaction exemption in proposed § 150.3(a)(2) and to the natural gas conditional position limit exemption in proposed § 150.3(a)(4), as described in detail below and under the discussion of § 150.2, above.[923] In addition, one commenter expressed general support for the Commission's proposed approach to recognizing exemptions under § 150.3.[924]

The Commission has determined to adopt § 150.3 largely as proposed, with certain modifications and clarifications in response to commenters' views and other considerations, as described in detail below.

*3. Section 150.3(a)(1)—Exemption for Bona Fide Hedging Transaction or Position*

i. Summary of the 2020 NPRM—Exemption for Bona Fide Hedging Transaction or Position

First, under proposed § 150.3(a)(1)(i), a bona fide hedging transaction or position that falls within one of the proposed enumerated hedges set forth in proposed Appendix A to part 150, discussed above, would be self-effectuating for purposes of Federal position limits. A market participant thus would not be required to request Commission approval prior to exceeding Federal position limits for such transaction or position. However, this does not affect a market participant's obligations under proposed § 150.5(a) and under the relevant exchange's rules and thus, the market participant would be required to request a bona fide hedge exemption from the relevant exchange for purposes of exchange-set limits established pursuant to proposed § 150.5(a), and submit required cash-market information to the exchange as part of that request.[925] The Commission also proposed to allow the existing enumerated anticipatory bona fide hedges (some of which are not currently self-effectuating, and must be approved by the Commission, under existing § 1.48) to be self-effectuating for purposes of Federal position limits (and thus would not require prior Commission approval).

Second, under proposed § 150.3(a)(1)(ii), for positions in referenced contracts that do not satisfy one of the proposed enumerated hedges in Appendix A, (*i.e.,* non-enumerated bona fide hedges), a market participant must request approval from the Commission either directly, or indirectly through an exchange, prior to exceeding Federal position limits. Such exemptions thus would not be self-effectuating and a market participant in such cases would have one of the following two options for requesting such a non-enumerated bona fide hedge recognition: (1) Apply directly to the Commission in accordance with § 150.3(b) (described below), and, separately, also apply to an exchange pursuant to exchange rules established under proposed § 150.5(a); [926] or (2) apply through an exchange pursuant to proposed § 150.9 for a non-enumerated bona fide hedge recognition that could ultimately be valid both for purposes of Federal and exchange-set position limit requirements, unless the Commission (and not staff, which would not have delegated authority) denies the application within a limited period of time.[927] As discussed in the 2020 NPRM, market participants relying on enumerated or non-enumerated bona fide hedge recognitions would no longer have to file the monthly Form 204/304 with supporting cash-market information.[928]

ii. Comments and Discussion of Final Rule—Exemption for Bona Fide Hedging Transactions or Positions

The Commission did not receive any comments on proposed § 150.3(a)(1). As such, the Commission is finalizing § 150.3(a)(1) with a few grammatical and organizational changes to improve readability. The Commission is also finalizing the introductory text in § 150.3(a) with a clarification that ''each'' of a person's transactions or positions must satisfy at least one of the

[919] 17 CFR 1.47.

[920] 17 CFR 1.48.

[921] Since 1938, the Commission (then known as the Commodity Exchange Commission) has recognized the use of spread positions to facilitate liquidity and hedging. *See* Notice of Proposed Order in the Matter of Limits on Position and Daily Trading in Grain for Future Delivery, 3 FR 1408 (June 14, 1938).

[922] The Commission revised § 150.3(a) in 2016, relocating the independent account controller aggregation exemption from § 150.3(a)(4) in order to consolidate it with the Commission's aggregation requirements in § 150.4(b)(4). *See* Final Aggregation Rulemaking, 81 FR at 91489–91490.

[923] *See supra* Section II.B.3.vi.a. (discussing the spot-month limit for natural gas).

[924] *See* CMC at 6.

[925] *See infra* Section II.D.3. *See also* 85 FR at 11644 (proposed § 150.5(a)(2)(ii)(A)).

[926] *See infra* Section II.D.3. (discussion of proposed § 150.5).

[927] *See infra* Section II.G. (discussion of proposed § 150.9).

[928] *See infra* Section II.H.2. (discussion of the proposed elimination of Form 204).

exemptions in § 150.3(a) in order to exceed Federal limits. None of the technical revisions are intended to change the substance of proposed § 150.3(a)(1).

4. Section 150.3(a)(2)—Spread Exemptions

i. Summary of the 2020 NPRM—Spread Exemptions

Under proposed § 150.3(a)(2)(i), a spread position would be self-effectuating for purposes of Federal position limits, provided that the position fits within at least one of the types of spread strategies listed in the ''spread transaction'' definition in proposed § 150.1,[929] and provided further that the market participant separately requests a spread exemption from the relevant exchange's limits established pursuant to proposed § 150.5(a).

Under proposed § 150.3(a)(2)(ii), for a spread strategy that does not meet the ''spread transaction'' definition in proposed § 150.1, a market participant must apply for a spread exemption directly from the Commission in accordance with proposed § 150.3(b). The market participant must also receive a notification of the approved spread exemption under proposed § 150.3(b)(4) before exceeding the Federal speculative position limits for that spread position. The Commission thus did not propose a process akin to § 150.9 for spreads that do not meet the proposed ''spread transaction'' definition.

ii. Comments—Spread Exemptions

Several commenters advocated for the Commission to expand the proposed § 150.9 process, which would allow exchanges to process applications for non-enumerated bona fide hedge exemptions for purposes of both Federal and exchange limits, to also allow exchanges to grant ''non-enumerated'' spread exemptions for spread positions that do not meet the ''spread transaction'' definition.[930] Commenters also requested that the Commission provide an explanation for why the Commission would not expand § 150.9 to cover ''non-enumerated'' spread exemptions.[931] Finally, commenters requested that market participants be able to apply for spread exemptions on a late or retroactive basis the same way they would be permitted to apply for bona fide hedge exemptions within five days of exceeding Federal position limits under proposed §§ 150.3 and 150.9.[932]

iii. Discussion of Final Rule—Spread Exemptions

The Commission has determined to adopt § 150.3(a)(2) with non-substantive revisions to address technical edits or improve readability. For the reasons discussed immediately below, the Commission has determined not to expand § 150.3(a)(2) as requested by commenters to allow market participants to apply to exchanges for ''non-enumerated'' spread exemptions that are not covered in the ''spread transaction'' definition in § 150.1.

First, as discussed above,[933] the Commission has determined to expand the ''spread transaction'' definition so that it covers most, if not all, of the most common spread exemptions used by market participants. With this expansion, the Commission expects that most spread exemption requests will fall within the scope of the ''spread transaction'' definition. Accordingly, the Commission expects that most spread exemptions will thus be self-effectuating for purposes of Federal position limits. Also, the Commission expects that any spread exemption requests falling outside of the ''spread transaction'' definition are likely to be novel exemption requests that the Commission—and not exchanges—should review, considering certain statutory considerations in CEA section 4a(a)(3)(B). As explained immediately below, the Commission cannot authorize exchanges to conduct this analysis because exchanges would lack clear standards for assessing whether a particular spread position satisfies the requirements of the CEA.

Second, bona fide hedge recognitions and spread exemptions are subject to different legal standards. That is, under CEA section 4a(a)(c)(2), Congress provided clear criteria to the Commission for determining what constitutes a bona fide hedging transaction or position. In turn, the Commission has defined in detail the term bona fide hedging transaction or position in § 150.1. As a result, under final § 150.9, the Commission is permitting exchanges to evaluate applications for non-enumerated bona fide hedges for purposes of exchange-set limits in accordance with the same clear criteria used by the Commission.

In contrast, the CEA does not include clear criteria for granting spread exemptions. Instead, CEA section 4a(a)(1) generally permits the Commission to exempt ''transactions normally known to the trade as ''spreads'' or ''straddles'' or ''arbitrage'' from position limits[934] and requires the Commission to administer Federal position limits in a manner that comports with certain policy considerations in CEA section 4a(a)(3)(B).[935] Analyzing novel spread exemption requests in accordance with these general principles requires the Commission to use its judgment to conduct a highly fact-specific analysis. And, in the absence of any detailed statutory or regulatory criteria, the Commission is not comfortable, at this time, with leveraging an exchange's analysis and determination with respect to novel spread exemption requests. As such, the Commission has determined that the Commission should conduct a direct review of any spread exemptions that do not meet the ''spread transaction'' definition, and the Commission thus will not expand § 150.9 to cover spreads because exchanges would lack clear standards for assessing whether a particular spread position satisfies the requirements of the CEA. In the future, the Commission may, however, consider developing regulatory criteria for spread exemptions such that novel spread exemptions could be considered through a more streamlined process, such as § 150.9.

Finally, unlike for certain bona fide hedge recognitions as discussed below, the Commission has determined not to permit retroactive applications for spread exemptions or other exemptions permitted under this § 150.3(a). The Commission believes that the Federal position limits framework adopted herein provides sufficient flexibility through expanded speculative limits, and a clear, comprehensive set of exemptions, most of which are self-effectuating and thus do not require prior Commission approval. As such, the Commission believes that market participants will be able to identify their exemption needs based on these clear regulatory requirements and apply for

[929] *See supra* Section II.A.20. (proposed definition of ''spread transaction'' in § 150.1, which would cover: Intra-market, inter-market, intra-commodity, or inter-commodity spreads, including calendar spreads, quality differential spreads, processing spreads (such as energy ''crack'' or soybean ''crush'' spreads), product or by-product differential spreads, and futures-options spreads.)

[930] *See* MFA/AIMA at 10; FIA at 21; Citadel at 8–9; ISDA at 9; ICE at 7–8 (suggesting that if the list of spread positions in the spread transaction definition is determined to be an exhaustive list, then the Commission should permit additional flexibility for an exchange to grant additional spread exemptions—that are not covered in the spread transaction definition—using the proposed § 150.9 process).

[931] *See* MFA/AIMA at 10.

[932] *See* ICE at 8.

[933] *See supra* Section II.A.20. (discussing changes to expand the spread transaction definition).

[934] 7 U.S.C. 6a(a)(1).

[935] 7 U.S.C. 6a(a)(3)(b).

all such exemptions ahead of time. In addition, the Commission believes that allowing retroactive spread exemptions and other types of retroactive exemptions (such as the financial distress or conditional natural gas spot month exemption) could potentially be harmful to the market as these types of strategies may involve non-risk-reducing or speculative activity that should be evaluated prior to a person exceeding Federal position limits.

5. Section 150.3(a)(3)—Financial Distress Exemptions

i. Summary of the 2020 NPRM—Financial Distress Exemptions

Proposed § 150.3(a)(3) would allow for a financial distress exemption in certain situations, including the potential default or bankruptcy of a customer or a potential acquisition target. For example, in periods of financial distress, such as a customer default at an FCM or a potential bankruptcy of a market participant, it may be beneficial for a financially-sound market participant to take on the positions and corresponding risk of a less stable market participant, and in doing so, exceed Federal speculative position limits. Pursuant to authority delegated under §§ 140.97 and 140.99, Commission staff previously granted exemptions in these types of situations to avoid sudden liquidations required to comply with a position limit.[936] Such sudden liquidations could otherwise potentially hinder statutory objectives, including by reducing liquidity, disrupting price discovery, and/or increasing systemic risk.[937]

The proposed exemption would be available for the positions of ''a person, or related persons,'' meaning that a financial distress exemption request should be specific to the circumstances of a particular person, or to persons affiliated with that person, and not a more general request by a large group of unrelated people whose financial distress circumstances may differ from one another. The proposed exemption would be granted on a case-by-case basis in response to a request submitted to the Commission pursuant to § 140.99, and would be evaluated based on the specific facts and circumstances of a particular person or a related person or persons. Any such financial distress position would not be a bona fide hedging transaction or position unless it otherwise met the substantive and procedural requirements set forth in proposed §§ 150.1, 150.3, and 150.9, as applicable.

ii. Comments and Summary of the Commission Determination—Financial Distress Exemptions

The Commission did not receive any substantive comments on proposed § 150.3(a)(3), although one commenter expressed general support for the financial distress exemption.[938] As such, the Commission has determined to finalize § 150.3(a)(3) as proposed, for the reasons discussed above and in the 2020 NPRM.

6. Section 150.3(a)(4)—Conditional Spot Month Exemption in Natural Gas

i. Summary of the 2020 NPRM—Conditional Spot Month Exemption in Natural Gas

Certain natural gas contracts are currently subject to exchange-set position limits, but not Federal position limits.[939] In the 2020 NPRM, the Commission proposed applying Federal position limits to certain natural gas contracts for the first time by including the physically-settled NYMEX Henry Hub Natural Gas (''NYMEX NG'') contract as a core referenced futures contract listed in proposed § 150.2(d). The Commission also proposed, consistent with existing exchange practice, establishing a conditional spot month exemption for Federal position limit purposes that would permit larger positions during the spot month for cash-settled natural gas referenced contracts so long as the market participant held no physically-settled NYMEX NG.

ii. Summary of the Commission Determination—Conditional Spot Month Exemption in Natural Gas

For the Final Rule, the Commission is adopting the conditional spot month exemption in natural gas, as proposed. The Commission discusses this conditional spot month exemption, as well as other issues in connection with NYMEX NG, above under the discussion of § 150.2.[940] The Commission is discussing all the issues related to the NYMEX NG core referenced futures contract, including this conditional spot month exemption, together in one place in this release for the reader's convenience.

7. Section 150.3(a)(5)—Exemption for Pre-Enactment Swaps and Transition Period Swaps

i. Background and Summary of the 2020 NPRM—Exemption for Pre-Enactment Swaps and Transition Period Swaps

Currently, swaps are not subject to the existing Federal position limits framework, and the Commission is unaware of any exchange-set limits on swaps with respect to any of the 25 core referenced futures contracts.

In order to promote a smooth transition to compliance for swaps, which were not previously subject to Federal speculative position limits, in the 2020 NPRM, the Commission proposed to exempt pre-enactment swaps and transition period swaps from Federal position limits. Proposed § 150.3(a)(5) provided that Federal position limits would not apply to positions acquired in good faith in any pre-enactment swaps or in any transition period swaps, in either case as defined by § 150.1.[941] Under the 2020 NPRM, any pre-enactment swap or transition period swap would be exempt from Federal position limits—even if the swap would qualify as an economically equivalent swap under the 2020 NPRM. This proposed exemption would be self-effectuating and would not require a market participant to request relief from the Commission.

For purposes of complying with the proposed Federal non-spot month limits, the 2020 NPRM would also allow both pre-enactment swaps and transition period swaps (to the extent such swaps qualify as ''economically equivalent swaps'') to be netted with post-Effective Date commodity derivative contracts. The 2020 NPRM did not permit such positions to be netted during the spot month so as to avoid rendering spot month limits ineffective. Specifically, the Commission explained that it was particularly concerned about protecting the spot month in physically-delivered futures contracts from price distortions or manipulation to protect against

[936] *See, e.g.,* CFTC Press Release No. 5551–08, *CFTC Update on Efforts Underway to Oversee Markets,* (Sept. 19, 2008), available at *http://www.cftc.gov/PressRoom/PressReleases/pr5551-08.*

[937] *See* 7 U.S.C. 6a(a)(3).

[938] CCI at 2.

[939] Some examples include natural gas contracts that use the NYMEX NG futures contract as a reference price, such as ICE's Henry Financial Penultimate Fixed Price Futures (PHH), options on Henry Penultimate Fixed Price (PHE), Henry Basis Futures (HEN) and Henry Swing Futures (HHD), NYMEX's E-mini Natural Gas Futures (QG), Henry Hub Natural Gas Last Day Financial Futures (HH), and Henry Hub Natural Gas Financial Calendar Spread (3 Month) Option (G3).

[940] *See supra* Section II.B.3.vi.a. (discussing the Federal spot-month limit for natural gas).

[941] ''Pre-enactment swap'' would mean any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

''Transition period swap'' would mean a swap entered into during the period commencing after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010), and ending 60 days after the publication in the **Federal Register** of final amendments to this part implementing section 737 of the Dodd-Frank Act of 2010, the terms of which have not expired as of 60 days after the publication date.

disrupting the hedging and price discovery utility of the futures contract.

ii. Comments and Summary of the Commission Determination—Exemption for Pre-Enactment Swaps and Transition Period Swaps

The Commission did not receive any comments specifically addressing the exemption for pre-enactment swaps and transition period swaps addressed in proposed § 150.3(a)(5). The Commission is adopting § 150.3(a)(5) as proposed with certain limited grammatical and technical changes that are not intended to reflect a change in the substantive meaning. For comments generally related to the exemption for pre-enactment swaps and transition period swaps, please refer to the discussion of pre-existing positions in general and comments thereto, in § 150.2(g) above,[942] and § 150.5(a)(3)(ii) below.[943]

8. Section 150.3(b)—Application for Relief and Removal of Existing Commission Application Processes

i. Summary of the 2020 NPRM—Application for Relief and Removal of Existing Commission Application Processes

The Commission proposed two avenues for a market participant to request a non-enumerated bona fide hedge recognition: § 150.3(b), described below, which would allow market participants to apply directly to the Commission; and § 150.9, which, as described in detail further below, would allow market participants to apply to exchanges for a non-enumerated bona fide hedge exemption for purposes of both Federal and exchange limits.[944] The Commission proposed to remove its existing processes for applying for such exemptions under §§ 1.47 and 1.48. The Commission also proposed to remove existing § 140.97, which delegates to the Director of the Division of Enforcement or his designee authority regarding requests for classification of positions as bona fide hedges under existing §§ 1.47 and 1.48.[945]

In the 2020 NPRM, the Commission explained that it did not intend the proposed replacement of §§ 1.47 and 1.48 to have any bearing on bona fide hedges previously recognized under those provisions. With the exception of certain recognitions for risk management positions discussed below, positions that were previously recognized as bona fide hedges under §§ 1.47 or 1.48 would continue to be recognized, provided such positions continue to meet the statutory bona fide hedging definition and all other existing and proposed requirements.

With respect to a § 150.3(b) application for a bona fide hedge recognition, the Commission proposed that such application must include: (i) A description of the position in the commodity derivative contract for which the application is submitted, including the name of the underlying commodity and the position size; (ii) information to demonstrate why the position satisfies CEA section 4a(c)(2) and the definition of bona fide hedging transaction or position in proposed § 150.1, including ''factual and legal analysis;'' (iii) a statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted (in order to provide a view of the true footprint of the position in the market); (iv) information regarding the applicant's activity in the cash markets and the swaps markets for the commodity underlying the position for which the application is submitted;[946] and (v) any other information that may help the Commission determine whether the position meets the requirements of CEA section 4a(c)(2) and the definition of bona fide hedging transaction or position in § 150.1.[947]

In addition, under the 2020 NPRM, a market participant would be required to apply to the Commission using the application process in § 150.3(b) for exemptions for any spread positions that do not meet the proposed ''spread transaction'' definition. With respect to a § 150.3(b) application for a spread exemption, the Commission proposed that such application must include: (i) A description of the spread transaction for which the exemption application is submitted;[948] (ii) a statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted; and (iii) any other information that may help the Commission determine whether the position is consistent with CEA section 4a(a)(3)(B).

Under proposed § 150.3(b)(2), the Commission (or Commission staff pursuant to delegated authority proposed in § 150.3(g)) could request additional information from the applicant and would provide the applicant with ten business days to respond. Under proposed § 150.3(b)(3) and (4), the applicant, however, could not exceed Federal position limits unless it receives a notice of approval from the Commission or from Commission staff pursuant to delegated authority proposed in § 150.3(g)—with one exception. That is, due to demonstrated sudden or unforeseen increases in a person's bona fide hedging needs, the person could request a recognition of a bona fide hedging transaction or position within five business days after the person established the position that exceeded the Federal speculative position limit.[949]

Under this proposed process, market participants would be encouraged to submit their requests for bona fide hedge recognitions and spread exemptions as early as possible since proposed § 150.3(b) would not set a specific timeframe within which the Commission must make a determination for such requests. Further, under the 2020 NPRM, all approved bona fide hedge recognitions and spread exemptions would need to be renewed if there are any changes to the information submitted as part of the request, or upon request by the Commission or Commission staff.[950]

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[942] *See supra* Section II.B.7. (discussing § 150.2 Federal position limits on pre-existing positions).

[943] *See infra* Section II.D.3. (discussing § 150.5 requirements for exchange limits on pre-existing positions in a non-spot month).

[944] *See infra* Section II.G.

[945] 17 CFR 140.97.

[946] The Commission stated that it would expect applicants to provide cash-market data for at least the prior year.

[947] For example, the Commission may, in its discretion, request a description of any positions in other commodity derivative contracts in the same commodity underlying the commodity derivative contract for which the application is submitted. Other commodity derivative contracts could include other futures contracts, option on futures contracts, and swaps (including OTC swaps) positions held by the applicant.

[948] The nature of such description would depend on the facts and circumstances, and different details may be required depending on the particular spread.

[949] Where a person requests a bona fide hedge recognition within five business days after exceeding Federal position limits, such person would be required to demonstrate that they encountered sudden or unforeseen circumstances that required them to exceed Federal position limits before submitting and receiving approval of their bona fide hedge application. These applications submitted after a person has exceeded Federal position limits should not be habitual and would be reviewed closely. If the Commission reviews such application and finds that the position does not qualify as a bona fide hedge, then the applicant would be required to bring its position into compliance within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable DCM or SEF. If the applicant brings the position into compliance within a commercially reasonable time, then the applicant would not be considered to have violated the position limits rules. Further, any intentional misstatements to the Commission, including statements to demonstrate why the bona fide hedging needs were sudden and unforeseen, would be a violation of sections 6(c)(2) and 9(a)(2) of the Act. 7 U.S.C. 9(2) and 13(a)(2).

[950] *See* proposed § 150.3(b)(5). Currently, the Commission does not require automatic updates to bona fide hedge applications, and does not require

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Finally, under proposed § 150.3(b)(6), the Commission (and not staff) could revoke or modify any bona fide hedge recognition or spread exemption at any time if the Commission determines that the bona fide hedge recognition or spread exemption, or portions thereof, are no longer consistent with the applicable statutory and regulatory requirements.[951]

In the 2020 NPRM, the Commission noted that it anticipates that most market participants would utilize the streamlined process set forth in proposed § 150.9 rather than the process proposed in § 150.3(b) because: Exchanges would generally be able to make an initial determination more efficiently than Commission staff; and market participants are likely already familiar with the proposed processes set forth in § 150.9 (which are intended to leverage the processes currently used by exchanges to address requests for exemptions from exchange-set limits). Nevertheless, proposed § 150.3(a)(1) and (2) clarify that market participants could request non-enumerated bona fide hedge recognitions and spread exemptions that do not meet the ''spread transaction'' definition directly from the Commission. After receiving any approval of a bona fide hedge recognition or spread exemption from the Commission under proposed § 150.3(b), the market participant would still be required to request a bona fide hedge recognition or spread exemption from the relevant exchange for purposes of exchange-set limits established pursuant to proposed § 150.5(a).

ii. Comments—Application for Relief and Removal of Existing Commission Application Processes

The Commission received one comment on proposed § 150.3(b) requesting that the Commission remove the requirement proposed in § 150.3(b)(1)(i)(B) that an applicant provide a ''factual and legal analysis'' as part of an exemption application for a non-enumerated bona fide hedge.[952]

iii. Discussion of Final Rule—Application for Relief and Removal of Existing Commission Application Processes

The Commission has determined to finalize its proposal to remove existing §§ 1.47, 1.48, and 140.97.[953] The Commission has also determined to finalize § 150.3(b) largely as proposed but with the following modifications in response to commenters and other considerations.

Generally, the information required to be submitted as part of the § 150.3(b) application is necessary to allow the Commission to evaluate whether the applicant's position satisfies the requirements in § 150.3(b)(1), as applicable. The Commission has determined to modify the requirement, as it appears in both § 150.3(b) and § 150.9(c), that an applicant provide a ''factual and legal analysis'' as part of its non-enumerated bona fide hedge exemption application. As explained further below, in proposing this requirement, the Commission did not intend to require that applicants engage legal counsel to complete their applications for non-enumerated bona fide hedge recognitions. Rather, the purpose of this proposed requirement was to ensure that applicants explain their hedging strategies and provide sufficient information to demonstrate why a particular position satisfies the bona fide hedge definition in proposed § 150.1 and CEA section 4a(c)(2).[954] Accordingly, the Commission has revised § 150.3(b)(1)(i)(B) to replace the requirement to provide ''factual and legal'' analysis with the requirement that an applicant provide: (1) An explanation of the hedging strategy, including a statement that the applicant's position complies with the applicable requirements of the bona fide hedge definition, and (2) information that demonstrates why the position satisfies the applicable requirements.

The Commission is also making several other clarifications to § 150.3(b). First, in § 150.3(b)(3)(ii)(C), the Commission proposed that, for a retroactive application submitted to the Commission after a person has already exceeded Federal position limits, the Commission would not hold an applicant accountable for a position limits violation during the period of the Commission's review, nor once the Commission has issued its determination. The Commission is revising this provision to clarify that the Commission ''will not pursue an enforcement action'' in these circumstances. The Commission is also revising this provision to clarify that the provision applies so long as the applicant submitted its application in good faith and, if required, the applicant brings its position below the Federal position limits. This revision is simply intended to make explicit an implicit presumption that the applicant should have a reasonable and good faith basis for determining that its position meets the requirements of § 150.3(b) and for submitting the retroactive application. This requirement is also intended to deter the filing of frivolous retroactive exemption applications. Finally, the Commission is making a few technical revisions to clarify that this section is referring to the retroactive application provisions in § 150.3(b)(3)(ii), and to correct a cross-reference in this paragraph to correctly reference paragraph § 150.3(b)(3)(ii)(B).

In addition, the Commission is modifying proposed § 150.3(b)(5) to clarify that an applicant who received its original approval of a recognition of a non-enumerated bona fide hedge or spread exemption through the Commission's § 150.3(b) process is required to submit a renewal application if there are any ''material'' changes to the original application, but is not required to submit a renewal application as a result of circumstances involving any minor or non-substantive changes to the information underlying the original application. If a market participant using the § 150.3(b) process has any questions regarding what qualifies as a material change to the original application, the Commission encourages the market participant to contact DMO staff for guidance on a case-by-case basis.

Next, the Commission is revising its revocation authority under § 150.3(b)(6) to expressly require that the Commission provide a person with an opportunity to respond after the Commission notifies such person that

applications or updates thereto for spread exemptions, which are self-effectuating. Consistent with current practices, under proposed § 150.3(b)(5), the Commission would not require automatic annual updates to bona fide hedge and spread exemption applications; rather, updated applications would only be required if there are changes to information the requestor initially submitted or upon Commission request. This approach is different than the proposed streamlined process in § 150.9, which would require automatic annual updates to such applications, which is more consistent with current exchange practices. *See, e.g.,* CME Rule 559.

[951] This proposed authority to revoke or modify a bona fide hedge recognition or spread exemption would not be delegated to Commission staff.

[952] CME Group at 10.

[953] Although §§ 1.47 and 1.48 are currently reflected in the Code of Federal Regulations (''CFR'') as ''[Reserved]'', §§ 1.47 and 1.48 that existed prior to the 2011 Final Rulemaking are currently in effect. The 2011 Final Rulemaking removed and reserved §§ 1.47 and 1.48. However, the U.S. District Court for the District of Columbia in *ISDA* subsequently vacated the 2011 Final Rulemaking on September 28, 2012. As a result, §§ 1.47 and 1.48 that existed prior to the 2011 Final Rulemaking went back into effect, though they were not recodified in the CFR. This Final Rule removes §§ 1.47 and 1.48 as they are currently in effect (*i.e.,* as they existed prior to the 2011 Final Rulemaking) and leaves those two sections reserved in the CFR. As this action does not result in a change to the currently codified CFR, there is no corresponding amendment in the regulatory text of this document.

[954] *See supra* Section II.G.5. (providing a more detailed discussion of this requirement as it appears in § 150.9(c)).

the Commission believes their transactions or positions no longer satisfy the bona fide hedge definition or spread exemption requirements, as applicable. The Commission is also revising § 150.3(b)(6) to clarify that the Commission will discuss with the applicant and consult with the relevant exchange when determining what is a commercially reasonable amount of time for the applicant to bring its position below the Federal position limits. The Commission also reorganized this section to improve readability.

Finally, the Commission made several grammatical and technical changes to § 150.3(b) that are not intended to change the substance of the remaining sections, unless discussed above.

9. Section 150.3(c)—Previously-Granted Risk Management Exemptions

i. Summary of the 2020 NPRM—Previously-Granted Risk Management Exemptions

As discussed above, the Commission previously recognized, as bona fide hedges under § 1.47, certain risk-management positions in physical commodity futures and/or option on futures contracts held outside of the spot month that were used to offset the risk of commodity index swaps and other related exposures, but that did not represent substitutes for transactions or positions to be taken in a physical marketing channel.[955] However, the 2020 NPRM interpreted the Dodd-Frank Act amendments to the CEA as eliminating the Commission's authority to grant such relief unless the position satisfies the pass-through provision in CEA section 4a(c)(2)(B).[956] Accordingly, to ensure consistency with the Dodd-Frank Act, the Commission proposed that it would not recognize further risk management positions as bona fide hedges, unless the position otherwise satisfies the requirements of the pass-through provisions.[957]

In addition, the Commission proposed in § 150.3(c) that such previously-granted exemptions shall not apply after the effective date of a final Federal position limits rulemaking implementing the Dodd-Frank Act. Proposed § 150.3(c) used the phrase ''positions in financial instruments'' to refer to such commodity index swaps and related exposure, and would have the effect of revoking the ability to use previously-granted risk management exemptions once the limits proposed in § 150.2 go into effect.

ii. Comments and Discussion of Final Rule—Previously-Granted Risk Management Exemptions

The Commission has addressed any comments on risk management exemptions in the discussion of § 150.1 above.[958] As discussed above, to ensure consistency with the Dodd-Frank Act, the Commission will not recognize risk management positions as bona fide hedges under the Final Rule, unless the position otherwise satisfies the requirements of the Final Rule's pass-through swap provisions.[959] Consequently, the Commission is adopting § 150.3(c) largely as proposed, which provides that such previously-granted risk management exemptions issued pursuant to § 1.47 shall no longer be recognized.[960] However, the Final Rule is also providing for a compliance date of January 1, 2023 with respect to the elimination of the risk management exemption by which risk management exemption holders must reduce their risk management exemption positions to comply with Federal position limits under the Final Rule.[961]

Section 150.3(c) uses the phrase ''positions in financial instruments'' to refer to such commodity index swaps and related exposure and would have the effect of revoking the ability to use previously-granted risk management exemptions once the Final Rule's Federal position limits in § 150.2 become effective. However, the Final Rule will also include an extended compliance date until January 1, 2023 with respect to positions entered into upon reliance of an existing risk management exemption.[962]

The Final Rule also deletes the sentence in proposed § 150.3(c), which stated that nothing in § 150.3(c) shall preclude the Commission, a DCM, or SEF from recognizing a bona fide hedging transaction or position for the former holder of such a risk management exemption if the position complies with the definition of bona fide hedging transaction or position under this part, including appendices hereto. This sentence was intended to clarify what has been explained above—risk management exemptions that meet the pass-through swap provisions are permitted under the Final Rule.[963] The Commission has determined that this sentence is unnecessary.

The Commission is making several technical changes to proposed § 150.3(c), including to clarify that the provision covers risk management exemptions previously granted by the Commission or by Commission staff. The Commission also reorganized § 150.3(c) to improve readability.

10. Section 150.3(d)—Recordkeeping

i. Summary of the 2020 NPRM—Recordkeeping

Proposed § 150.3(d) would establish recordkeeping requirements for persons who claim any exemption under proposed § 150.3. Proposed § 150.3(d) is intended to help ensure that any person who claims any exemption permitted under proposed § 150.3 could demonstrate compliance with the applicable requirements by providing all relevant records to support the claim of a particular exemption. That is, under proposed § 150.3(d)(1), any persons claiming an exemption would be required to keep and maintain complete books and records concerning all details of their related cash, forward, futures, options on futures, and swap positions and transactions, including anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, cross-commodity hedges, and records of bona fide hedging swap counterparties.

Proposed § 150.3(d)(2) would address recordkeeping requirements related to the pass-through swap provision in the proposed definition of bona fide hedging transaction or position in proposed § 150.1.[964] Under proposed § 150.3(d)(2), a pass-through swap counterparty, as contemplated by proposed § 150.1, that relies on a representation received from a bona fide hedging swap counterparty that a swap qualifies in good faith as a bona fide hedging position or transaction under proposed § 150.1, would be required to: (i) Maintain any written representation for at least two years following the expiration of the swap; and (ii) furnish the representation to the Commission upon request.

ii. Comments—Recordkeeping

Several commenters requested clarification that the recordkeeping

[955] *See supra* Section II.A.1.iii. (discussing the temporary substitute test and risk management exemption under § 150.1).

[956] *Id.*

[957] 85 FR at 11641.

[958] *See supra* Section II.A.1.iii (discussing risk management exemptions and comments received in greater detail).

[959] *See supra* Section II.A.1.x. (discussing the proposed pass-through swap provisions).

[960] Under this Final Rule, however, exchanges may continue to grant risk management exemptions (that do not otherwise meet the bona fide hedge definition in § 150.1) up to the applicable Federal position limit.

[961] *See supra* Section I.D. (discussing the effective and compliance dates).

[962] *Id.*

[963] *See supra* Section II.A.1.x. (discussing the proposed pass-through language).

[964] *See supra* Section II.A.1.x. (discussion of proposed pass-through swap provision).

requirements in proposed § 150.3(d)(1) would not impose an additional recordkeeping obligation on commercial end-users beyond the records that are kept in the normal course of business and are typical for the relevant industry.[965]

In addition, commenters recommended that the Commission delete the pass-through swap recordkeeping requirements in proposed § 150.3(d)(2).[966] Commenters were concerned that the pass-through swap provision in § 150.1 places all compliance burdens on the pass-through swap counterparty offering the swap, and not on the bona fide hedging counterparty using the swap.[967] Commenters expressed that this recordkeeping provision would require the pass-through swap counterparty to maintain records of each representation made by the bona fide hedging counterparty on a trade-by-trade basis—a practice commenters view as onerous and unnecessary.[968] Commenters suggested that the Commission will have access to records from anyone availing themselves of any exemption from speculative limits, and thus does not need the additional recordkeeping requirement in proposed § 150.3(d)(2).[969] One commenter also requested that the Commission clarify that the pass-through swap counterparty can rely on the bona fide hedging counterparty's good faith representation that a record of an agreement or confirmation of the transaction containing the bona fide hedge pass-through representation would satisfy the record retention requirements set forth in proposed § 150.3(d)(2).[970]

iii. Discussion of Final Rule—Recordkeeping

The Commission has determined to finalize § 150.3(d), for the reasons stated in the 2020 NPRM, with certain clarifications discussed below.

First, the Commission clarifies that the recordkeeping requirements in § 150.3(d)(1) are not intended to impose any additional recordkeeping obligations on market participants beyond the records they are required to keep in the normal course of business. The Commission notes, however, that, consistent with the general recordkeeping obligations in Commission regulation 1.31, and as explained in the 2020 NPRM, § 150.3(d)(1) is intended to capture records market participants should be maintaining with respect to each of their exemptions from Federal position limits. The Commission is revising § 150.3(d)(1) to clarify that market participants that avail themselves of exemptions under this section are required to keep the relevant ''books and records'' of ''each of their exemptions'' and any related position or transaction information for such applications, including any books and records market participants create for related ''merchandising activity'' or other relevant aspects of a particular exemption (including the items listed in § 150.3(d)(1)), as applicable.

Next, regarding the pass-through swap recordkeeping requirements, in § 150.2(d)(2), the Commission intended for this requirement to be an extension of market participants' existing obligations to maintain swap data records under Part 45 and regulatory records under § 1.31.[971] That is, under § 150.1, the Commission has revised paragraph (2) of the bona fide hedging transaction or position definition to require that a pass-through swap counterparty receive a written representation from its bona fide hedging swap counterparty that the swap ''qualifies as a bona fide hedging transaction or position'' pursuant to paragraph (1) of the definition of a bona fide hedging transaction or position in § 150.1 in order for the pass-through swap to qualify as a bona fide hedge. The pass-through swap counterparty may rely in good faith on such written representation from the bona fide hedging swap counterparty, unless the pass-through swap counterparty has information that would cause a reasonable person to question the accuracy of the representation. Thus, the recordkeeping requirements in § 150.3(d)(2) are intended to capture any ''written'' record created for purposes of making such demonstration. The Commission provides additional explanation above on how a pass-through swap counterparty can demonstrate good faith reliance.[972] For the avoidance of doubt, the Commission is revising § 150.3(d)(2) to clarify that a person relying on the pass-through swap provision is required to maintain any records created for purposes of demonstrating a good faith reliance on that provision in accordance with § 150.1.

The Commission also clarifies that, pursuant to the swap recordkeeping requirements in § 45.2(b)[973] and the general recordkeeping requirements in § 1.31,[974] the bona fide hedging swap counterparty to the pass-through swap is required to maintain a record of such pass-through swap. The Commission considers any written representation the bona fide hedging swap counterparty provides to the pass-through swap counterparty as being part of the full, complete, and systematic records that the bona fide hedging swap counterparty is required to keep pursuant to § 45.2(b), with respect to each pass-through swap to which it is a counterparty. The bona fide hedging swap counterparty is required to keep such records according to the form and duration requirements of § 1.31. Such records are also subject to the inspection and production requirements of both § 1.31(d)[975] and § 45.2(h).[976] As such, the Commission reminds bona fide hedging swap counterparties to a pass-through swap that they are responsible for maintaining an accurate and true record of any written representations they make to the pass-through swap counterparty regarding the bona fides of the pass-through swap. Further, any such records and written representations that a bona fide hedging swap counterparty makes may, upon request, be filed with the Commission as part of an inspection, pursuant to §§ 1.31(d) and 45.2(h), and would be subject to the Commission's prohibition regarding false statements in section 6(c)(2) of the Act, as well as any other applicable provisions regarding false information.[977]

11. Section 150.3(e)—Call for Information

i. Summary of the 2020 NPRM—Call for Information

The Commission proposed to move existing § 150.3(b), which currently allows the Commission or certain Commission staff to make calls to demand certain information regarding positions or trading, to proposed

[965] Cope at 5–6; EEI/EPSA at 7–8.

[966] Cargill at 6; Shell at 6.

[967] *Id.*

[968] Shell at 7; CMC at 5.

[969] COPE at 5–6.

[970] Shell at 6.

[971] 17 CFR 1.31(a)–(b).

[972] *See supra* Section II.A.1.x. (discussing the pass-through swap provision in greater detail).

[973] 17 CFR 45.2(b) (requiring that all non-swap dealer/non-major swap participant counterparties keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty).

[974] 17 CFR 1.31 (regulatory records, retention, and production requirements).

[975] 17 CFR 1.31(d) (requirement for a records entity, as defined in § 1.31(a), to produce or make accessible for inspection all regulatory records).

[976] 17 CFR 45.2(h) (swap record inspection requirements).

[977] 7 U.S.C. 9(2) (prohibition on making a false or misleading statement of material fact to the Commission); *see also* 7 U.S.C. 9(4) (general enforcement authority of the Commission).

§ 150.3(e), with some technical modifications.

Together with the recordkeeping provision of proposed § 150.3(d), proposed § 150.3(e) should enable the Commission to monitor the use of exemptions from speculative position limits and help to ensure that any person who claims any exemption permitted by proposed § 150.3 can demonstrate compliance with the applicable requirements.

ii. Comments and Summary of Commission Determination—Call for Information

The Commission did not receive comments on proposed § 150.3(e). Accordingly, the Commission is adopting § 150.3(e) with one grammatical edit that is not intended to reflect a substantive change to this section.

12. Section 150.3(f)—Aggregation of Accounts

i. Summary of the 2020 NPRM—Aggregation of Accounts

Proposed § 150.3(f) would clarify that entities required to aggregate under § 150.4 would be considered the same person for purposes of determining whether they are eligible for a bona fide hedge recognition under § 150.3(a)(1).[978]

ii. Comments and Summary of Commission Determination—Aggregation of Accounts

The Commission did not receive comments on proposed § 150.3(f). Accordingly, the Commission is adopting § 150.3(f) as proposed.[979]

13. Section § 150.3(g)—Delegation of Authority

i. Summary of the 2020 NPRM—Delegation of Authority

Proposed § 150.3(g) would delegate authority to the Director of the Division of Market Oversight to: Grant financial distress exemptions pursuant to proposed § 150.3(a)(3); request additional information with respect to an exemption request pursuant to proposed § 150.3(b)(2); determine, in consultation with the exchange and applicant, a commercially reasonable amount of time for a person to bring its positions within the Federal position limits pursuant to proposed § 150.3(b)(3)(ii)(B); make a determination whether to recognize a position as a bona fide hedging transaction or to grant a spread exemption pursuant to proposed § 150.3(b)(4); and to request that a person submit additional application information or updated materials or renew their request pursuant to proposed § 150.3(b)(2) or (5). This proposed delegation would enable the Division of Market Oversight to act quickly in the event of financial distress and in the other circumstances described above.

ii. Comments and Summary of the Commission Determination—Delegation of Authority

The Commission did not receive comments on proposed 150.3(g). Accordingly, the Commission is adopting § 150.3(g) with one technical edit to correct a punctuation error, which is not intended to reflect a change in the substance of this section.

14. Request for a New Exemption in § 150.3(a) for Certain Energy Utility Entities

i. Summary of the 2020 NPRM and Comments—New Exemption for Certain Energy Utility Entities

Although the 2020 NPRM did not include a new exemption explicitly applicable to certain energy utility entities, it did include a request for comment regarding the possibility of such an exemption.[980] In response, NRECA (which encompasses several not-for-profit energy associations)[981] along with other commenters,[982] requested that the Commission use its authority in CEA section 4a(a)(7) to exempt certain not-for-profit electric and natural gas utility entities (''NFP Energy Entities'') from position limits.

These commenters (in particular, NRECA) argued that Congress did not intend for the Commission's position limits regime to apply to commercial market participants engaged in hedging and mitigating commercial risk, such as the NFP Energy Entities.[983] The commenters also provided several reasons why the Commission's position limits regulatory regime is incongruous with the operations of NFP Energy Entities, including that NFP Energy Entities: (a) Operate on a not-for-profit basis; (b) have unique public service obligations to provide reliable, affordable utility services to residential, commercial, and industrial customers; (c) have governance structures with oversight by elected or appointed government officials or cooperative members/consumers; (d) do not engage in speculative trading in derivatives markets; and (e) enter into energy commodity swaps and trade options only to hedge or mitigate commercial risk arising from ongoing business operations.[984] NRECA expressed concern that the effort required for NFP Energy Entities to analyze and identify every transaction as non-speculative would be purely academic and would unnecessarily increase the cost of electricity, natural gas and other fuels for generation for American consumers and businesses served by the NFP Energy Entities.[985]

ii. Discussion of the Commission Determination—New Exemption for Certain Energy Utility Entities

The Commission has considered these comments and believes that many of the concerns raised by NFP Energy Entities are addressed through the Final Rule's pass-through swap provision and the expanded list of enumerated bona fide hedge exemptions. That is, the Commission believes that most, if not all, of the hedging needs of NFP Energy Entities will be considered enumerated, self-effectuating bona fide hedges that will not be subject to Federal position limits. Further, NFP Energy Entity counterparties that are not bona fide hedgers would receive pass-through bona fide hedging treatment for any swaps with NFP Energy Entities, or any offsetting positions as a result of such swaps with NFP Energy Entities. This expanded flexibility should significantly alleviate the compliance burdens and cost concerns voiced by NFP Energy Entities.

The Commission recommends that NFP Energy Entities assess the impact of the Final Rule on their operations, and if needed, pursue the requested exemption separate from this Final Rule. The Commission also believes that the extended compliance date for the Final Rule of January 1, 2022 in connection with the Federal position limits for the 16 non-legacy core referenced futures contracts, and the further extended compliance date of January 1, 2023 for swaps that are subject to Federal position limits under the Final Rule, should give commenters and the Commission sufficient time to

[978] *See* 17 CFR 150.4 (providing the Commission's existing aggregation requirements for Federal position limits); *See also supra* Section II.B.11. (discussing eligible affiliates and position aggregation requirements).

[979] The Commission did receive general comments on position aggregation discussing existing no-action relief in connection with the position aggregation requirement in existing § 150.4. For a discussion on comments received in connection with existing staff no-action relief for position aggregation requirements, *see supra* Section II.B.11.

[980] *See* 85 FR at 11642.

[981] NRECA at 3–14.

[982] *See* IECA at 5; LIPA at 1; NFPEA at 6.

[983] NRECA at 19.

[984] *Id.*

[985] *Id.*

continue to discuss this request if necessary.

*D. § 150.5—Exchange-Set Position Limits and Exemptions Therefrom*

For the avoidance of confusion, this discussion of § 150.5 addresses exchange-set limits and exemptions therefrom, not Federal position limits. For a discussion of the proposed processes by which an exemption may be recognized for purposes of Federal position limits, please see the discussion of proposed § 150.3 above and § 150.9 below.[986]

1. Background—Existing Requirements for Exchange-Set Position Limits

i. Applicable DCM and SEF Core Principles

Under DCM Core Principle 5, a DCM shall adopt for each contract, as is necessary and appropriate, position limitations or position accountability for speculators. In addition, for any contract that is listed on a DCM and subject to a Federal position limit, the DCM must establish exchange-set limits for such contract no higher than the Federal limit level.[987] Finally, DCMs are required to monitor their markets and enforce compliance with their rules.[988]

Similarly, under SEF Core Principle 6, a SEF that is a trading facility must adopt for each contract, as is necessary and appropriate, position limitations or position accountability for speculators.[989] Such SEF must also, for any contract that is listed on the SEF and subject to a Federal position limit, establish exchange-set limits for such contract no higher than the Federal limit.[990] Finally, such SEF must monitor positions established on or through the SEF for compliance with the limit set by the Commission and the limit, if any, set by the SEF.[991] Beyond these and other statutory and certain specified Commission requirements, unless otherwise determined by the Commission, DCM Core Principle 1 and SEF Core Principle 1 afford DCMs and SEFs, respectively, ''reasonable discretion'' in establishing the manner in which they comply with the core principles.[992]

The current regulatory provisions governing exchange-set position limits and exemptions therefrom appear in § 150.5.[993] To align § 150.5 with statutory changes made by the Dodd-Frank Act,[994] and with other changes in the 2020 NPRM,[995] the Commission proposed a new version of § 150.5. This new proposed § 150.5 would generally afford exchanges the discretion to decide how best to set limit levels and grant exemptions from such limits in a manner that best reflects their specific markets.

ii. Existing § 150.5

As noted above, existing § 150.5 pre-dates the Dodd-Frank Act and addresses the establishment of DCM-set position limits for all contracts not subject to Federal position limits under existing § 150.2 (aside from certain major foreign currencies).[996] First, existing § 150.5(a) authorizes DCMs to set different limits for different contracts and contract months, and permits DCMs to grant exemptions from DCM-set limits for spreads, straddles, or arbitrage trades. Existing § 150.5(b) provides a limited set of methodologies for DCMs to use in establishing initial limit levels, including separate maximum spot-month limit levels for physical-delivery contracts and cash-settled contracts,[997] as well as separate non-spot month limits for tangible commodities (other than energy),[998] and for energy products and non-tangible commodities, including financials.[999] Existing § 150.5(c) provides guidelines for how DCMs may adjust their speculative initial levels.

Next, existing § 150.5(d) addresses bona fide hedging exemptions from DCM-set limits, including an exemption application process, providing that exchange-set speculative position limits shall not apply to bona fide hedging positions as defined by a DCM in accordance with the definition of bona fide hedging transactions and positions for excluded commodities in § 1.3. Existing § 150.5(d) also addresses factors for DCMs to consider in recognizing bona fide hedging exemptions (or position accountability), including whether such positions ''are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.'' [1000]

As an alternative to exchange-set position limits set in accordance with the provisions described above, existing § 150.5(e) permits a DCM, in certain circumstances, to submit for Commission approval a rule requiring traders ''to be accountable for large positions'' (or position accountability levels). That is, under certain circumstances, the DCM would require traders to, upon request, provide information about their position to the exchange, and/or consent to halt further increasing a position if so ordered by the exchange.[1001] Among other things, this provision includes open interest and volume-based parameters for determining when DCMs may do so.[1002]

In addition, existing § 150.5(f) provides that DCM speculative position limits adopted pursuant to § 150.5 shall not apply to certain positions acquired in good faith prior to the effective date of such limits or to a person that is registered as an FCM or as a floor broker under the CEA except to the extent that transactions made by such person are made on behalf of, or for the account or benefit of, such person.[1003] This provision also provides that in addition to the express exemptions specified in § 150.5, a DCM may propose such other exemptions from the requirements of § 150.5 as are consistent with the purposes of § 150.5, and submit such rules for Commission review.[1004] Finally, existing § 150.5(g) addresses aggregation of positions for which a person directly or indirectly controls trading.

[986] *See supra* Section II.C. (discussing § 150.3 exemptions from Federal position limits). *See also infra* Section II.G. (discussing the § 150.9 streamlined process for recognizing non-enumerated bona fide hedges for purposes of both exchange and Federal position limits).

[987] *See* 7 U.S.C. 7(d)(5).

[988] *See* 7 U.S.C. 7(d)(2).

[989] *See* 7 U.S.C. 7b–3(f)(6).

[990] *Id.*

[991] *Id.*

[992] *See* 7 U.S.C. 7(d)(1) and 7 U.S.C. 7b–3(f)(1).

[993] 17 CFR 150.5.

[994] While existing § 150.5 on its face only applies to contracts that are not subject to Federal position limits, DCM Core Principle 5, as amended by the Dodd-Frank Act, and SEF Core Principle 6, establish requirements both for contracts that are, and are not, subject to Federal position limits. 7 U.S.C. 7(d)(5) and 7 U.S.C. 7b–3(f)(6).

[995] Significant changes discussed herein include the process set forth in proposed § 150.9 and revisions to the bona fide hedging definition proposed in § 150.1.

[996] Existing § 150.5(a) states that the requirement to set position limits shall not apply to futures or option contract markets on major foreign currencies, for which there is no legal impediment to delivery and for which there exists a highly liquid cash market. 17 CFR 150.5(a).

[997] *See* 17 CFR 150.5(b)(1) (providing that, for physical delivery contracts, the spot month limit level must be no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed, and for cash settled contracts, the spot month limit level must be no greater than necessary to minimize the potential for manipulation or distortion of the contract's or the underlying commodity's price).

[998] *See* 17 CFR 150.5(b)(2) (providing that individual non-spot or all-months-combined levels must be no greater than 1,000 contracts for tangible commodities other than energy products).

[999] *See* 17 CFR 150.5(b)(3) (providing that individual non-spot or all-months-combined levels must be no greater than 5,000 contracts for energy products and nontangible commodities, including contracts on financial products).

[1000] *See* 17 CFR 150.5(d)(1).

[1001] 17 CFR 150.5(e).

[1002] 17 CFR 150.5(e)(1)–(4).

[1003] 17 CFR 150.5(f).

[1004] *Id.*

2. Overview of the 2020 NPRM, Commenters' Views, and Commission Final Rule Determination—Exchange-Set Position Limits and Exemptions Therefrom

This section provides a brief overview of proposed § 150.5, commenters' general views, and the Commission's determination. The Commission will summarize and address each sub-section of § 150.5 in greater detail further below.

Pursuant to CEA sections 5(d)(1) and 5h(f)(1), the Commission proposed a new version of § 150.5.[1005] Proposed § 150.5 is intended to allow DCMs and SEFs to set limit levels and grant exemptions in a manner that best accommodates activity particular to their markets, while promoting compliance with DCM Core Principle 5 and SEF Core Principle 6. Proposed § 150.5 is also intended to ensure consistency with other changes proposed herein, including the process for exchanges to administer applications for non-enumerated bona fide hedge exemptions for purposes of Federal position limits proposed in § 150.9.[1006]

Proposed § 150.5 contains two main sub-sections, with each sub-section addressing a different category of contract: (i) § 150.5(a) proposed rules governing exchange-set limits for referenced contracts subject to Federal position limits; and (ii) § 150.5(b) proposed rules governing exchange-set limits for physical commodity derivative contracts that are not subject to Federal position limits.

Notably, with respect to exchange-set limits on swaps, the Commission proposed to delay compliance with DCM Core Principle 5 and SEF Core Principle 6, as compliance would otherwise be impracticable, and, in some cases, impossible, at this time. In the 2020 NPRM, the Commission explained that this delay was based largely on the fact that exchanges cannot view positions in OTC swaps across the various places they are trading, including on competitor exchanges.

The Commission has determined to finalize § 150.5 largely as proposed, with certain modifications and clarifications in response to commenters and other considerations, as discussed below.

The Commission will oversee swaps in connection with compliance with Federal position limits under the Final Rule. The Commission has also determined to delay compliance for the requirement for exchanges to set position limits on swaps at this time. Specifically, with respect to exchange-set position limits on swaps, the Commission notes that in two years, the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms with respect to swaps and to implement DCM Core Principle 5 and SEF Core Principle 6, as applicable.

The Commission believes that delayed implementation of exchange-set position limits on swaps at this time is not inconsistent with the statutory objectives outlined in section 4a(a)(3) of the CEA for several reasons. First, as explained above, at this time, it would be impracticable and, in some cases, impossible for exchanges to comply with any requirement for establishing exchange-set limits on swaps. Next, the Commission is adopting in this Final Rule Federal position limits on economically equivalent swaps, which the Commission will monitor. These factors, coupled with the Commission's existing ability to surveil swap exposure across markets in a manner that at this time would be impracticable for the exchanges, will help ensure that the Commission meets its statutory obligations. Accordingly, while § 150.5 as finalized herein will apply to DCMs and SEFs, the Final Rule's requirements associated with exchange oversight of swaps, including with respect to exchange-set position limits, will be enforced at a later time. In other words, upon the compliance date, exchanges must comply with final § 150.5 only with respect to futures and options on futures traded on DCMs.

3. Section 150.5(a)—Requirements for Exchange-Set Limits on Commodity Derivative Contracts Subject to Federal Position Limits Set Forth in § 150.2

The following section discusses the 2020 NPRM, comments received, and the Commission's final determination with respect to each sub-section of § 150.5(a), which addresses exchange-set position limits on contracts that are subject to Federal position limits.

i. Section § 150.5(a)(1)—Requirements for Exchange-Set Limits on Contracts Subject to Federal Position Limits

a. Summary of the 2020 NPRM—Requirements for Exchange-Set Limits on Contracts Subject to Federal Position Limits

Proposed § 150.5(a) would apply to all contracts subject to the Federal position limits proposed in § 150.2 and, among other things, is intended to help ensure that exchange-set limits do not undermine the Federal position limits framework. Under proposed § 150.5(a)(1), for any contract subject to a Federal limit, DCMs and, ultimately, SEFs, would be required to establish exchange-set limits for such contracts. Consistent with DCM Core Principle 5 and SEF Core Principle 6, the exchange-set limit levels on such contracts, whether cash-settled or physically-settled, and whether during or outside the spot month, would have to be no higher than the level specified for the applicable referenced contract in proposed § 150.2. An exchange would be free to set position limits that are lower than the Federal limit. An exchange would also be permitted to adopt position accountability levels that are lower than the Federal position limits, in addition to any exchange-set position limits it adopts that are equal to or less than the Federal position limits.

b. Comments—Requirements for Exchange-Set Limits on Contracts Subject to Federal Position Limits

With respect to requirements for exchange-set limits under proposed § 150.5(a)(1), some commenters expressed concern that if an exchange determines to set a position limit for a particular contract significantly below the Federal position limit for that contract, then market participants could be restricted in their ability to provide liquidity, hedge activity, and otherwise pursue their trading objectives.[1007] ISDA recommended that to the extent that an exchange determines to set position limits significantly below Federal position limits, CFTC staff, through its exchange examination process, should make transparent the exchange's reasoning and analysis underlying any lower position limits.[1008] Likewise, SIFMA AMG encouraged the Commission to require exchanges to explain and justify any exchange-set limits that are below Federal position limits, and to work

[1005] While proposed § 150.5 included references to swaps and SEFs, the proposed rule would initially only apply to DCMs, as requirements relating to exchange-set limits on swaps would be phased in at a later time.

[1006] To avoid confusion created by the parallel Federal and exchange-set position limit frameworks, the Commission clarifies that proposed § 150.5 deals solely with exchange-set position limits and exemptions therefrom, whereas proposed § 150.9 deals solely with a streamlined process for the Commission to recognize non-enumerated bona fide hedges for purposes of Federal position limits by leveraging exchanges.

[1007] ISDA at 11; SIFMA AMG at 4.

[1008] ISDA at 11.

with exchanges to ensure that exchange limits do not discourage liquidity.[1009]

c. Discussion of Final Rule—Requirements for Exchange-Set Limits on Contracts Subject to Federal Position Limits

The Commission is adopting § 150.5(a)(1) as proposed. In response to comments on § 150.5(a)(1) requesting that the Commission require transparency into exchanges' reasoning for when they set limits well below Federal position limits, the Commission believes market participants already have sufficient transparency under part 40 of the Commission's regulations. When exchanges seek to implement rules to establish new or amended exchange-set limits, exchanges are required to submit those rules through the Commission's part 40 process, and the rules are made publicly available on the CFTC's website.[1010] Exchanges are also required to post such submissions on their own websites.[1011]

Further, regarding the request that the Commission work with exchanges on exchange-set limits that are below Federal position limits, exchanges are permitted to establish exchange-set limits in a manner that is most appropriate for their own marketplaces and in a manner that allows them to comply with the applicable DCM and SEF core principles. The Commission views this process as a business and compliance decision that is best left in the discretion of each exchange. However, pursuant to DCM Core Principle 5 and SEF Core Principle 6, exchanges must implement exchange-set position limits in a manner that reduces market manipulation and congestion.

ii. Section 150.5(a)(2)—Exemptions to Exchange-Set Limits for Contracts Subject to Federal Position Limits

a. Summary of the 2020 NPRM—Exemptions to Exchange-Set Limits for Contracts Subject to Federal Position Limits

Under the 2020 NPRM, § 150.5(a)(2)(ii) would permit exchanges to grant exemptions from exchange-set limits according to the guidelines outlined below.

First, if such exemptions from exchange-set limits conform to the types of exemptions that may be granted for purposes of Federal position limits under proposed sections: (1) 150.3(a)(1)(i) (enumerated bona fide hedge recognitions), (2) 150.3(a)(2)(i) (spread exemptions that meet the ''spread transaction'' definition in § 150.1), (3) 150.3(a)(4) (exempt conditional spot month positions in natural gas), or (4) 150.3(a)(5) (pre-enactment and transition period swaps), then the level of the exemption may exceed the applicable Federal position limit under proposed § 150.2. Because the proposed exemptions listed in the four provisions above are self-effectuating for purposes of Federal position limits, exchanges may grant such exemptions pursuant to proposed § 150.5(a)(2)(i) without prior Commission approval.

Second, if such exemptions from exchange-set limits conform to the exemptions from Federal position limits that may be granted under proposed §§ 150.3(a)(1)(ii) (non-enumerated bona fide hedges) and 150.3(a)(2)(ii) (spread positions that do not meet the ''spread transaction'' definition in proposed § 150.1), then the level of the exemption may exceed the applicable Federal position limit under proposed § 150.2, provided that the exemption for purposes of Federal position limits is first approved in accordance with proposed § 150.3(b) or, in the case of non-enumerated bona fide hedges, § 150.9, as applicable.

Third, if such exemptions conform to the exemptions from Federal position limits that may be granted under proposed § 150.3(a)(3) (financial distress positions), then the level of the exemption may exceed the applicable Federal position limit under proposed § 150.2, provided that the Commission has first issued a letter or other notice approving such exemption pursuant to a request submitted under § 140.99.[1012]

Finally, for purposes of exchange-set limits only, under the 2020 NPRM, exchanges may grant exemption types that are not listed in § 150.3(a). However, in such cases, the exemption level would have to be capped at the level of the applicable Federal position limit, so as not to undermine the Federal position limits framework, unless the Commission has first approved such exemption for purposes of Federal position limits pursuant to § 140.99 or proposed § 150.3(b).

The 2020 NPRM also explained that exchanges that wish to offer exemptions from their own limits other than the types listed in proposed § 150.3(a) could also submit rules for the Commission's review, pursuant to part 40, allowing for such exemptions. The Commission would carefully review any such exemption types for compliance with applicable standards, including any statutory requirements[1013] and Commission regulations.[1014]

Under proposed § 150.5(a)(2)(ii)(A)(1), exchanges that wish to grant exemptions from their own limits would have to require traders to file an application. The 2020 NPRM explained that, generally, exchanges would have flexibility to establish the application process as they see fit, but subject to the requirements discussed below, including the requirement that the exchange collect cash-market and swaps market information from the applicant.

For all exemption types, exchanges would have to generally require that such applications be filed in advance of the date such position would be in excess of the limits. However, under proposed § 150.5(a)(2)(ii)(B) and (C), exchanges would be given the discretion to adopt rules allowing traders to file retroactive applications for bona fide hedges within five business days after a trader established such position so long as the applicant demonstrates a sudden and unforeseen increase in its hedging needs. Further, under proposed § 150.5(a)(2)(ii)(D), if the exchange denies a retroactive application, it would require that the applicant bring its position into compliance with exchange-set limits within a commercially reasonable amount of time (as determined by the exchange). Finally, pursuant to proposed § 150.5(a)(2)(ii)(A)(5), neither the Commission nor the exchange would enforce a position limits violation for such retroactive applications.

Proposed § 150.5(a)(2)(ii)(B) provided that an exchange would require that a trader reapply for the exemption granted

[1009] SIFMA AMG at 4.

[1010] *See* CFTC Industry Filings available at *https://www.cftc.gov/IndustryOversight/IndustryFilings/index.htm.*

[1011] *See* 17 CFR 40.2(a)(3)(vi), 40.3(a)(9), 40.5(a)(6), 40.6(a)(2).

[1012] Under the 2020 NPRM, requests for exemptions for financial distress positions would be submitted directly to the Commission (or delegated staff) for consideration, and any approval of such exemption would be issued in the form of an exemption letter from the Commission (or delegated staff) pursuant to § 140.99.

[1013] For example, an exchange would not be permitted to adopt rules allowing for risk management exemptions for positions in physical commodities that exceed Federal limits because the Commission interprets the Dodd-Frank Act amendments to CEA section 4a(c)(2) as prohibiting risk management exemptions in such commodities (unless such position is considered a pass-through swap under paragraph (2) of the bona fide hedging definition in § 150.1). *See supra* Section II.A.1. (discussing of the temporary substitute test, risk-management exemptions, and the pass-through swap provision).

[1014] For example, as discussed below, proposed § 150.5(a)(2)(ii)(C) would require that exchanges consider whether the requested exemption would result in positions that are not in accord with sound commercial practices in the relevant commodity derivative market and/or would not exceed an amount that may be established and liquidated in an orderly fashion in that market.

under proposed § 150.5(a)(2) at least annually so that the exchange and the Commission can closely monitor exemptions for contracts subject to Federal position limits, and to help ensure that the exchange and the Commission remain aware of the trader's activities.

Proposed § 150.5(a)(2)(ii)(C) would authorize an exchange to deny, limit, condition, or revoke any exemption request in accordance with exchange rules,[1015] and would set forth a principles-based standard for doing so. Specifically, under proposed § 150.5(a)(2)(ii)(C), exchanges would be required to take into account: (i) Whether granting the exemption request would result in a position that is ''not in accord with sound commercial practices'' in the market in which the DCM is granting the exemption; and (ii) whether granting the exemption request would result in a position that would ''exceed an amount that may be established or liquidated in an orderly fashion in that market.'' The 2020 NPRM explained that exchanges' evaluation of exemption requests against these standards would be a facts and circumstances determination.

The 2020 NPRM further explained that activity may reflect ''sound commercial practice'' for a particular market or market participant but not for another market or market participant. Similarly, activity may reflect ''sound commercial practice'' outside the spot month, but not in the spot month. Further, activity with manipulative intent or effect, or that has the potential or effect of causing price distortion or disruption, would be inconsistent with ''sound commercial practice,'' even if it is common practice among market participants. While an exemption granted to an individual market participant may reflect ''sound commercial practice'' and may not ''exceed an amount that may be established or liquidated in an orderly fashion in that market,'' the 2020 NPRM clarified that the Commission expects exchanges to also evaluate whether the granting of a particular exemption type to multiple participants could have a collective impact on the market in a manner inconsistent with ''sound commercial practice'' or in a manner that could result in a position that would ''exceed an amount that may be established or liquidated in an orderly fashion in that market.''

In the 2020 NPRM, the Commission explained that it understands that the above-described parameters for exemptions from exchange-set limits are generally consistent with current practice among DCMs. Bearing in mind that proposed § 150.5(a) would apply to contracts subject to Federal position limits, the Commission proposed codifying such parameters, as they would establish important, minimum standards needed for exchanges to administer, and the Commission to oversee, a robust program for granting exemptions from exchange-set limits in a manner that does not undermine the Federal position limits framework. Proposed § 150.5(a) also would afford exchanges the ability to generally oversee their programs for granting exemptions from exchange-set limits as they see fit, including to establish different application processes and requirements to accommodate the unique characteristics of different contracts.

Finally, proposed § 150.5(a)(2)(ii)(D) would permit an exchange, in its discretion, to require a person relying on an exchange-granted exemption (for contracts subject to Federal position limits) to exit or limit the size of any position in excess of exchange-set limits during the lesser of the last five days of trading or the time period for the spot month in a physical-delivery contract. The Commission has traditionally referred to such requirements as a ''Five-Day Rule.''

b. Comments—Exemptions to Exchange-Set Limits for Contracts Subject to Federal Position Limits

With respect to permitted exemptions from exchange-set limits under proposed § 150.5(a)(2), CMC requested that the Commission clarify that each exchange has discretion to determine what information is required of applicants when applying for a spread exemption from exchange-set limits, and that an exchange is not responsible for monitoring the use of spread positions for purposes of Federal position limits.[1016]

In addition, regarding the retroactive application provision in proposed § 150.5(a)(2)(ii)(A)(5), CME Group recommended that the Commission should implement a standard that permits exchanges to impose position limits violations in cases where a person has exceeded Federal position limits and filed a late or retroactive application that the exchange then denies.[1017]

The Commission also received several comments regarding the provision that allows exchanges to impose a Five-Day Rule in proposed § 150.5(a)(2)(ii)(D). In particular, commenters requested that the Commission expressly clarify that the Five-Day Rule does not apply to markets for energy commodity derivatives.[1018] Commenters also requested clarification about whether, in cases where an exchange opts not to apply the Five-Day Rule, the Commission expects the exchange to follow the waiver guidance in proposed Appendix B, or whether the exchange can simply take no further action.[1019]

c. Discussion of Final Rule—Exemptions to Exchange-Set Limits for Contracts Subject to Federal Position Limits

The Commission has determined to finalize § 150.5(a)(2) largely as proposed and with the clarifications and modifications, described below, in response to commenters and other considerations.

Regarding comments on application information exchanges are required to collect under § 150.5(a)(2), as explained in the 2020 NPRM, the Commission is providing exchanges great flexibility to create an application process for exemptions from exchange-set limits as they see fit. This means an exchange has discretion to determine what information is required of applicants applying for a spread exemption, or any other exemption from exchange-set limits, except for instances where the exchange is processing a non-enumerated bona fide hedge application

[1015] Currently, DCMs review and set exemption levels annually based on the facts and circumstances of a particular exemption and the market conditions at that time. As such, a DCM may decide to deny, limit, condition, or revoke a particular exemption, typically, if the DCM determines that certain conditions have changed and warrant such action. This may happen if, for example, there are droughts, floods, embargoes, trade disputes, or other events that cause shocks to the supply or demand of a particular commodity and thus impact the DCM's disposition of a particular exemption.

[1016] CMC at 7.

[1017] *See* CME Group at 10 (explaining that today at the exchange level, CME Group considers firms to be in violation of a position limit if the firms exceed a limit and the exemption application is denied. CME Group believes the Commission should implement this standard, rather than permitting the proposed grace period for denial of an exemption application. CME Group explains that, otherwise, market participants with excessively large speculative positions could exploit the grace period accompanying an application for an exemption and intentionally go over the applicable limit without consequences—all the while disrupting orderly market operations. In CME Group's experience, the prospect of having an application denied and being found in violation of position limits has worked to deter market participants from attempting to exploit the retroactive exemption process).

[1018] Chevron at 13; Suncor at 12.

[1019] CCI at 9–10; CEWG at 25–26. *See also supra* Section II.A.1.viii. (explaining Appendix B, which provides guidance the Commission believes exchanges should consider when determining whether to apply the Five-Day Rule restriction).

in accordance with the application requirements of § 150.9. The Commission is making one modification to clarify the Commission's posture when reviewing exchange-granted exemptions. In proposed § 150.5(a)(2)(ii)(A), the Commission proposed to require exchanges to collect sufficient information for the exchange to determine and the Commission to ''verify'' that the facts and circumstances demonstrate that the exchange may grant the exemption. In final § 150.5(a)(2)(ii)(A), the Commission is revising this provision to make clear that the Commission will conduct an independent evaluation of any application it reviews to ''determine'' (not verify) whether the facts and circumstances demonstrate that the exchange may grant the exemption.

Further, regarding monitoring spread exemptions, exchanges are required to administer and monitor their position limits and any exemptions therefrom in accordance with DCM Core Principle 5 and SEF Core Principle 6, as applicable. To the extent, however, that an exchange grants an inter-market spread exemption where part of the spread position is executed on another exchange or OTC, although an exchange is not responsible for monitoring a trader's position on other exchanges or OTC, an exchange should request information from the spread exemption applicant about the entire composition of the spread position so that the exchange is best informed about whether to grant the exemption. Ultimately, the person relying on the spread exemption is responsible for monitoring for compliance with the applicable Federal position limits. The Commission reminds market participants that an approved exemption does not preclude the Commission from finding that a person has otherwise disrupted or manipulated the market.

Next, regarding comments on the retroactive application provision in proposed § 150.5(a)(2)(ii)(A)(5), the Commission believes that exchanges are in the best position to determine whether to pursue enforcement actions for violations of exchange-set limits. Accordingly, the Commission has determined to revise this provision so that exchanges have discretion to determine whether to impose a position limits violation for any retroactive exemption request for exchange-set limits that the exchange ultimately denies. The Commission, however, retains its position that the Commission will not pursue a position limits violation in those circumstances, provided that the application was submitted in good faith and the applicant brings its position within the DCM or SEF's speculative position limits within a commercially reasonable time, as determined by the DCM or SEF.[1020] This revision is simply intended to make explicit an implicit presumption that the applicant should have a reasonable and good faith basis for determining that its position meets the requirements of § 150.5(a)(2)(ii)(A) and for submitting the retroactive application.

Next, regarding various comments on the provision that allows exchanges to impose the Five-Day Rule, or a similar requirement, in proposed § 150.5(a)(2)(ii)(D), for the avoidance of doubt, the Commission reiterates that exchanges are not required to impose the Five-Day Rule. Further, the Commission is adopting Appendix B and Appendix G to provide guidance for exchanges to consider when determining whether to impose the Five-Day Rule or similar requirements in the spot period with respect to bona fide hedge exemptions or spread exemptions, respectively.[1021] The Final Rule permits exchanges to determine whether any such restriction on trading in the spot period is necessary given the facts and circumstances of a particular exemption request. Further, when an exchange determines not to impose the Five-Day Rule or similar requirement for an approved exemption, it is not obligated to take any additional steps. The Commission has revised § 150.5(a)(2)(ii)(H) to make these points clear.

Finally, the Commission is making various non-substantive technical and grammatical changes to § 150.5(a)(2) to improve readability. The Commission has also updated the outline numbering of § 150.5(a)(2)(ii). These changes are not intended to change the substance of this section.

[1020] The Commission notes that, under Section 4a(e) of the Act, the Commission could pursue violations of exchange position limit rules; however, the Commission, as a matter of policy, will not pursue such violations so long as the conditions of § 150.5(a)(2)(ii)(E) are met.

[1021] *See supra* Sections II.A.1.viii. (discussing Appendix B) and II.A.20 (discussing Appendix G). *See also infra* Appendices B and G.

iii. Section 150.5(a)(3)—Exchange-Set Limits on Pre-Existing Positions for Contracts Subject to Federal Position Limits

a. Summary of the 2020 NPRM—Exchange-Set Limits on Pre-Existing Positions for Contracts Subject to Federal Position Limits

In the 2020 NPRM, the Commission recognized that the proposed Federal position limits framework may result in certain ''pre-existing positions'' being subject to speculative position limits, even though the positions predated the adoption of such limits. So as not to undermine the Federal position limits framework during the spot month, and to minimize disruption outside the spot month, proposed § 150.5(a)(3) would require that during the spot month, for contracts subject to Federal position limits, exchanges impose limits no larger than Federal levels on ''pre-existing positions,'' other than for pre-enactment swaps and transition period swaps. However, outside the spot month, an exchange would not be required to impose limits on any such position, provided the position is acquired in good faith consistent with the ''pre-existing position'' definition of proposed § 150.1, and provided further that if the person's position is increased after the effective date of the limit, such pre-existing position (other than pre-enactment swaps and transition period swaps) along with the position increased after the effective date, would be attributed to the person. This provision is consistent with the proposed treatment of pre-existing positions for purposes of Federal position limits set forth in proposed § 150.2(g), and was intended to prevent spot-month limits from being rendered ineffective.

That is, not subjecting pre-existing positions to spot-month position limits could result in a large, pre-existing position either intentionally or unintentionally causing a disruption as it is rolled into the spot month, and the Commission was particularly concerned about protecting the spot month in physical-delivery futures from corners and squeezes. Outside of the spot month, however, concerns over corners and squeezes may be less acute.

b. Comments—Exchange-Set Limits on Pre-Existing Positions for Contracts Subject to Federal Position Limits

The Commission addressed comments on pre-existing positions under its discussion of § 150.2(g)(2) above.[1022]

[1022] *See supra* Section II.B.7. (further discussing limits on pre-existing positions).

c. Discussion of Final Rule—Exchange-Set Limits on Pre-Existing Positions for Contracts Subject to Federal Position Limits

The Commission is adopting § 150.5(a)(3) with two modifications to conform to the changes made to § 150.2(g)(2), described below.

First, the Commission is amending § 150.5(a)(3)(ii) to clarify that non-spot month limits shall apply to pre-existing positions, other than pre-enactment swaps and transition period swaps. As discussed above in Section II.B.7., the Commission did not intend in the 2020 NPRM to exclude existing non-spot month positions in the nine legacy agricultural contracts that would otherwise qualify as ''pre-existing positions.'' As discussed, the other 16 non-legacy core referenced futures contracts that are subject to Federal position limits for the first time under the Final Rule are not subject to Federal non-spot month position limits and therefore proposed § 150.5(a)(3)(ii) would not have applied to these contracts in any event.[1023]

Second, the Commission is eliminating the language in proposed § 150.5(a)(3)(ii) that would attribute to a person any increase in their position after the effective date of the non-spot month limit. This language is no longer necessary since final § 150.5(a)(3)(ii) clarifies that pre-existing positions, other than pre-enactment swaps and transition period swaps, are subject to non-spot month limits.

For further discussion on pre-existing positions in general and comments thereto, please refer to §§ 150.2(g).[1024]

iv. Section 150.5(a)(4)—Monthly Report Detailing Exemption Applications for Contracts Subject to Federal Limits

a. Summary of the 2020 NPRM—Monthly Report Detailing Exemption Applications for Contracts Subject to Federal Limits

In the 2020 NPRM, the Commission explained that it seeks a balance between having sufficient information to oversee the exchange-granted exemptions, and not burdening exchanges with excessive periodic reporting requirements. The Commission thus proposed under § 150.5(a)(4) to require one monthly report by each exchange providing certain information about exchange-granted exemptions for contracts that are subject to Federal position limits. Certain exchanges already voluntarily file these types of monthly reports with the Commission, and proposed § 150.5(a)(4) would standardize such reports for all exchanges that process applications for bona fide hedges, spread exemptions, and other exemptions from exchange-set limits for contracts that are subject to Federal position limits. The proposed report would provide information regarding the disposition of any application to recognize a position as a bona fide hedge (both enumerated and non-enumerated) or to grant a spread or other exemption, including any renewal, revocation of, or modification to the terms and conditions of, a prior recognition or exemption.[1025]

As specified under proposed § 150.5(a)(4), the report would provide certain details regarding any application to recognize a bona fide hedging position, or grant a spread exemption or other exemption, including: The effective date and expiration date of any recognition or exemption; any unique identifier assigned to track the application or position; identifying information about the applicant; the derivative contract or positions to which the application pertains; the maximum size of the commodity derivative position that is recognized or exempted by the exchange (including any ''walk-down'' requirements);[1026] any size limitations the exchange sets for the position; and a brief narrative summarizing the applicant's relevant cash-market activity.

With respect to any unique identifiers to be included in the proposed monthly report, the exchange's assignment of a unique identifier would assist the Commission's tracking process. Accordingly, the Commission suggested that, as a ''best practice,'' the exchange's procedures for processing bona fide hedging position and spread exemption applications contemplate the assignment of such unique identifiers.[1027] The proposed report would also be required to specify the maximum size and/or size limitations by contract month and/or type of limit (*e.g.,* spot month, single month, or all-months-combined), as applicable. The proposed monthly report would be a critical element of the Commission's surveillance program by facilitating the Commission's ability to track bona fide hedging positions and spread exemptions approved by exchanges. The proposed monthly report would also keep the Commission informed as to the manner in which an exchange is administering its application procedures, the exchange's rationale for permitting large positions, and relevant cash-market activity. The Commission expected that exchanges would be able to leverage their current exemption processes and recordkeeping procedures to generate such reports.

In certain instances, information included in the proposed monthly report may prompt the Commission to request records required to be maintained by an exchange. For example, the Commission proposed that, for each derivative position that an exchange wishes to recognize as a bona fide hedge, or any revocation or modification of such recognition, the report would include a concise summary of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position. The Commission explained that it expects that this summary would focus on the facts and circumstances upon which an exchange based its determination to recognize a bona fide hedge, to grant a spread exemption, or to revoke or modify such recognition or exemption. In light of the information provided in the summary, or any other information included in the proposed monthly report regarding the position, the Commission may request the exchange's complete record of the application. The Commission also explained that it expects that it would only need to request such complete records in the event that it noticed an issue that could cause market disruptions.

Proposed § 150.5(a)(4) would require an exchange, unless instructed otherwise by the Commission, to submit such monthly reports according to the form and manner requirements the Commission specifies. In order to facilitate the processing of such reports,

[1023] *See supra* Section II.B.7. (discussing § 150.2 Federal position limits on pre-existing positions).

[1024] *Id.*

[1025] Under the 2020 NPRM, in the monthly report, exchanges may elect to list new recognitions or exemptions, and modifications to or revocations of prior recognitions and exemptions each month. Alternatively, exchanges may submit cumulative monthly reports listing all active recognitions and exemptions (*i.e.,* including exemptions that are not new or have not changed).

[1026] An exchange could determine to recognize as a bona fide hedge or spread exemption all, or a portion, of the commodity derivative position for which an application has been submitted, provided that such determination is made in accordance with the requirements of proposed § 150.5 and is consistent with the Act and the Commission's regulations. In addition, an exchange could require that a bona fide hedging position or spread position be subject to ''walk-down'' provisions that require the trader to scale down its positions in the spot month in order to reduce market congestion as needed based on the facts and circumstances.

[1027] The unique identifier could apply to each of the bona fide hedge or spread exemption applications that the exchange receives, and, separately, each type of commodity derivative position that the exchange wishes to recognize as a bona fide hedge or spread exemption.

and the analysis of the information contained therein, the Commission would establish reporting and transmission standards. The 2020 NPRM would also require that such reports be submitted to the Commission using an electronic data format, coding structure, and electronic data transmission procedures specified on the Commission's Forms and Submissions page of its website.

b. Comments—Monthly Report Detailing Exemption Applications for Contracts Subject to Federal Limits

With respect to the monthly reporting requirement in proposed § 150.5(a)(4), ICE requested that the Commission clarify that the monthly report is only required to capture positions that are subject to Federal position limits and does not apply to other exchange-set non-enumerated exemptions.[1028] ICE also requested that the Commission codify when the monthly reports are required to be submitted, and that any regular reports can be made at the discretion of the exchange.[1029] Other commenters expressed that they prefer that the Commission not specify a particular day each month as a deadline for exchanges to submit their monthly reports pursuant to § 150.5(a)(4).[1030] Finally, ICE requested that the Commission clarify how factual and legal justifications for exemptions should be provided in the monthly report, and the level of granularity required.[1031]

c. Discussion of Final Rule—Monthly Report Detailing Exemption Applications for Contracts Subject to Federal Limits

The Commission is finalizing § 150.5(a)(4) as proposed, with minor technical revisions. The Commission clarifies, as stated in the proposed and final regulation text, that the monthly reporting requirement only applies to exemptions an exchange grants for contracts that are subject to Federal position limits. Further, in consideration of comments and the Commission's past with collecting voluntary monthly reports from exchanges, the Commission has determined not to prescribe a particular day of the month or monthly deadline for exchanges to submit the monthly reports. Rather, the Commission defers to exchanges on the best timing for submitting their reports so long as the reports are submitted on a monthly basis in accordance with § 150.5(a)(4). Finally, the Commission clarifies that § 150.5(a)(4) does not require exchanges to provide factual and legal analysis in the monthly report. The monthly report is intended to give the Commission a snapshot of all exemptions the exchange has granted from exchange-set limits for contracts that are subject to Federal position limits. The Commission's expectation is that in circumstances when it needs additional information on the exchange's analysis for a particular exemption application, it will work with the exchange to obtain such additional information.

4. Section 150.5(b)—Requirements and Acceptable Practices for Exchange-Set Limits on Commodity Derivative Contracts in a Physical Commodity That Are Not Subject to the Limits Set Forth in § 150.2

i. Summary of the 2020 NPRM—Exchange-Set Limits on Commodity Derivative Contracts in a Physical Commodity Not Subject to the Limits Set Forth in § 150.2

Under proposed § 150.5(b), for physical commodity derivative contracts that are *not* subject to Federal position limits, whether cash-settled or physically-settled, exchanges would be subject to flexible standards for setting exchange limits during the contract's spot month and non-spot month.

During the spot month, under proposed § 150.5(b)(1)(i), exchanges would be required to establish position limits, and such limits would have to be set at a level that is no greater than 25 percent of deliverable supply. As described in detail in connection with the proposed Federal spot-month limits described above, it would be difficult, in the absence of other factors, for a participant to corner or squeeze a market if the participant holds less than or equal to 25 percent of deliverable supply, and the Commission has long used deliverable supply as the basis for spot month position limits due to concerns regarding corners, squeezes, and other settlement-period manipulative activity.[1032]

In the 2020 NPRM, the Commission recognized, however, that there may be circumstances where an exchange may not wish to use the 25% formula, including, for example, if the contract is cash-settled, does not have a measurable deliverable supply, or if the exchange can demonstrate that a different parameter is better suited for a particular contract or market.[1033] Accordingly, proposed § 150.5(b)(1) would afford exchanges the ability to submit to the Commission alternative potential methodologies for calculating spot month limit levels, provided that the limits are set at a level that is "necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index." This standard has appeared in existing § 150.5 since its adoption in connection with spot-month limits on cash-settled contracts.

As noted above, existing § 150.5 includes separate parameters for spot-month limits in physical-delivery contracts and for cash-settled contracts, but does not include flexibility for exchanges to consider alternative parameters. In an effort to both simplify the regulation and provide the ability for exchanges to consider multiple parameters that may be better suited for certain products, the Commission proposed the above standard as a principles-based requirement for both cash-settled and physically-settled contracts subject to proposed § 150.5(b).

Outside of the spot month, where, historically, attempts at certain types of market manipulation is generally less of a concern, proposed § 150.5(b)(2)(i) would allow exchanges to choose between position limits or position accountability for physical commodity contracts that are not subject to Federal position limits. While exchanges would be permitted to decide whether to use limit levels or accountability levels for any such contract, under either approach, the exchange would have to set a level that is "necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index."

To help exchanges efficiently demonstrate compliance with this standard for physical commodity contracts outside of the spot month, the Commission proposed separate acceptable practices for exchanges that wish to adopt non-spot month position limits and exchanges that wish to adopt non-spot month accountability.[1034] For

[1028] ICE at 14.

[1029] *Id.*

[1030] CME Group at 14; IFUS at 13.

[1031] ICE at 14.

[1032] *See supra* Section II.B. (discussing proposed § 150.2).

[1033] Guidance for calculating deliverable supply can be found in Appendix C to part 38. 17 CFR part 38, Appendix C.

[1034] The acceptable practices in Appendix F to part 150 of the 2020 NPRM reflected non-exclusive methods of compliance. Accordingly, the language of these proposed acceptable practices, used the word "shall" not to indicate that the acceptable practice is a required method of compliance, but rather to indicate that in order to satisfy the exchanges that choose to adopt non-spot month position limits, rather than position accountability, proposed paragraph (a)(1) to Appendix F of part 150 would set forth non-exclusive acceptable practices. Under that provision, an exchange would be deemed in compliance with proposed § 150.5(b)(2)(i) if the exchange sets non-spot limit levels for each contract subject to § 150.5(b) at a level no greater than: (1) The average of historical position sizes held by speculative traders in the contract as a percentage of the contract's open interest; [1035] (2) the spot month limit level for the contract; (3) 5,000 contracts (scaled up proportionally to the ratio of the notional quantity per contract to the typical cash-market transaction if the notional quantity per contract is smaller than the typical cash-market transaction, or scaled down proportionally if the notional quantity per contract is larger than the typical cash-market transaction); [1036] or (4) 10% of open interest in that contract for the most recent calendar year up to 50,000 contracts, with a marginal increase of 2.5% of open interest thereafter.[1037] When evaluating average position sizes held by speculative traders, the Commission expected exchanges: (i) To be cognizant of speculative positions that are extraordinarily large relative to other speculative positions, and (ii) to not consider any such outliers in their calculations.

These proposed parameters have largely appeared in existing § 150.5 for many years in connection with either initial or subsequent levels.[1038] The Commission was of the view that these parameters would be useful, flexible standards to carry forward as acceptable practices. For example, the Commission expected that the 5,000-contract acceptable practice would be a useful benchmark for exchanges because it would allow them to establish limits and demonstrate compliance with Commission regulations in a relatively efficient manner, particularly for new contracts that have yet to establish open interest. Similarly, for purposes of exchange-set limits on physical commodity contracts that are not subject to Federal position limits, the Commission proposed to maintain the baseline 10/2.5 percent formula as an acceptable practice. Because these parameters are simply acceptable practices, exchanges may, after evaluation, propose higher limits or accountability levels.

Along those lines, the Commission recognized that other parameters may be preferable and/or just as effective, and was open to considering alternative parameters submitted pursuant to part 40 of the Commission's regulations, provided, at a minimum, that the parameter complies with § 150.5(b)(2)(i). The Commission encouraged exchanges to submit potential new parameters to Commission staff in draft form prior to submitting them under part 40.

For exchanges that choose to adopt position accountability, rather than limits, outside of the spot month, proposed paragraph (a)(2) of Appendix F to part 150 would set forth a non-exclusive acceptable practice that would permit such exchanges to comply with proposed § 150.5(b)(2)(i) by adopting rules establishing ''position accountability'' as defined in proposed § 150.1. ''Position accountability'' would mean rules that the exchange submits to the Commission pursuant to part 40 that require a trader, upon request by the exchange, to consent to: (i) Provide information to the exchange about their position, including, but not limited to, information about the nature of the positions, trading strategies, and hedging information; and (ii) halt further increases to their position or to reduce their position in an orderly manner.[1039]

Proposed § 150.5(b)(3) addressed a circumstance where multiple exchanges list contracts that are substantially the same, including physically-settled contracts that have the same underlying physical commodity and delivery location, or cash-settled contracts that are directly or indirectly linked to a physically-settled contract. Under proposed § 150.5(b)(3), exchanges listing contracts that are substantially the same in this manner must either adopt ''comparable'' limits for such contracts, or demonstrate to the Commission how the non-comparable levels comply with the standards set forth in proposed § 150.5(b)(1) and (2). Such a determination also must address how the levels are necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index. Proposed § 150.5(b)(3) would apply equally to cash-settled and physically-settled contracts, and to limits during and outside of the spot month, as applicable.[1040] Proposed § 150.5(b)(3) was intended to help ensure that position limits established on one exchange would not jeopardize market integrity or otherwise harm other markets. Further, proposed § 150.5(b)(3) would be consistent with the Commission's proposed approach to generally apply equivalent Federal position limits to linked contracts, including linked contracts listed on multiple exchanges.[1041]

Finally, under proposed § 150.5(b)(4), exchanges would be permitted to grant exemptions from any limits established under proposed § 150.5(b). As noted, proposed § 150.5(b) would apply to physical commodity contracts not subject to Federal position limits; thus, exchanges would be given flexibility to

acceptable practice, a market participant must (*i.e.,* shall) establish compliance with that particular acceptable practice.

[1035] For example, if speculative traders in a particular contract typically make up 12 percent of open interest in that contract, the exchange could set limit levels no greater than 12 percent of open interest.

[1036] Under the 2020 NPRM, for exchanges that choose to adopt a non-spot month limit level of 5,000 contracts, this level assumes that the notional quantity per contract is set at a level that reflects the size of a typical cash-market transaction in the underlying commodity. However, if the notional quantity of the contract is larger/smaller than the typical cash-market transaction in the underlying commodity, then the DCM must reduce/increase the 5,000 contract non-spot month limit until it is proportional to the notional quantity of the contract relative to the typical cash-market transaction. These required adjustments to the 5,000-contract metric are intended to avoid a circumstance where an exchange could allow excessive speculation by setting excessively large notional quantities relative to typical cash-market transaction sizes. For example, if the notional quantity per contract is set at 30,000 units, and the typical observed cash-market transaction is 2,500 units, the notional quantity per contract would be 12 times larger than the typical cash-market transaction. In that case, the non-spot month limit would need to be 12 times smaller than 5,000 (*i.e.,* at 417 contracts.). Similarly, if the notional quantity per contract is 1,000 contracts, and the typical observed cash-market transaction is 2,500 units, the notional quantity per contract would be 2.5 times smaller than the typical cash-market transaction. In that case, the non-spot month limit would need to be 2.5 times larger than 5,000, and would need to be set at 12,500 contracts.

[1037] In connection with the proposed Appendix F to part 150 acceptable practices, open interest should be calculated by averaging the month-end open positions in a futures contract and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year.

[1038] 17 CFR 150.5(b) and (c). Proposed § 150.5(b) would address physical commodity contracts that are not subject to Federal position limits.

[1039] While existing § 150.5(e) includes open-interest and volume-based limitations on the use of position accountability, the Commission opted not to include such limitations in the 2020 NPRM. Under the 2020 NPRM, if an exchange submitted a part 40 filing seeking to adopt position accountability, the Commission would determine on a case-by-case basis whether such rules are consistent with the Act and the Commission's regulations. The Commission did not want to use one-size-fits-all volume-based limitations for making such determinations.

[1040] For reasons discussed elsewhere in the 2020 NPRM, this provision would not apply to natural gas contracts. *See supra* Section II.C.6. (discussion of proposed conditional spot month exemption in natural gas).

[1041] *See supra* Section II.A.16. (discussion of the proposed referenced contract definition and linked contracts).

grant exemptions in such contracts, including exemptions for both intra-market and inter-market spread positions,[1042] as well as other exemption types (including risk management exemptions) not explicitly listed in proposed § 150.3.[1043] However, such exchanges must require that traders apply for the exemption. In considering any such application, the exchanges would be required to consider whether the exemption would result in a position that would not be in accord with ''sound commercial practices'' in the market for which the exchange is considering the application, and/or would ''exceed an amount that may be established and liquidated in an orderly fashion in that market.''

While exchanges would be subject to the requirements of § 150.5(a) and (b) described above, such proposed requirements are not intended to limit the discretion of exchanges to utilize other tools to protect their markets. Among other things, an exchange would have the discretion to: Impose additional restrictions on a person with a long position in the spot month of a physical-delivery contract who stands for delivery, takes that delivery, and then re-establishes a long position; establish limits on the amount of delivery instruments that a person may hold in a physical-delivery contract; and impose such other restrictions as it deems necessary to reduce the potential threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consistent with its responsibilities.

ii. Comments—Exchange-Set Limits on Commodity Derivative Contracts in a Physical Commodity Not Subject to the Limits Set Forth in § 150.2

Better Markets recommended revisions for proposed § 150.5(b)(2) if the Commission decides to finalize the proposed approach to only implement spot month limits on contracts that are not subject to Federal position limits.[1044] Proposed § 150.5(b)(2) requires exchanges to have either non-spot month position limits or accountability levels, as necessary and appropriate, to reduce manipulation and price distortions for contracts that are not subject to limits in § 150.2. Better Markets' recommendation goes a step further and would require exchanges to set position limits *and* position accountability levels outside of the spot month to reduce the potential threat of market manipulation or price distortion *and* the potential for sudden or unreasonable fluctuations or unwarranted changes.[1045]

iii. Discussion of Final Rule—Exchange-Set Limits on Commodity Derivative Contracts in a Physical Commodity Not Subject to the Limits Set Forth in § 150.2

The Commission is adopting § 150.5(b), as proposed, with a few technical or grammatical revisions to improve readability and the following explanation. Of note, the Commission is revising the beginning of § 150.5(b)(1) to clarify that this section applies to exchange-set limits on cash-settled and physically-settled commodity derivative contracts in a physical commodity that are not subject to the Federal position limits set forth in § 150.2. Although this point is made clear in the preamble and the introductory title of § 150.5(b), the Commission has added the additional clarification for the avoidance of any confusion.

In response to comments from Better Markets, and as explained in detail earlier in this release, the Commission believes that outside the spot month, either exchange-set position limits or exchange-set accountability levels will be sufficient for exchanges to reduce the potential threat of market manipulation and price distortions and manage fluctuations and changes in their markets.[1046] Accordingly, the Commission has determined to finalize the position limits and accountability requirements as proposed.

5. Section 150.5(c)—Requirements for Security Futures Products

i. Background and Summary of the 2020 NPRM—Requirements for Security Futures Products

As the Commission has previously noted, security futures products and security options may serve economically equivalent or similar functions to one another.[1047] Therefore, when the Commission originally adopted position limits regulations for security futures products in part 41, it set levels that were generally comparable to, although not identical with, the limits that applied to options on individual securities.[1048] The Commission has pointed out that security futures products may be at a competitive disadvantage if position limits for security futures products vary too much from those of security options.[1049] As a result, the Commission in 2019 adopted amendments to the position limitations and accountability requirements for security futures products, noting that one goal was to provide a level regulatory playing field with security options.[1050] The Commission proposed § 150.5(c), therefore, to include a cross-reference clarifying that for security futures products, position limitations and accountability requirements for exchanges are specified in § 41.25.[1051] This would allow the Commission to take into account the position limits regime that applies to security options when considering position limits regulations for security futures products.

ii. Comments and Summary of the Commission Determination—Requirements for Security Futures Products

The Commission did not receive comments on § 150.5(c) and is adopting this section as proposed.

6. Section 150.5(d)—Rules on Aggregation

i. Summary of the 2020 NPRM—Rules on Aggregation

As noted earlier in this release, the Commission adopted in 2016 final aggregation rules under § 150.4 that apply to all contracts subject to Federal position limits. The Commission recognized that with respect to contracts not subject to Federal position limits, market participants may find it burdensome if different exchanges adopt different aggregation standards. Accordingly, under proposed § 150.5(d), all DCMs, and, ultimately, SEFs, that list any physical commodity derivatives, regardless of whether the contract is subject to Federal position limits, would be required to adopt position aggregation rules for such contracts that

[1042] *See* Appendix G (providing additional guidance on spread exemptions).

[1043] As noted above, proposed § 150.3 would allow for several exemption types, including: Bona fide hedging positions; certain spreads; financial distress positions; and conditional spot month limit exemption positions in natural gas.

[1044] Better Markets at 47–48.

[1045] *Id.*

[1046] *See supra* Section II.B.2.iv. (providing a detailed discussion of the Commission's extensive experience monitoring position accountability levels, which have been effective at exchanges).

[1047] *See* Position Limits and Position Accountability for Security Futures Products, 83 FR at 36799, 36802 (July 31, 2018).

[1048] *Id. See also* Listing Standards and Conditions for Trading Security Futures Products, 66 FR at 55078, 55082 (Nov. 1, 2001) (explaining the Commission's adoption of position limits for security futures products).

[1049] *See* 83 FR at 36802.

[1050] *See* Position Limits and Position Accountability for Security Futures Products, 84 FR at 51005, 51009 (Sept. 27, 2019).

[1051] *See* 17 CFR 41.25. Rule § 41.25 establishes conditions for the trading of security futures products.

conform to § 150.4.[1052] Exchanges that list excluded commodities would be encouraged to also adopt position aggregation rules that conform to § 150.4. Aggregation policies that otherwise vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in monitoring and enforcing exchange-set position limits.

ii. Comments and Summary of the Commission Determination—Rules on Aggregation

The Commission did not receive comments on § 150.5(d) and is adopting this section as proposed.

7. Section 150.5(e)—Requirements for Submissions to the Commission

i. Summary of the 2020 NPRM—Requirements for Submissions to the Commission

Proposed § 150.5(e) reflects that, consistent with the definition of ''rule'' in existing § 40.1, any exchange action establishing or modifying exchange-set position limits or exemptions therefrom, or position accountability, in any case pursuant to proposed § 150.5(a), (b), (c), or Appendix F to part 150, would qualify as a ''rule'' and must be submitted to the Commission as such pursuant to part 40 of the Commission's regulations. Such rules would also include, among other things, parameters used for determining position limit levels, and policies and related processes setting forth parameters addressing, among other things, which types of exemptions are permitted, the parameters for the granting of such exemptions, and any exemption application requirements.

Proposed § 150.5(e) further provides that exchanges would be required to review regularly[1053] any position limit levels established under proposed § 150.5 to ensure the level continues to comply with the requirements of those sections. For example, in the case of § 150.5(b), exchanges would be expected to ensure the limits comply with the requirement that limits be set ''at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' Exchanges would also be required to update such levels as needed, including if the levels no longer comply with the proposed rules.

ii. Comments and Summary of the Commission Determination—Requirements for Submissions to the Commission

The Commission did not receive comments on § 150.5(e) and is adopting this section with a few non-substantive revisions to address grammatical issues and improve the readability and organization of the section. These revisions are not intended to change the substance of this section.

8. Section 150.5(f)—Delegation of Authority to the Director of the Division of Market Oversight

i. Summary of the 2020 NPRM—Delegation of Authority to the Director of the Division of Market Oversight

The Commission proposed to delegate its authority, pursuant to proposed § 150.5(a)(4)(ii), to the Director of the Commission's Division of Market Oversight, or such other employee(s) that the Director may designate from time to time, to provide instructions regarding the submission of information required to be reported by exchanges to the Commission on a monthly basis, and to determine the manner, format, coding structure, and electronic data transmission procedures for submitting such information.

ii. Comments and Summary of the Commission Determination—Delegation of Authority to the Director of the Division of Market Oversight

The Commission did not receive comments on § 150.5(f) and is adopting this section as proposed.

9. Commission Enforcement of Exchange-Set Limits

As discussed throughout this Final Rule, the framework for exchange-set limits operates in conjunction with the Federal position limits framework. The Futures Trading Act of 1982 gave the Commission, under CEA section 4a(5) (since re-designated as section 4a(e)), the authority to directly enforce violations of exchange-set, Commission-approved speculative position limits in addition to position limits established directly by the Commission.[1054] Since 2008, it has also been a violation of the Act for any person to violate an exchange position limit rule certified to the Commission by such exchange pursuant to CEA section 5c(c)(1).[1055] Thus, under CEA section 4a(e), it is a violation of the Act for any person to violate an exchange position limit rule certified to or approved by the Commission, including to violate any subsequent amendments thereto, and the Commission has the authority to enforce those violations.

The Commission did not receive comments on its authority to enforce exchange-set position limits.

*E. § 150.6—Scope*

Existing § 150.6 provides that nothing in this part shall be construed to affect any provisions of the CEA relating to manipulation or corners nor to relieve any contract market or its governing board from responsibility under the CEA to prevent manipulation and corners.[1056]

1. Summary of the 2020 NPRM—Scope

Proposed § 150.6 was intended to make clear that fulfillment of specific part 150 requirements alone does not necessarily satisfy other obligations of an exchange. Proposed § 150.6 provided that part 150 of the Commission's regulations would only be construed as having an effect on position limits set by the Commission or an exchange including any associated recordkeeping and reporting requirements. Proposed § 150.6 provided further that nothing in part 150 would affect any other provisions of the CEA or Commission regulations including those relating to actual or attempted manipulation, corners, squeezes, fraudulent or deceptive conduct, or to prohibited

[1052] Under § 150.4, unless an exemption applies, a person's positions must be aggregated with positions for which the person controls trading or for which the person holds a 10% or greater ownership interest. Commission Regulation § 150.4(b) sets forth several exemptions from aggregation. *See* Final Aggregation Rulemaking, 81 FR at 91454. The Division of Market Oversight has issued time-limited no-action relief from some of the aggregation requirements contained in that rulemaking. *See* CFTC Letter No. 19–19 (July 31, 2019), available at *https://www.cftc.gov/csl/19-19/download*.

[1053] Under the 2020 NPRM, an acceptable, regular review regime would consist of both a periodic review and an event-specific review (*e.g.,* in the event of supply and demand shocks such as unanticipated shocks to supply and demand of the underlying commodity, geo-political shocks, and other events that may result in congestion and/or other disruptions).

[1054] *See* Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2299–30 (1983).

[1055] *See* CFTC Reauthorization Act of 2008, Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008) (also known as the ''Farm Bill'') (amending CEA section 4a(e), among other things, to assure that a violation of exchange-set position limits, regardless of whether such position limits have been approved by or certified to the Commission, would constitute a violation of the Act that the Commission could independently enforce). *See also* Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 FR at 4144, 4145 (Jan. 26, 2010) (summarizing the history of the Commission's authority to directly enforce violations of exchange-set speculative position limits).

[1056] 17 CFR 150.6. The Commission notes that while existing § 150.6 references ''section 5(4) of the [CEA]'' no such CEA section currently exists. The Final Rule instead references section 5(d)(4) of the CEA.

transactions. For example, proposed § 150.5 would require DCMs, and, ultimately, SEFs, to impose and enforce exchange-set speculative position limits. The fulfillment of the requirements of § 150.5 alone would not satisfy any other legal obligations under the CEA or Commission regulations applicable to exchanges to prevent manipulation and corners. Likewise, a market participant's compliance with position limits or an exemption thereto would not confer any type of safe harbor or good faith defense to a claim that the participant had engaged in an attempted or perfected manipulation.

Further, the proposed amendments were intended to help clarify that § 150.6 would apply to: Regulations related to position limits found outside of part 150 of the Commission's regulations (*e.g.,* relevant sections of part 1 and part 19); and recordkeeping and reporting regulations associated with speculative position limits.

2. Comments and Discussion of Final Rule—Scope

The Commission received no comments on proposed § 150.6 and is adopting as proposed.

As the Commission explained in the 2020 NPRM, position limits are meant to diminish, eliminate, and prevent excessive speculation and to deter and prevent market manipulation, squeezes, and corners. The Commission stresses that nothing in the Final Rule's revisions to part 150 would impact the anti-disruptive, anti-cornering, and anti-manipulation provisions of the CEA and Commission regulations, including but not limited to CEA sections 6(c) or 9(a)(2) regarding manipulation, CEA section 4c(a)(5) regarding disruptive practices including spoofing, or sections 180.1 and 180.2 of the Commission's regulations regarding manipulative and deceptive practices. It may be possible for a trader to manipulate or attempt to manipulate the prices of futures contracts or the underlying commodity with a position that is within the Federal position limits. It may also be possible for a trader holding a bona fide hedge, as recognized by the Commission or an exchange, to manipulate or attempt to manipulate the markets. The Commission would not consider it a defense to a charge under the anti-manipulation provisions of the CEA or the regulations that a trader's position was within position limits.

*F. § 150.8—Severability*

Final § 150.8 provides that should any provision(s) of part 150 be declared invalid, including the application thereof to any person or circumstance, all remaining provisions of part 150 shall not be affected to the extent that such remaining provisions, or the application thereof, can be given effect without the invalid provisions.

The Commission did not receive comments on proposed § 150.8, and is adopting it as proposed.

*G. § 150.9—Process for Recognizing Non-Enumerated Bona Fide Hedging Transactions or Positions With Respect to Federal Speculative Position Limits*

1. Background—Non-Enumerated Bona Fide Hedging Transactions or Positions

The Commission's authority and existing processes for recognizing bona fide hedges can be found in CEA section 4a(c), and §§ 1.3, 1.47, and 1.48 of the Commission's regulations.[1057] In particular, CEA section 4a(c)(1) provides that no CFTC rule issued under CEA section 4a(a) applies to ''transactions or positions which are shown to be bona fide hedging transactions or positions.'' [1058] Under the existing definition of ''bona fide hedging transactions and positions'' in § 1.3,[1059] paragraph (1) provides the Commission's general definition of bona fide hedging transactions or positions; paragraph (2) provides a list of enumerated bona fide hedging positions that, generally, are self-effectuating, and must be reported (along with supporting cash-market information) to the Commission monthly on Form 204 after the positions are taken; [1060] and paragraph (3) provides a procedure for market participants to seek recognition from the Commission for non-enumerated bona fide hedging positions. Under paragraph (3), any person that seeks a Commission recognition of a position as a non-enumerated bona fide hedge must apply to the Commission in advance of taking on the position, and pursuant to the processes outlined in § 1.47 (30 days in advance for non-enumerated bona fide hedges) or § 1.48 (10 days in advance for enumerated anticipatory hedges), as applicable.

For the nine legacy agricultural contracts currently subject to Federal position limits, the Commission's current process for recognizing non-enumerated bona fide hedge positions exists in parallel with exchange processes for granting exemptions from exchange-set limits, as described below. The exchange processes for granting exemptions vary by exchange, and generally do not mirror the Commission's processes.[1061] Thus, when requesting a non-enumerated bona fide hedging position recognition, currently market participants must submit two applications—one application submitted to the Commission in accordance with § 1.47 for purposes of compliance with Federal position limits, and another application submitted to the relevant exchange in accordance with the exchange's rules for purposes of exchange-set position limits.

2. Overview of the 2020 NPRM, Comments, and the Commission's Determination

Generally, the Commission is adopting § 150.9 largely as proposed, but with certain clarifications and modifications to address commenters' views and other considerations. This section provides an overview of, and addresses general comments regarding, proposed § 150.9. Further below, the Commission summarizes each sub-section of § 150.9 and comments relevant to that sub-section, and provides a more detailed discussion of the Commission's determination and any changes to each sub-section of § 150.9.

i. General Overview of the 2020 NPRM

The Commission proposed § 150.9 to establish a new framework whereby a

[1057] 7 U.S.C. 6a(c); 17 CFR 1.3, 1.47, and 1.48.

[1058] 7 U.S.C. 6a(c)(1).

[1059] As described above, the Commission is moving an amended version of the bona fide hedging definition from § 1.3 to § 150.1. *See supra* Section II.A.1. (discussion of § 150.1).

[1060] As described below, the Commission is eliminating Form 204 and relying instead on the cash-market information submitted to exchanges pursuant to §§ 150.5 and 150.9. *See infra* Section II.H. (discussion of amendments to part 19).

[1061] As discussed in the 2020 NPRM, exchanges typically use one application process to grant all exemption types, whereas the Commission has different processes for different bona fide hedge exemption types. That is, the Commission currently has different processes for permitting enumerated bona fide hedges and for recognizing positions as non-enumerated bona fide hedges or anticipatory bona fide hedges. Generally, for bona fide hedges enumerated in paragraph (2) of the bona fide hedge definition in § 1.3, no formal process is required by the Commission. Instead, such enumerated bona fide hedge recognitions are self-effectuating and Commission staff reviews monthly reporting of cash-market positions on existing Form 204 and part 17 position data to monitor such positions. Requests for recognitions of non-enumerated bona fide hedging positions and for certain enumerated anticipatory bona fide hedge positions, as explained above, must be submitted to the Commission pursuant to the processes in existing §§ 1.47 and 1.48 of the regulations, as applicable. Further, exchanges generally do not require the submission of monthly cash-market information; instead, they generally require exemption applications to include cash-market information supporting positions that exceed the limits, to be filed prior to exceeding a position limit, and to be updated on an annual basis. On the other hand, the Commission has various monthly reporting requirements under Form 204 and part 17 of the Commission's regulations as described above.

market participant seeking a non-enumerated bona fide hedge recognition could file one application with an exchange to receive a non-enumerated bona fide hedge recognition for purposes of both exchange-set limits and Federal position limits.[1062] The proposed framework was intended to be independent of, and serve as an alternative to, the Commission's process for reviewing exemption requests under proposed § 150.3. The proposed framework was also intended to help: (1) Streamline the process by which non-enumerated bona fide hedge applications are addressed; (2) minimize disruptions by leveraging existing exchange-level processes with which many market participants are already familiar; [1063] and (3) reduce inefficiencies created when market participants are required to comply with different Federal and exchange-level processes.

In the 2020 NPRM, the Commission emphasized that proposed § 150.9 would serve as a separate, self-contained process that is related to, but independent of, the proposed regulations governing: (1) The process in proposed § 150.3 for traders to apply directly to the Commission for a bona fide hedge recognition; and (2) exchange processes for establishing exchange-set limits and granting exemptions therefrom in proposed § 150.5. The Commission also emphasized that proposed § 150.9 would serve as a voluntary process that exchanges could implement to provide additional flexibility for their market participants to file one non-enumerated bona fide hedge application with an exchange to receive a recognition for purposes of both exchange-set limits and Federal speculative position limits. Finally, the 2020 NPRM made clear that an exchange's determination to recognize a non-enumerated bona fide hedge in accordance with proposed § 150.9 with respect to exchange-set limits would serve to inform the Commission's own decision as to whether to recognize the exchange's determination for purposes of Federal speculative position limits set forth in proposed § 150.2, and would not be a substitute for the Commission's determination.

Under the proposed procedural framework, an exchange's determination to recognize a non-enumerated bona fide hedge in accordance with proposed § 150.9 with respect to exchange-set limits would serve to inform the Commission's own decision as to whether to recognize the exchange's determination for purposes of Federal position limits set forth in proposed § 150.2. Among other conditions, the exchange would be required to base its determination on standards that conform to the Commission's own standards for recognizing bona fide hedges for purposes of Federal position limits.

Further, the exchange's determination with respect to its own position limits and application process would be subject to Commission review and oversight. These requirements were proposed to facilitate the Commission's independent review and determination by ensuring that any bona fide hedge recognized by an exchange for purposes of exchange-set limits in accordance with proposed § 150.9 conforms to the Commission's standards. For a given referenced contract, proposed § 150.9 would allow a person to exceed Federal position limits if the exchange listing the contract recognized the position as a bona fide hedge with respect to exchange-set limits, unless the Commission denies or stays the application within ten business days (or two business days for applications, including retroactive applications, filed due to sudden or unforeseen circumstances) (the ''10/2-day review''). Under the 2020 NPRM, if the Commission does not intervene during that 10/2-day review period, then the exemption would be deemed approved for purposes of Federal position limits. The Commission provides a more detailed discussion of each sub-section of proposed § 150.9 further below.

ii. General Comments—Non-Enumerated Bona Fide Hedging Transactions or Positions, Generally

Generally, the majority of commenters supported the Commission's proposed approach in § 150.9.[1064] In particular, one commenter expressed that § 150.9 represents a ''fair and balanced'' approach,[1065] and another commenter expressed that § 150.9 offers an ''efficient and timely process for hedgers to obtain permission to mitigate their risk.'' [1066] On the other hand, certain commenters opposed the streamlined process in § 150.9 and requested that the Commission reduce or eliminate the role of exchanges in processing non-enumerated bona fide hedge exemptions.[1067]

In particular, certain commenters expressed concerns regarding the proposed role of exchanges in § 150.9. That is, certain commenters were concerned that the streamlined approach in proposed § 150.9 would create conflicts of interest for exchanges (which commenters note are for-profit entities) where exchanges could benefit from granting non-compliant non-enumerated bona fide hedge exemptions to boost trading volume and profits.[1068] Other commenters expressed concern that § 150.9 delegates too much discretion to exchanges to determine what qualifies as a non-enumerated bona fide hedge without well-defined criteria, and that such discretion could lead to an unlimited universe of new non-enumerated bona fide hedge exemptions that could adversely impact

[1062] Alternatively, under the proposed framework, a trader could submit a request directly to the Commission pursuant to proposed § 150.3(b). A trader that submitted such a request directly to the Commission for purposes of Federal position limits would have to separately request an exemption from the applicable exchange for purposes of exchange-set limits. As discussed earlier in this release, the Commission proposed to separately allow for enumerated hedges and spreads that meet the ''spread transaction'' definition to be self-effectuating. *See supra* Section II.C. (discussing proposed § 150.3).

[1063] In particular, the Commission recognizes that, in the energy and metals spaces, market participants are familiar with exchange application processes and are not familiar with the Commission's processes since, currently, there are no Federal position limits for those commodities.

[1064] ICE at 8; CCI at 2; IECA at 1–2; NGFA at 9; MGEX at 4; AGA at 11; CME Group at 7; FIA at 2; CMC at 10–11; EPSA at 6–7; Suncor at 2; COPE at 4; Shell at 3–4; and CEWG at 3; *See also* ASR at 3 (noting that proposed § 150.9 effectively leverages existing exchange frameworks).

[1065] Suncor at 2.

[1066] COPE at 4.

[1067] Rutkowski at 1; AFR at 2; IECA at 2–3; Public Citizen at 2–3; NEFI at 4; Better Markets at 3, 62; IATP at 13–14; NEFI at 4; and PMAA at 4 (noting a concern that non-enumerated bona fide hedges would be granted outside of the notice and comment rulemaking process).

[1068] Rutkowski at 1; *see also* AFR at 2 (stating concerns that proposed § 150.9 would be ineffective at controlling speculation due, in part, to the substantially increased flexibility of exchanges and market participants to determine whether positions qualify for bona fide hedge exemptions or to propose and institute new non-enumerated hedge exemptions, despite clear conflicts posed by exchanges' incentive to directly profit from trading volume); IECA at 2–3 and NEFI at 4 (stating that proposed § 150.9 would perpetuate a concern, raised by Congress in the Dodd-Frank Act, that exchanges may be motivated by profit to allow broad hedge exemptions that may include non-commercial market participants); Public Citizen at 2–3 (stating that proposed § 150.9 puts for-profit exchanges in the driver's seat of making decisions on granting exemptions, and that customer incentive programs offered by exchanges to increase trading volumes would undermine the exchanges' efforts to determine hedge exemptions; arguing that certain exchanges have experienced difficulty in ''cooperating'' with current laws and regulations, thus casting doubt on their ability to enforce the proposed rule; and arguing that no additional authority should be granted to CME pending resolution of *CFTC* v. *Byrnes,* Case. No. 13–cv–01174 (SDNY) (alleging a violation of internal firewalls and sales of confidential trading information to an outside broker). Regarding Public Citizen's comment on *CFTC* v. *Byrnes,* the Commission notes that this case has been resolved and is not a condition precedent to this Final Rule.

markets.[1069] Finally, several commenters shared the view that § 150.9 would erode the Commission's authority over exchange-granted exemptions, and that the Commission should retain all authority to grant non-enumerated bona fide hedge exemptions.[1070]

iii. Discussion of Final Rule—Non-Enumerated Bona Fide Hedging Transactions or Positions, Generally—General Concerns and Comments on § 150.9

First, the Commission reiterates, as stated in the 2020 NPRM, that an exchange's determination to recognize a non-enumerated bona fide hedge in accordance with proposed § 150.9 with respect to exchange-set limits would serve to inform the Commission's decision whether to recognize such position as a non-enumerated bona fide hedge for purposes of Federal position limits set forth in proposed § 150.2. The Commission is not delegating or ceding its authority to exchanges to make the determination for purposes of Federal position limits to recognize a position as a non-enumerated bona fide hedge for applications submitted under § 150.9. In that regard, the exchange's determination to recognize a bona fide hedge with respect to exchange-set limits established under § 150.5 is not a substitute for the Commission's independent review of, and determination with respect to, non-enumerated bona fide hedge applications submitted pursuant to § 150.9.

As described in detail below, under § 150.9 as adopted herein, exchanges that elect to review non-enumerated bona fide hedge applications under § 150.9 are required to establish and maintain standards and processes for such review, approved by the Commission pursuant to § 40.5. Section 150.9 requires, among other things, that the exchanges base their determinations on standards that conform to the Commission's own standards for recognizing bona fide hedges for purposes of Federal position limits. The Final Rule also requires an exchange to directly notify the Commission of any determinations to recognize a non-enumerated bona fide hedge for purposes of exchange-set limits, and, upon such notification, the Commission will make its determination as to such applications for purposes of Federal position limits. The Commission also reserves authority to, at a later date and after providing an opportunity to respond, revoke a non-enumerated bona fide hedge recognition that is approved through the § 150.9 process and require a participant to lower its position below the Federal position limit level within a commercially reasonable time if the Commission finds that the position no longer meets the bona fide hedge definition in § 150.1.

In response to general concerns that § 150.9 would create conflicts of interest for exchanges, the Commission does not believe that § 150.9 creates incentives for exchanges to grant non-enumerated bona fide hedge exemptions in order to boost trading volume and profits.[1071] On the contrary, the Commission believes there are several requirements and obligations that incentivize and require exchanges to implement § 150.9 in a manner that protects their markets.

First, under § 150.9, exchanges may only grant non-enumerated bona fide hedges that meet the Commission's bona fide hedging definition, and each non-enumerated bona fide hedge approved by an exchange for purposes of its own limits is separately and independently reviewed by the Commission for purposes of Federal position limits.

Next, under § 150.5(a)(2)(ii)(G) finalized herein, exchanges are required to consider whether approving a particular exemption request would result in positions that would not be in accord with sound commercial practices in the relevant commodity derivatives market and/or whether the position resulting from an approved exemption would exceed an amount that may be established and liquidated in an orderly fashion in that market.[1072]

Finally, under DCM Core Principle 5 and SEF Core Principle 6, exchanges are accountable for administering position limits in a manner that reduces the potential threat of market manipulation or congestion.[1073] The Commission believes that these requirements, working in concert, provide sufficient guardrails to mitigate any potential conflicts of interest for exchanges.

Further, the Commission does not agree that § 150.9 improperly delegates discretion to exchanges or erodes the Commission's authority over exchanges and the non-enumerated bona fide hedge recognition process because, as discussed above, the Commission is not delegating its decision-making authority with respect to the granting of bona fide hedge recognitions for purposes of Federal position limits. Rather, the Commission is allowing exchanges to offer traders the opportunity to submit their applications for a bona fide hedge recognition pursuant to a consolidated review process under which the Commission will conduct its own review and make an independent determination for purposes of Federal speculative position limits.

The Commission has thus determined to adopt § 150.9 largely as proposed, but with certain modifications and clarifications, as described further below, to address commenters' views and other considerations. The following discussions summarize each sub-section of proposed § 150.9, as well as comments received and the Commission's final determination with respect to each sub-section of § 150.9.

3. Section 150.9(a)—Approval of Exchange Rules Related to the Application Submission Process for Non-Enumerated Bona Fide Hedging Transactions or Positions

i. Summary of 2020 NPRM—Approval of Rules

Proposed § 150.9(a) would require an exchange to have rules, adopted pursuant to the existing rule-approval process in § 40.5 of the Commission's regulations, that establish standards and processes in accordance with proposed § 150.9 as described below. The Commission would review such rules to ensure that the exchange's standards and processes for recognizing bona fide hedges for its own exchange-set limits conform to the Commission's standards and processes for recognizing bona fide hedges for Federal position limits.

ii. Comments—Approval of Exchange Rules Related to the Application Submission Process for Non-Enumerated Bona Fide Hedging Transactions or Positions

Although the Commission did not receive comments directly about the requirements under proposed § 150.9(a), the Commission did receive comments related to when an exchange could start implementing § 150.9, which is contingent on the exchange having approved rules in place. That is, several commenters recommended a phased implementation for starting the § 150.9 process to avoid a concentration of non-enumerated bona fide hedge applications at one time.[1074]

[1069] PMAA at 4; *see also* Better Markets at 63 (arguing that the standards for exchanges to grant non-enumerated bona fide hedge recognitions are too flexible and lack meaningful constraints).

[1070] PMAA at 4 (noting a concern that non-enumerated bona fide hedges would be granted outside of the notice and comment rulemaking process); IATP at 13–14; NEFI at 4.

[1071] *See generally supra* Sections II.B.2.iv.b. and II.G.2. (discussing studies that indicate that exchanges are incentivized to maintain market integrity).

[1072] *See infra* Final Rule § 150.5(a)(2)(ii)(G).

[1073] *See* 17 CFR 37.600 and 38.300.

[1074] *See* ICE at 9; IFUS at 7; CMC at 12; Shell at 4; FIA at 18; Chevron at 16; and CEWG at 27. *See*

Commenters suggested starting the process either six months prior to the effective date or permitting phased compliance for six months after the effective date of the Final Rule.

iii. Discussion of Final Rule—Approval of Exchange Rules Related to the Application Submission Process for Non-Enumerated Bona Fide Hedging Transactions or Positions

The Commission is finalizing § 150.9(a) with the clarifications and rewording changes described below. As explained in the Proposal, the Commission's pre-approval of an exchange's standards and process for review of non-enumerated bona fide hedge applications ensures that the exchange's determination is based on the Commission's applicable standards and process, allowing the Commission to leverage off exchange determinations in conducting the Commission's own, independent review.

While the Commission has determined, as described above, to extend the compliance period with respect to certain obligations under this Final Rule,[1075] exchanges may start, but are not required, to implement and begin processing non-enumerated bona fide hedge applications under § 150.9 as early as the Effective Date of the Final Rule.[1076] The Commission reminds exchanges that, to implement § 150.9, they will first need to submit new or amended rules to the Commission, pursuant to the existing rule-approval process in § 40.5 (which could take up to 45–90 days or longer, as agreed to by the exchange) before they exchanges can begin processing applications under § 150.9.

Finally, the Commission clarifies that market participants with existing Commission-granted non-enumerated or anticipatory bona fide hedge recognitions (other than risk management exemptions) are *not* required to reapply to the Commission for a new recognition under the Final Rule. That is, if the Commission previously issued a non-enumerated or anticipatory bona fide hedge recognition for one of the nine legacy agricultural contracts pursuant to existing § 1.47 or § 1.48, as applicable, a market participant is not required, under the Final Rule, to reapply to the Commission for such recognition pursuant to final § 150.3 or § 150.9.

In addition, the Commission is making a technical change by rewording § 150.9(a) to clarify that exchanges must seek approval, using the Commission's rule approval process in existing § 40.5, to implement their rules establishing application processes under § 150.9.

4. Section 150.9(b)—Prerequisites for an Exchange To Recognize Non-Enumerated Bona Fide Hedges in Accordance With This Section

i. Summary of 2020 NPRM—Prerequisites for an Exchange To Recognize Non-Enumerated Bona Fide Hedges

Proposed § 150.9(b) set forth conditions that would require an exchange-recognized bona fide hedge to conform to the corresponding definitions and standards the Commission uses in proposed §§ 150.1 and 150.3 for purposes of the Federal position limits regime. Proposed § 150.9(b) would require the exchange to meet the following conditions: (i) The exchange lists the applicable referenced contract for trading; (ii) the position is consistent with both the definition of bona fide hedging transaction or position in proposed § 150.1 and existing CEA section 4a(c)(2); and (iii) the exchange does not recognize as bona fide hedges any positions that include commodity index contracts and one or more referenced contracts, including exemptions known as risk management exemptions.[1077]

ii. Comments and Summary of Commission Determination—Prerequisites for an Exchange To Recognize Non-Enumerated Bona Fide Hedges

The Commission did not receive any comments on proposed § 150.9(b) and is finalizing this section as proposed, for reasons stated above with respect to § 150.9(b), and with only minor grammatical edits to change certain words to a singular tense.

5. Section 150.9(c)—Application Process

Proposed § 150.9(c) set forth the information and representations that the exchange, at a minimum, would be required to obtain from applicants as part of the § 150.9 application process. Proposed § 150.9(c) would permit exchanges to rely upon their existing application forms and processes in making such determinations, provided that they collect the information outlined below. The following sections summarize each sub-section of proposed § 150.9(c) as well as comments received and the Commission's determination on each sub-section.

i. Section 150.9(c)(1)—Required Information for Non-Enumerated Bona Fide Hedging Positions

a. Summary of 2020 NPRM—Required Information for Non-Enumerated Bona Fide Hedging Positions

With respect to bona fide hedging positions in referenced contracts, proposed § 150.9(c)(1) would require that any application include: (i) A description of the position in the commodity derivative contract for which the application is submitted (which would include the name of the underlying commodity and the position size); (ii) information to demonstrate why the position satisfies CEA section 4a(c)(2) and the definition of bona fide hedging transaction or position in proposed § 150.1, including "factual and legal analysis;" (iii) a statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted (in order to provide a view of the true footprint of the position in the market); (iv) information regarding the applicant's activity in the cash markets for the commodity underlying the position for which the application is submitted;[1078] and (v) any other information the exchange requires, in its discretion, to enable the exchange and the Commission to determine whether such position should be recognized as a bona fide hedge.[1079]

In the 2020 NPRM, the Commission noted that exchanges would not need to require the identification of a hedging need against a particular identified

*also* CME Group at 8 (supporting a 12-month compliance date, but suggesting that the Commission work with exchanges to implement a rolling process where market participants are "grandfathered into current exchange approved exemptions they hold today, permitting them to file for those exemptions on the same annual schedule").

[1075] *See supra* Section I.D. (discussing the effective and compliance dates for the Final Rule).

[1076] *Id.*

[1077] The Commission finds that financial products are not substitutes for positions taken or to be taken in a physical marketing channel. Thus, the offset of financial risks arising from financial products would be inconsistent with the definition of bona fide hedging transactions or positions for physical commodities in proposed § 150.1. *See supra* Section II.A.1. (discussion of the temporary substitute test and risk-management exemptions).

[1078] The Commission expects that exchanges would require applicants to provide cash-market data for at least the prior year.

[1079] Under proposed § 150.9(c)(1)(iv) and (v), exchanges, in their discretion, could request additional information as necessary, including information for cash-market data similar to what is required in the Commission's existing Form 204. *See infra* Section II.H.2. (discussion of Form 204 and amendments to part 19). Exchanges could also request a description of any positions in other commodity derivative contracts in the same commodity underlying the commodity derivative contract for which the application is submitted. Other commodity derivatives contracts could include other futures contracts, option on futures contracts, and swaps (including OTC swaps) positions held by the applicant.

category, but that the requesting party must satisfy all applicable requirements in proposed § 150.9, including demonstrating with a factual and legal analysis that a position would fit within the bona fide hedge definition. The 2020 NPRM was not intended to require the hedging party's books and records to identify the particular type of hedge being applied.

b. Comments—Required Information for Non-Enumerated Bona Fide Hedging Positions

The Commission received few comments related to the application requirements exchanges must implement under proposed § 150.9(c)(1). Some commenters requested that the Commission remove the requirement that the exchange applications implemented under proposed § 150.9(c)(1)(ii) require a ''factual and legal analysis'' from applicants.[1080] Another commenter requested that the Commission clarify any additional factors exchanges should consider when granting non-enumerated bona fide hedge applications pursuant to proposed § 150.9.[1081]

c. Discussion of Final Rule—Required Information for Non-Enumerated Bona Fide Hedging Positions

The Commission is adopting § 150.9(c)(1), with certain revisions and clarifications, explained below. The information required to be submitted as part of the application is necessary to allow the exchange and the Commission to evaluate whether the applicant's hedging position satisfies the bona fide hedge definition in proposed § 150.1 and CEA section 4a(c)(2).

The Commission is making one modification to clarify the Commission's posture when reviewing non-enumerated bona fide hedge applications under the § 150.9 process. In proposed § 150.9(c)(1) the Commission proposed to require exchanges to collect sufficient information for the exchange to determine and the Commission to ''verify'' that the facts and circumstances demonstrate that the exchange may recognize a position as a bona fide hedge. In final § 150.9(c)(1), the Commission is revising this provision to make clear that the Commission will conduct an independent evaluation of any application it reviews to ''determine'' (not verify) whether the facts and circumstances demonstrate that the exchange may recognize the position as a bona fide hedge. Likewise, the Commission is also revising final § 150.9(c)(1)(v), to require that exchanges collect any other information they deem necessary to ''determine'' (not ''verify'' as proposed) whether a particular position meets the bona fide hedge definition. The term ''determine'' more accurately describes the exchange's responsibility to conduct an independent evaluation of each application, as opposed to a verification, as proposed.

In final § 150.9(c)(1)(ii), the Commission is modifying the requirement from proposed § 150.9(c)(1)(ii) that exchanges request a ''factual and legal'' analysis from applicants for non-enumerated bona fide hedge recognitions. In proposing this requirement, the Commission did not intend for exchanges to require that applicants engage legal counsel to complete their applications for non-enumerated bona fide hedge recognitions. Rather, the purpose of this proposed provision was to ensure that applicants provide an explanation and information that sufficiently demonstrates why a particular position qualifies as bona fide hedge, as defined in § 150.1 and CEA section 4a(c)(2). Instead of requiring a ''factual and legal analysis,'' the Commission has revised § 150.9(c)(1)(ii) in the Final Rule accordingly so that an applicant must provide an explanation of the hedging strategy, including a statement that the applicant's position complies with the applicable requirements of the bona fide hedge definition, and information to demonstrate why the position satisfies the applicable requirements. This revision is intended to clarify that the applicant is not required to provide a detailed legal analysis or engage legal counsel to complete their application. Rather, the applicant must provide: (1) A simple explanation or description of the hedging strategy (and include a statement that the strategy complies with the bona fide hedge definition requirements); and (2) the relevant information that shows why or how the strategy meets the bona fide hedge definition requirements. The exchange can then consider this explanation and information in light of its expertise with the relevant market in performing its own analysis.

Also, under § 150.9(c)(1), regarding the request that the Commission provide additional factors that exchanges should consider when granting non-enumerated bona fide hedge recognitions, the Commission believes that the requirements under final § 150.9(c) provide sufficient criteria for exchanges to consider when evaluating applications. As stated in the 2020 NPRM, the Commission believes the information an exchange is required to collect under § 150.9(c) is sufficient for the exchange and the Commission to determine whether a particular transaction or position satisfies the definition of bona fide hedging transaction for purposes of Federal position limits. The Commission further highlights that, under final § 150.9(c)(1)(v), an exchange has the authority to collect any additional information that, in its discretion, would help it assess whether to approve a request for a non-enumerated bona fide hedge recognition. Further, in response to ISDA's request, an exchange is required by § 150.5(a)(2)(ii)(G) to consider some of the factors ISDA recommended when determining whether to grant an exemption, including whether the approval of an exemption would result in positions that are in accord with sound commercial practices, among other considerations.[1082] In summary, the Commission believes that the final regulations strike the proper balance by providing sufficient guidance to the exchanges for their review and determination in the context of exchange-set limits, while preserving the exchanges' discretionary authority to determine what types of additional information, if any, to collect.

In addition to the revisions and explanations above, the Commission is adding the word ''needed'' to § 150.9(c)(1) to clarify that exchanges may collect all information needed to conduct their analysis of a particular application.

[1080] CME Group at 10 (noting its concern that this requirement could be interpreted as requiring applicants to engage legal counsel to complete their applications. CME Group stated that by way of background, CME Group exchanges have never required detailed legal or economic analysis to demonstrate compliance with regulatory requirements. Instead, CME Group requires the applicant to explain its strategy, and CME Group considers and analyzes this explanation using the exchange's expertise. CME Group recommends that the CFTC instead require an applicant to ''explain its strategy and state that it complies with the regulatory requirements for a bona fide hedge exemption without having to provide a legal analysis.'' The exchange can solicit additional information from the applicant as needed.) and CMC at 11 (providing that, in the alternative, the Commission could clarify that exchanges or the Commission might request legal analyses at their discretion, which may be in the form of analysis provided by in-house counsel).

[1081] *See* ISDA at 9 (requesting that the final rule include factors exchanges should consider, such as ''sound commercial practices'' or ''necessary and appropriate to reduce potential threat of market manipulation'').

[1082] *See supra* Section II.D.3. (addressing other factors exchanges must consider, under § 150.5(a)(2)(ii)(G), when granting exemptions for contracts that are subject to Federal position limits).

ii. Section 150.9(c)(2)—Timing of Non-Enumerated Bona Fide Hedge Application

a. Summary of 2020 NPRM—Timing of Non-Enumerated Bona Fide Hedge Application

The Commission did not propose to prescribe timelines (*e.g.,* a specified number of days) for exchanges to review applications because the Commission believed that exchanges are in the best position to determine how to best accommodate the needs of their market participants. Rather, under proposed § 150.9(c)(2), an applicant must submit its application in advance of exceeding the applicable Federal position limits for any given referenced contract.

However, the 2020 NPRM would permit a person to submit a bona fide hedge application within five days after the person has exceeded Federal speculative limits (commonly referred to as retroactive applications) if such person exceeds the limits due to ''demonstrated sudden or unforeseen increases in its bona fide hedging needs.'' Where an applicant claims a sudden or unforeseen increase in its bona fide hedging needs, the 2020 NPRM would require exchanges to require that the person provide materials demonstrating that the person exceeded the Federal speculative limit due to sudden or unforeseen circumstances. Further, in the 2020 NPRM, the Commission cautioned exchanges that applications submitted after a person has exceeded Federal position limits should not be habitual and would be reviewed closely. Finally, if the Commission found that the position did not qualify as a bona fide hedge, then the applicant would be required to bring its position into compliance, and could face a position limits violation if it did not reduce the position within a commercially reasonable time.

b. Comments—Timing of Non-Enumerated Bona Fide Hedge Application

The Commission received several comments regarding the retroactive application provision in proposed § 150.9(c)(2)(ii). CME preferred allowing retroactive application exemptions that are *not* limited to circumstances involving sudden/unforeseen increases in bona fide hedging needs.[1083] Instead, CME Group recommended that the Commission (i) allow retroactive applications regardless of the circumstances, and (ii) impose a position limits violation upon an applicant if the exchange denies the retroactive application.[1084] ICE recommended that the Commission permit retroactive exemptions for other types of exemptions (including spread exemptions and pass-through-swap exemptions) as well as for position limit overages that occur as a result of operational or incidental issues where the applicant did not intend to evade position limits.[1085] Finally, IFUS supported the retroactive application provision as it was proposed.[1086] IFUS noted that it follows a similar approach under its existing rules.[1087]

c. Discussion of Final Rule—Timing of Non-Enumerated Bona Fide Hedge Application

The Commission is adopting § 150.9(c) largely as proposed, with certain modifications and clarifications to reflect commenters' views and other considerations. First, the Commission is revising Final Rule § 150.9(c)(2)(i) so that it is consistent with changes the Commission is making to § 150.9(e)(3), discussed further below.[1088] As explained below, under Final Rule § 150.9(e)(3),[1089] applicants may elect (at their own risk) [1090] to exceed Federal position limits after an exchange notifies the Commission of the exchange's approval of the application for purposes of exchange-set limits,[1091] and during the Commission's 10-day review period. This is a change from the 2020 NPRM under which a person would be required to wait until the Commission's 10-day review period expired before exceeding Federal position limits. Proposed § 150.9(c)(2)(i) was drafted in a manner that reflects this proposed requirement. Accordingly, the Commission is revising § 150.9(c)(2)(i) to clarify that an applicant may exceed Federal position limits after receiving a notice of approval from the relevant designated contract market or swap execution facility.

Next, the Commission has determined *not* to expand the retroactive application provision in § 150.9(c)(2)(ii) to be available in any circumstances (*i.e.,* not just for sudden or unforeseen hedging needs) or for other exemption types. The Final Rule provides broad flexibility to market participants in the form of various exemptions from Federal position limits. In particular, this Final Rule significantly expands the list of self-effectuating enumerated bona fide hedges available to market participants,[1092] provides an expansive spread transaction exemption provision,[1093] and provides new exemptions for relief for financial distress positions and conditional spot month limits for certain natural gas positions.[1094] This Final Rule also grants additional flexibility for market participants to exceed Federal position limits during the pendency of the Commission's review of the application. Given these additional enhancements to the Federal position limits framework for bona fide hedges and other exemptions, the Commission expects that there will be a limited number of non-enumerated bona fide hedge requests submitted through the § 150.9 process and that it is reasonable to expect that market participants will be able to file any such non-enumerated bona fide hedge requests ahead of needing to exceed limits.

The Commission is willing to permit the limited exception for retroactive applications that occur due to sudden or unforeseen bona fide hedging needs, as described above. Otherwise, market participants would be penalized and prevented from assuming appropriate hedges even though their hedging need arises from circumstances beyond their

[1083] CME Group at 9–10 (explaining that in its experience, position limit violations ''often occur unintentionally due to operational or administrative oversight, not because the market participant needed to enter into a hedge quickly in response to changing market conditions'' and that over the past three years, CME Group has received at least 49 retroactive exemption applications to address some type of administrative oversight issue); *See also* CMC at 11 (agreeing with CME Group), and FIA at 18 (recommending the Commission allow retroactive exemptions within five business days for any reason).

[1084] CME Group at 9–10 (explaining that without the threat of a potential position limits violation, market participants could exploit the retroactive provision and intentionally exceed position limits without consequences—''all while disrupting orderly market operations.'' According to CME Group, the prospect of having an application denied and being found in violation of position limits has worked to deter market participants from attempting to exploit the retroactive exemption process).

[1085] ICE at 10.

[1086] IFUS at 13–14.

[1087] *Id.*

[1088] *See infra* Section II.G.7. (discussing when a person may exceed Federal position limits).

[1089] *Id.*

[1090] *See infra* Section II.G.7.ii. (explaining that an applicant bears the risk that the Commission could deny the application and require the person to bring their position into compliance with Federal position limits).

[1091] The Commission clarifies, for the avoidance of doubt, that an exchange approval of a non-enumerated bona fide hedge (for purposes of exchange limits) issued under § 150.9 is not a Commission approval of the non-enumerated bona fide hedge.

[1092] *See supra* Section II.A.1. (discussing the expanded list of enumerated bona fide hedges in Appendix A).

[1093] *See supra* Section II.A.20. (discussing the expanded spread transaction definition in § 150.1).

[1094] *See supra* Section II.C.5–6. (discussing the financial distress exemption and the conditional spot month limit exemption in natural gas).

control. Beyond that exception, the Commission believes that market participants are able, and should be required, to file timely applications. The Commission believes this is particularly true for trading strategies that are not enumerated bona fide hedges and thus may involve some element of non-risk reducing activity. Expanding the exception beyond bona fide hedging needs that arise due to sudden or unforeseen circumstances may dis-incentivize market participants from properly monitoring their hedging activities and filing exemption applications in a timely manner.

iii. Section 150.9(c)(3)—Renewal of Applications for Non-Enumerated Bona Fide Hedges

a. Summary of 2020 NPRM—Renewal of Applications for Non-Enumerated Bona Fide Hedges

Proposed § 150.9(c)(3) would require that the exchange require persons with approved non-enumerated bona fide hedges that were previously granted pursuant to proposed § 150.9 to reapply to the exchange at least on an annual basis by updating their original applications. Proposed § 150.9(c)(3) would also require that the exchange require applicants to receive a notice of approval of the renewal from the exchange prior to exceeding the applicable position limit.

b. Comments—Renewal of Applications for Non-Enumerated Bona Fide Hedges

Several commenters requested a clarification that an applicant (i) would only be subject to the Commission's 10/2-day review process in § 150.9(e) (described below) for initial applications for non-enumerated bona fide hedge recognitions, and (ii) would not be subject to such review for annual renewal applications, unless the facts and circumstances materially change from those presented in the initial application.[1095]

c. Discussion of Final Rule—Renewal of Applications for Non-Enumerated Bona Fide Hedges

The Commission is adopting § 150.9(c)(3) with modifications to clarify that the Commission's review and determination conducted under final § 150.9(e) is required only for *initial* applications for non-enumerated bona fide hedge recognitions. The Commission is also clarifying that, except as provided below, renewals of previously-approved non-enumerated bona fide hedge applications are not required to be submitted to the Commission under § 150.9, and need only be submitted to and approved by the relevant exchange at least on an annual basis for the applicant to continue relying on such recognition for purposes of Federal position limits. Such renewal application serves the purpose of confirming that the facts and circumstances underlying the original application approved by the Commission remain operative. However, if the facts and circumstances underlying a renewal application are materially different than the initial application, then such application should be treated as a new request that should be submitted through the § 150.9 process and subject to the Commission's 10/2-day review process in § 150.9(e).

iv. Section 150.9(c)(4)—Exchange Revocation Authority

a. Summary of the 2020 NPRM—Exchange Revocation Authority

Proposed § 150.9(c)(4) would require that an exchange retain its authority to limit, condition, or revoke, at any time, any recognition previously issued pursuant to proposed § 150.9, for any reason, including if the exchange determines that the recognition is no longer consistent with the bona fide hedge definition in proposed § 150.1 or section 4a(c)(2) of the Act.

b. Comments and Summary of the Commission Determination—Exchange Revocation Authority

The Commission did not receive comments on proposed § 150.9(c)(4) and is finalizing this section as proposed.

6. Section 150.9(d)—Recordkeeping

i. Summary of the 2020 NPRM—Recordkeeping

Proposed § 150.9(d) would require exchanges to maintain complete books and records of all activities relating to the processing and disposition of applications in a manner consistent with the Commission's existing general regulations regarding recordkeeping.[1096] Such records would need to include: All information and documents submitted by an applicant in connection with its application; records of oral and written communications between the exchange and the applicant in connection with the application; and information and documents in connection with the exchange's analysis of, and action on, such application. Exchanges would also be required to maintain any documentation submitted by an applicant after the disposition of an application, including, for example, any reports or updates the applicant files with the exchange.

ii. Comments—Recordkeeping

The Commission received one comment regarding exchange recordkeeping requirements under proposed § 150.9. NGSA requested that any exchange recordkeeping/reporting requirements that apply to the proposed § 150.9 process do not require matching applicants' hedge positions to their underlying cash positions on a one-to-basis, but should instead allow for recordkeeping/reporting of positions on an aggregate basis.[1097]

iii. Discussion of Final Rule—Recordkeeping

The Commission is adopting § 150.9(d) as proposed, and with only one minor grammatical edit to change the term ''designated contract market'' to the correct possessive tense. The Commission also clarifies here, in response to comments, that the § 150.9(d) recordkeeping requirements do not prescribe the manner in which exchanges record how they match applicants' bona fide hedge positions to applicants' underlying cash positions. Rather, final § 150.9(c)(1)(iv) requires that an exchange collect the necessary information regarding an applicant's cash-market activity and offsetting cash positions, and final § 150.9(d) simply requires the exchange to keep a record of such application materials and information collected. However, an exchange's records should be sufficient to demonstrate that any approved non-enumerated bona fide hedges meet the requirements of § 150.9(b). The Commission also reiterates, as explained in the 2020 NPRM, that exchanges are required to store and produce records pursuant to existing § 1.31,[1098] and will

[1095] CEWG at 27; MGEX at 3; CME Group at 8; FIA at 17; ICE at 9; and IFUS at 7 (further requesting that if a non-enumerated bona fide hedge is granted, a participant should be able to treat similar positions as bona fide hedges so long as they re-apply to the exchange through the annual renewal process).

[1096] Requirements regarding the keeping and inspection of all books and records required to be kept by the Act or the Commission's regulations are found at § 1.31. 17 CFR 1.31. DCMs are already required to maintain records of their business activities in accordance with the requirements of § 1.31 and § 38.951. 17 CFR 38.951.

[1097] *See* NGSA at 9 (noting that allowing matching on an aggregate basis would accommodate the practical needs of many market participants to hedge their risks on a portfolio basis).

[1098] Consistent with existing § 1.31, the Commission expects that these records would be readily available during the first two years of the required five-year recordkeeping period for paper records, and readily accessible for the entire five-year recordkeeping period for electronic records. In addition, the Commission expects that records required to be maintained by an exchange pursuant to this section would be readily accessible during be subject to requests for information pursuant to other applicable Commission regulations, including, for example, existing § 38.5.[1099]

7. Section 150.9(e)—Process for a Person To Exceed Federal Position Limits

The following discussion summarizes proposed § 150.9(e), comments received, and the Commission's determination according to each sub-section, or a combination of certain subsections, of § 150.9(e).

i. Section 150.9(e)(1)–(2)—Notification to the Commission and Notification Requirements

a. Summary of the 2020 NPRM—Notification to the Commission and Notification Requirements

Under proposed § 150.9(e)(1), once an exchange recognizes a non-enumerated bona fide hedge with respect to its own exchange-set position limits established pursuant to § 150.5(a), the exchange would be required to notify the Commission concurrently with the approval notice it provides to the applicant. Under proposed § 150.9(e)(2), such notification to the Commission would need to include a copy of the application and any supporting materials, as well as certain basic information, outlined in § 150.9(e)(2)(i)–(vi), about the exemption. The exchange would only be required to provide this notice to the Commission with respect to its initial (and not renewal) determination for a particular application.

b. Comments—Notification to the Commission and Notification Requirements

While proposed § 150.9(e)(1) would require an exchange to notify the Commission upon making an initial determination to recognize a non-enumerated bona fide hedge, that rule would not require the exchange to notify the public of any such determination. Commenters submitted several general requests related to the publication of non-enumerated bona fide hedges and the future expansion of the list of enumerated bona fide hedges in Appendix A to the proposed regulatory text in the 2020 NPRM. Specifically, certain commenters requested that exchanges be required to publicize approved non-enumerated bona fide hedge recognitions so that market participants are aware of the types of recognitions they can receive.[1100]

c. Discussion of Final Rule—Notification to the Commission and Notification Requirements

The Commission has determined to finalize § 150.9(e)(1)–(2) as proposed. While the Final Rule does not require exchanges to publicize approved non-enumerated bona fide hedge recognitions, an exchange may elect, in its discretion, to provide such a list. The Commission understands, however, that in the past, exchanges and market participants have raised concerns that publicizing information about approved non-enumerated bona fide hedges could divulge confidential information (such as trade secrets, intellectual property, the market participant's identity or position).[1101]

To the extent that an exchange elects to publicize descriptions of approved non-enumerated bona fide hedges, the Commission cautions that any such data published should not disclose the identity of, or confidential information about, the applicant. Rather, any published summaries are expected to be general (generic facts and circumstances). While the decision whether to publicize descriptions of approved non-enumerated bona fide hedges is at the discretion of the exchange, the exchange remains subject to all applicable laws and regulations (including exchange bylaws) governing the protection of confidential trade and trader information. The Commission also cautions exchanges to make clear that any descriptions or lists of approved non-enumerated bona fide hedges they elect to publish are for informational purposes only and do not bestow any rights upon applicants to a claim that a particular strategy is a non-enumerated bona fide hedge simply because it aligns with a published example or description provided by the exchange.

ii. Section 150.9(e)(3)–(4)—Exceeding Federal Speculative Position Limits and the Commission's 10/2-Day Review Process

a. Summary of the 2020 NPRM—Exceeding Federal Speculative Position Limits and the Commission's 10/2-Day Review Process

Under proposed § 150.9(e)(3), a person could exceed Federal position limits ten business days after the exchange notifies the Commission in accordance with proposed § 150.9(e)(2) that the exchange has approved the non-enumerated bona fide hedge application for purposes of exchange limits, provided that the Commission does not notify the exchange or applicant that the Commission has determined to stay or deny the application during its ten-day review.

Under proposed § 150.9(e)(4), if a person exceeds Federal position limits due to sudden or unforeseen bona fide hedging needs and then files a retroactive application pursuant to proposed § 150.9(c)(2)(ii), then such application would be deemed approved by the Commission two business days after the exchange issues the required notification, provided that the Commission does not notify the exchange or applicant that the Commission has determined to stay or deny the application during its two-day review.

Under the 2020 NPRM, once those ten (or two) business days have passed, the person could rely on the bona fide hedge recognition both for purposes of exchange-set and Federal position limits, with the certainty that the Commission (and not Commission staff) would only revoke that determination in the limited circumstances set forth in proposed § 150.9(f)(1) and (2) described further below.

b. Comments—Exceeding Federal Speculative Position Limits and the Commission's 10/2-Day Review Process

The bulk of the comments the Commission received on proposed § 150.9 relate to the Commission's proposed ten-day or two-day period for reviewing a non-enumerated bona fide hedge application after an exchange has already approved the application for purposes of the exchange-set limits (as noted above,[1102] the 10/2-day review). In particular, the Commission received several comments on the sufficiency of the proposed review periods, including that the Commission's proposed 10/2-

the pendency of any application, and for two years following any disposition that did not recognize a derivative position as a bona fide hedge.

[1099] *See* 17 CFR 38.5 (requiring, in general, that upon request by the Commission, a DCM must file responsive information with the Commission, such as information related to its business, or a written demonstration of the DCM's compliance with one or more core principles).

[1100] *See* COPE at 5 (noting that such notice should provide market participants the facts upon which the recognition is based, and would save the Commission from repeatedly processing requests for the same hedging strategy); FIA at 15, 19 (requesting that exchanges be required to publish anonymized descriptions of non-enumerated hedging recognitions granted by the exchange); EPSA at 5–7.

[1101] *See* 81 FR at 96824.

[1102] *See supra* Section II.G.

day review period is: (1) Too long; [1103] (2) too short; [1104] and (3) just right.[1105]

In addition, several commenters suggested that the Commission permit applicants to exceed Federal position limits during the Commission's ten-day review period (which occurs after an exchange issues its approval with respect to exchange-set limits).[1106] Commenters also suggested that rather than the CFTC reviewing each non-enumerated bona fide hedge exemption application after each exchange determination, the CFTC should monitor exchanges at a higher level (such as through the rule enforcement review process).[1107]

c. Discussion of Final Rule—Exceeding Federal Speculative Position Limits and the Commission's 10/2-Day Review Process

The Commission is adopting § 150.9(e)(3)–(4) with certain revisions and clarifications as discussed below.

First, regarding general comments on the length of the Commission's 10/2-day review periods, the Commission acknowledges commenters' concerns regarding whether the Commission will have enough time to review and act on non-enumerated bona fide hedge applications. However, the Commission will continue to develop internal processes and systems to respond to § 150.9 applications as needed and within those timeframes. In addition, the § 150.9 process enables the Commission to leverage the exchange's review and analysis, which would serve to inform the Commission's own review. The Commission believes that this streamlined approach will reduce the amount of time required for the Commission's review each application.

In addition, regarding comments suggesting that the 10/2-day review periods are too long and will impose unnecessary delays on market participants, and the request that market participants be able to exceed Federal position limits during the Commission's 10-day review, the Commission is revising proposed § 150.9(e)(3) to provided additional flexibility. Under § 150.9(e)(3), applicants may elect to exceed Federal position limits once they receive a notice of approval from the relevant exchange and during the Commission's 10-day review period, but will do so at their own risk.

That is, if an applicant exceeds Federal position limits before the Commission's 10-day review period ends, the applicant bears market risk for that position, in that the Commission could, in accordance with § 150.9(e)(6) described below, deny the application for purposes of Federal position limits and require the applicant to bring its position back into compliance with the Federal position limits within a commercially reasonable amount of time, as determined by the Commission in consultation with the relevant exchange and applicant. As discussed below in connection with § 150.9(e)(6), in these circumstances where an applicant is required to lower its position, as a matter of policy, the Commission will not pursue an enforcement action against the applicant so long as the application was filed in good faith (meaning the applicant and exchange have a reasonable and good faith basis for determining that the position meets the requirements of § 150.9(b)) and the applicant brings its position into compliance within a commercially reasonable amount of time.

Further, regarding general comments that the length of the 10/2-day review period is too long, the Commission believes allowing applicants to exceed Federal position limits during the Commission's ten-day review period addresses many commenter concerns. As described above, the Final Rule also affords applicants the ability to file retroactive applications in certain limited circumstances, and to hold positions above Federal position limits during the Commission's two-day review of such retroactive application. The Commission believes that these avenues adequately accommodate market participants' needs to hedge in a timely manner, and are well-balanced with the Commission's need to maintain adequate oversight of non-enumerated bona fide hedge applications through its limited 10/2-day review periods.

Furthermore, the Commission would consider it to be a reasonable and helpful practice if exchanges elect to provide information to the Commission on non-enumerated bona fide hedge applications as the exchange is considering such applications. That is, the Commission would find it helpful to receive an advance courtesy copy of any § 150.9 applications the exchange receives. The exchange is not, however, required to provide such advance copies, and would not be required to obtain an opinion on such applications from the Commission before making its determination. Rather, providing such application information as the exchange receives it could facilitate a more rapid Commission evaluation of § 150.9 applications. This would help facilitate additional regulatory certainty for market participants and would aid the Commission in its review of applications processed under § 150.9.

Also, while commenters requested that the Commission should not review each non-enumerated bona fide hedge application, the Commission is of the view that it must review each application in order to conform to the legal limits on what an agency may delegate to persons outside the agency.[1108] Under the new model finalized herein, the Commission will be informed by the exchanges' determinations to make the Commission's own determination for purposes of Federal position limits before the 10/2-day review period expires. Accordingly, the Commission will retain its decision-making authority with respect to the Federal position limits and provide legal certainty to market participants of their determinations.

Finally, in § 150.9(e)(3) and (4), the Commission is making one technical correction to clarify that a person may exceed Federal position limits or rely on

[1103] ADM at 6 (suggesting a five/one business day review period); ICE at 9 (explaining that the 10-day review period would impose unnecessary burdens and delay and create uncertainty for market participants); IFUS at 14 (explaining that the 10-day review period potentially conflicts with the exchange's spot-month exemption review process, as contracts could expire before the review period ends, and noting that a two day review, although not ideal, is preferred); NGFA at 9 (suggesting a two-business-day review period).

[1104] IATP at 13–14 (contending that the 10/2-day review period would burden an under-resourced Commission); Better Markets at 3, 63 (asserting that, under proposed § 150.9, it is impossible for Commission staff to, within the prescribed amount of time: review and collect additional information on non-enumerated bona fide hedge applications; draft orders; receive the Chairman's approval for a seriatim process; and secure the necessary Commissioner votes).

[1105] CME Group at 7 (also agreeing that a timeline for exchanges' review of applications should not be prescribed).

[1106] ADM at 6; ICE at 9; IFUS at 7; CME Group at 7–8 (explaining that exchanges have ''strong incentives to grant exemptions only after careful review'' because they have statutory obligations to prevent manipulation); CMC at 12 (noting that it is currently unclear whether an applicant can enter into a position during the Commission's 10/2-day review).

[1107] ICE at 9; IFUS at 7 (questioning whether it is necessary for the Commission to routinely review each non-enumerated bona fide hedge application); CEWG at 26–27 (suggesting an annual exchange rule enforcement review process instead of the 10/2-day review).

[1108] In *U.S. Telecom Ass'n* v. *FCC,* the D.C. Circuit held ''that, while Federal agency officials may sub-delegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not sub-delegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.'' *U.S. Telecom Ass'n* v. *FCC,* 359 F.3d 554, 565–68 (D.C. Cir. 2004) (citations omitted). Nevertheless, there are three circumstances that the agency may ''delegate'' its authority to an outside party because they do not involve sub-delegation of decision-making authority: (1) Establishing a reasonable condition for granting Federal approval; (2) fact gathering; and (3) advice giving. *Id.* at 568.

an approved retroactive application after the 10/2-day review period, as applicable, unless the Commission notifies the person and relevant exchange that it has determined to stay or deny the application, pursuant to § 150.9(e)(5) *or* (e)(6). In the 2020 NPRM, the Commission only referred to its stay authority in § 150.9(e)(5), discussed in detail below. However, as clarified in the Final Rule, the Commission could also notify the applicant and exchange of its determination to deny the application for purposes of Federal position limits under § 150.9(e)(6), also discussed below. This change is a technical correction and does not change the substance of § 150.9(e)(3) or (4).

iii. Section 150.9(e)(5)—Commission Stay of Pending Applications and Requests for Additional Information

a. Summary of the 2020 NPRM—Commission Stay of Pending Applications and Requests for Additional Information

Under proposed § 150.9(e)(5), the Commission could stay a non-enumerated bona fide hedge application that an exchange has approved, pursuant to § 150.9(e)(2), for purposes of exchange-set limits. Under the 2020 NPRM, if, during the ten (or two) business day timeframe in § 150.9(e)(3) or (4), the Commission notifies the exchange and applicant that the Commission (and not staff) has determined to stay the application, the applicant would not be able to rely on the exchange's approval of the application for purposes of exceeding Federal position limits, unless the Commission approves the application after further review. The proposed stay provision did not include a time limitation on the duration of a Commission stay.

Separately, under proposed § 150.9(e)(5), the Commission (or Commission staff) could request additional information from the exchange or applicant in order to evaluate the application, and the exchange and applicant would have an opportunity to provide the Commission with any supplemental information requested to continue the application process. Any such request for additional information by the Commission (or staff), however, would not stay or toll the ten (or two) business day application review period.

b. Comments—Commission Stay of Pending Applications and Requests for Additional Information

With respect to instances where the Commission has stayed an exchange-granted non-enumerated bona fide hedge application or elects to review a previously approved-application, several commenters requested that the Commission limit the duration of its review period, which was unlimited in the 2020 NPRM.[1109]

c. Discussion of Final Rule—Commission Stay of Pending Applications and Requests for Additional Information

The Commission has determined to finalize § 150.9(e)(5) with certain modifications and clarifications in response to commenters and other considerations.

In response to commenters' requests, the Commission is modifying its stay authority under proposed § 150.9(e)(5). Under the Final Rule, any Commission stay issued pursuant to § 150.9(e)(5) will be limited to 45 days. The Commission has a long history of conducting other extensive regulatory reviews within a 45-day period.[1110] The Commission has found that this timeframe provides sufficient time for the Commission to conduct an adequate review while also providing certainty to market participants that the review will not be indefinite.

The Commission is also clarifying in final § 150.9(e)(5) that if the Commission stays a pending application where the applicant has not yet exceeded Federal position limits, then the applicant may not exceed Federal position limits until the Commission issues a final determination. Further, if the Commission stays a pending application and the applicant has already exceeded Federal position limits (either during the Commission's 10-day review period or as part of a retroactive application), then the applicant may continue to maintain its position unless the Commission notifies the designated contract market or swap execution facility and the applicant otherwise, pursuant to § 150.9(e)(6).

In addition to the changes above, the Commission is making several technical edits to improve readability, none of which impact the substance of the section.

iv. Section 150.9(e)(6)—Commission Determination for Applications During the 10/2-Day Review

The following discussion addresses § 150.9(e)(6), which deals with any Commission determinations that are issued for pending applications and during the Commission's 10/2-day review.

a. Summary of the 2020 NPRM—Commission Determination for Applications During the 10/2-Day Review

Under proposed § 150.9(e)(6), if the Commission determined that an application does not meet the conditions set forth in proposed § 150.9(b), the Commission would notify the exchange and the applicant and provide an opportunity for the applicant to respond. After doing so, the Commission could, in its discretion, deny the application for purposes of Federal position limits, and require the person to reduce the position within a commercially reasonable amount of time, as determined by the Commission in consultation with the applicant and the exchange.

In such a case, the applicant would not be subject to any finding of a position limits violation during the Commission's review of a pending application or after the Commission makes its determination. A person would also not be subject to a violation if they already exceeded Federal position limits and filed a retroactive application, and the Commission then determined that the bona fide hedge is not approved for purposes of Federal position limits. In either case, the 2020 NPRM provided that the Commission would not find that the person had committed a position limits violation so long as the person brings the position into compliance within a commercially reasonable time.

b. Comments—Commission Determination for Applications During the 10/2-Day Review

Commenters requested that the Commission allow traders sufficient time to exit a position if the Commission denies an exchange-approved non-enumerated bona fide hedge application before the end of the 10/2-day review period.[1111]

[1109] ICE at 9; FIA at 18; CME Group at 7 (suggesting that the Commission's stay or review of an application should not exceed 30 calendar days); IFUS at 15 (noting that any Commission stay will almost certainly conflict with IFUS procedures for reviewing exemptions in the spot month, where certain exemptions may be in effect for less than 10 days).

[1110] *See* 17 CFR 40.3 and 40.5 (providing the Commission's 45-day review period for new product and rule approval applications).

[1111] CMC at 12 (requesting a commercially reasonably amount of time to exit positions); ADM at 6 (requesting, in addition, that the Commission consult exchanges on what is a commercially

Continued

c. Discussion of Final Rule—Commission Determination for Applications During the 10/2-Day Review

The Commission has determined to finalize § 150.9(e)(6) with certain modifications and clarifications in response to commenters and other considerations.

First, for the avoidance of doubt and in response to comments, the Commission clarifies and reiterates how it will handle any determination to deny an application under final § 150.9(e)(6). Generally, if the Commission denies an application under § 150.9(e)(6), and the applicant consequently is required to reduce its position below the applicable Federal position limit, the Commission will allow the applicant a commercially reasonable amount of time to do so. The Commission will determine the commercially reasonable amount of time in consultation with the relevant exchange and the applicant. The Commission intends for the applicant and the relevant exchange to have input regarding what amount of time is sufficient.

Further, the Commission is clarifying for final § 150.9(e)(6) that it expects all applicants to submit their applications in good faith. As part of that good faith submission, the Commission expects each applicant will have a reasonable basis for determining that the purported non-enumerated bona fide hedge meets the requirements of § 150.9(b). Accordingly, the Commission is revising § 150.9(e)(6) to clarify that the Commission will not pursue an enforcement action for a position limits violation for the applicant holding the position if the applicant exceeds Federal position limits during the 10/2-day review and the Commission subsequently determines to deny the application, so long as: (1) The application was submitted to the exchange pursuant to § 150.9 in good faith, and (2) if required, the applicant reduces its positions within a commercially reasonable amount of time.

In addition, the Commission is making several non-substantive clarifications to final § 150.9(e)(6). The Commission is clarifying that this section deals with any Commission determination issued for pending applications during the 10/2-day review period (as opposed to Commission determinations issued under § 150.9(f) after the 10/2-day review period). The Commission is also adding language to clarify that the Commission must notify the applicant and relevant exchange of any determination within the 10/2-day review period. In addition, the Commission is adding language to clarify that § 150.9(e)(6) is not limited to Commission denials of applications; rather, the Commission could also determine to issue an approval with certain conditions or limitations that may be different from the approval issued by the exchange for purposes of exchange-set limits. Finally, the Commission is making various non-substantive technical and organizational changes to make the section more readable.

v. Section 150.9(e)—Recognition of Additional Enumerated Bona Fide Hedges

a. Summary of the 2020 NPRM—Recognition of Additional Enumerated Bona Fide Hedges

Proposed Appendix A to the Final Rule identified each of the enumerated bona fide hedges, and under the 2020 NPRM, the Commission's recognition of a non-enumerated bona fide hedge, pursuant to § 150.3 or § 150.9, would not add new bona fide hedges to the list of enumerated bona fide hedges in Appendix A.

b. Comments—Recognition of Additional Enumerated Bona Fide Hedges

Commenters requested that the Commission codify a path to move commonly granted non-enumerated bona fide hedge recognitions to the list of enumerated bona fide hedge recognitions in Appendix A.[1112]

c. Discussion of Final Rule—Recognition of Additional Enumerated Bona Fide Hedges

The Commission has determined to finalize the approach as proposed. Regarding a path forward for the Commission to expand the list of enumerated bona fide hedges to include certain non-enumerated bona fide hedges that are commonly granted, the Commission notes that it has an existing rulemaking process (which requires public notice and comment) to accomplish this. The Commission also clarifies, for the avoidance of doubt, that it remains open to expanding the list of enumerated hedges, as appropriate, but that the Commission would be required to do so under its existing rulemaking process subject to public notice and comment. Market participants are welcome to request that the Commission take up future rulemakings to amend the list of enumerated bona fide hedges.[1113]

8. Section 150.9(f)—Commission Revocation of an Approved Application

i. Summary of 2020 NPRM—Commission Revocation of an Approved Application

Proposed § 150.9(f) set forth the limited circumstances under which the Commission would revoke a previously-approved non-enumerated bona fide hedge recognition granted pursuant to proposed § 150.9. First, under proposed § 150.9(f)(1), if an exchange limits, conditions, or revokes its recognition of a non-enumerated bona fide hedge that was previously approved under § 150.9, then such bona fide hedge would also be deemed limited, conditioned, or revoked for purposes of Federal position limits.

Next, under proposed § 150.9(f)(2), if the Commission determines that an application that has been approved or deemed approved by the Commission is no longer consistent with the applicable sections of the Act and the Commission's regulations, the Commission could revoke the non-enumerated bona fide hedge recognition and/or require the person to reduce its position within a commercially reasonable time, or otherwise come into compliance.

Under proposed § 150.9(f)(2), if the Commission makes such determination, it would need to first notify the person holding the position and provide them with an opportunity to respond. The Commission would also provide a notification briefly explaining the nature of the issues raised and the regulatory provision with which the position is inconsistent. If the Commission requires the person to reduce the position, the Commission would allow the person a commercially reasonable amount of time to do so, as determined by the Commission in consultation with the applicable exchange and applicant. Finally, under the 2020 NPRM, the Commission would not find that the person has committed a position limit violation so long as the person comes into compliance within the commercially reasonable time.

reasonable amount of time for an applicant to exit a position); CME Group at 7–8.

[1112] *See* MGEX at 4; EPSA at 5–7; COPE at 5; FIA at 19 (noting that the process should be subject to the notice and comment rulemaking process); ICE at 10; and IFUS at 7 (requesting that such process also require Commission staff to provide an annual report to the Commission recommending non-enumerated bona fide hedges that should be enumerated).

[1113] Market participants may petition the Commission to expand the list of enumerated bona fide hedges under existing § 13.1, which provides that any ''person may file a petition with . . . the Commission . . . for the issuance, amendment or repeal of a rule of general application.''

ii. Comments—Commission Revocation of an Approved Application

Commenters' views on proposed § 150.9(f) tended to overlap with their views on the Commission's determination authority under § 150.9(e)(6) (discussed above). In particular, commenters requested that the Commission allow traders sufficient time to exit a position if the Commission revokes a previously approved non-enumerated bona fide hedge recognition.[1114] Commenters also requested that the Commission further clarify that an applicant will not be penalized for relying on an approved non-enumerated bona fide hedge recognition if the Commission later revokes such approval after the 10/2-day review period.[1115]

iii. Discussion of Final Rule—Commission Revocation of an Approved Application

The Commission has determined to finalize § 150.9(f) with certain modifications and clarifications in response to commenters and other considerations.

First, under the Final Rule, if the Commission limits, conditions, or revokes a previously approved non-enumerated bona fide hedge recognition under § 150.9(f)(2), and the applicant consequently is required to reduce its position below the applicable Federal position limit, the Commission will allow the applicant a commercially reasonable amount of time to do so. The Commission will determine the commercially reasonable amount of time in consultation with the relevant exchange and the applicant. The Commission intends for the applicant and the relevant exchange to have input regarding what amount of time is sufficient.

Further, if the Commission limits, conditions, or revokes a previously approved non-enumerated bona fide hedge recognition under § 150.9(f)(2), the Commission will not pursue an enforcement action for a position limits violation for the person holding the position in excess of Federal position limits so long as the person: (1) Submitted its application pursuant to § 150.9 in good faith,[1116] and (2) if required, reduces the position within a commercially reasonable amount of time as determined by the Commission in consultation with the person and the relevant exchange.

The Commission is revising the title of final § 150.9(f) to clarify that this section is limited to revocations of non-enumerated bona fide hedges previously approved by the Commission. The Commission is also adding language to final § 150.9(f)(2)(i) (consistent with language in § 150.9(f)(1)) to clarify that, in addition to revoking a previously-granted non-enumerated bona fide hedge recognition, the Commission could alternatively determine to limit or condition a previously-granted recognition. The Commission believes that there could be circumstances where it would not need to completely revoke a previously-granted recognition, but instead may determine a less drastic measure is more appropriate to enable a market participant to achieve compliance with the applicable requirements. Finally, the Commission is revising § 150.9(f)(2)(iii) to include the same language that it added to § 150.9(e)(6) to explicitly make clear an underlying premise that the Commission will not pursue Federal position limits violations so long as any applications are filed in good faith. Finally, the Commission is making a number of technical and grammatical corrections in § 150.9(f) that are not substantive revisions.

In addition to the clarifications and modifications above, the Commission would like to reiterate the following explanations and guidance from the 2020 NPRM. The Commission expects for persons to be able to rely on non-enumerated bona fide hedge recognitions granted pursuant to § 150.9 with the certainty that the final determination would only be limited, conditioned, or revoked in very limited circumstances. The Commission expects that it (and not Commission staff) would only exercise such authority under rare circumstances where the disposition of an application has resulted, or is likely to result, in price anomalies, threatened manipulation, actual manipulation, market disruptions, or disorderly markets. The Commission also expects that any action compelling a market participant to reduce its position pursuant to § 150.9(f)(2) would be a rare Commission action, and such action is not delegated to Commission staff. In determining requirements for a person to reduce a position, the Commission may consult the person and relevant exchange, and may also consider factors such as current market conditions and the protection of price discovery in the market. Finally, for the avoidance of doubt, the Commission expects that its exercise of its authorities under § 150.9(f)(2) would not be subject to the requirements of CEA section 8a(9), that is, the Commission would not be compelled to find that a CEA section 8a(9) emergency condition exists prior to requiring that a market participant reduce certain positions.

9. Section 150.9(g)—Delegation of Authority to the Director of the Division of Market Oversight

i. Summary of the 2020 NPRM—Delegation of Authority to the Director of the Division of Market Oversight

The Commission proposed to delegate certain of its authorities under proposed § 150.9 to the Director of the Commission's Division of Market Oversight, or such other employee(s) that the Director may designate from time to time. Proposed § 150.9(g)(1) would delegate the Commission's authority, in § 150.9(e)(5), to request additional information from the exchange and applicant.

The Commission did not propose, however, to delegate its authority, in proposed § 150.9(e)(5) and (6) to stay or deny a non-enumerated bona fide hedge application. The Commission also did not delegate its authority in proposed § 150.9(f)(2) to revoke a non-enumerated bona fide hedge recognition granted pursuant to § 150.9, or to require an applicant to reduce its positions or otherwise come into compliance. The Commission stated that if an exchange's disposition of an application raises concerns regarding consistency with the CEA, presents novel or complex issues, or requires remediation, then the Commission (and not Commission staff) would make the final determination, after taking into consideration any supplemental information provided by the exchange or the applicant.

As with all authorities delegated by the Commission to staff, under the 2020 NPRM, the Commission would maintain the authority to consider any matter which has been delegated. The Commission stated in the 2020 NPRM that it intended to closely monitor staff administration of the proposed processes for granting non-enumerated bona fide hedge recognitions.

ii. Comments and Summary of the Commission Determination—Delegation of Authority to the Director of the Division of Market Oversight

The Commission did not receive comments on proposed § 150.9(g). The Commission is finalizing § 150.9(g) with one revision to reorganize certain text to improve readability. This update is not

[1114] CMC at 12 (requesting a commercially reasonable amount of time to exit positions); ADM at 6 (requesting, in addition, that the Commission consult exchanges on what is a commercially reasonably amount of time for an applicant to exit a position).

[1115] CMC at 12; ADM at 6.

[1116] *See supra* Section II.G.7. (providing additional discussion of the premise that a person submit their § 150.9 application in good faith).

intended to change the substance of this section.

*H. Part 19 and Related Provisions—Reporting of Cash-Market Positions*

1. Background

Key reports currently used for purposes of monitoring compliance with Federal position limits include Form 204 [1117] and Parts I and II of Form 304,[1118] known collectively as the ''series '04'' reports. Under existing § 19.01, market participants that hold bona fide hedging positions in excess of limits for the nine legacy agricultural contracts currently subject to Federal position limits must justify such overages by filing the applicable report each month: Form 304 for cotton, and Form 204 for the other commodities.[1119] These reports are: Generally filed after exceeding the Federal position limit; show a snapshot of such trader's cash positions on one given day each month; and are used by the Commission to determine whether a trader has sufficient cash positions to justify futures and options on futures positions above the speculative limits.

The existing series '04 reports are both duplicative of, and inconsistent with, the processes market participants use to report cash-market information to the exchanges. When granting exemptions from their own limits, exchanges do not use a monthly cash-market reporting framework akin to the '04 reports. Instead, exchanges generally require market participants who wish to exceed exchange-set limits, including for bona fide hedging positions, to submit an annual exemption application form in advance of exceeding the limits.[1120] Such applications are typically updated annually and generally include a month-by-month breakdown of cash-market positions for the previous year supporting any position-limits overages during that period.[1121]

2. Elimination of Form 204 and Cash-Reporting Elements of Form 304

i. Summary of the 2020 NPRM—Elimination of Form 204 and Cash-Reporting Elements of Form 304

The Commission proposed to eliminate existing Form 204. The Commission also proposed to eliminate Parts I and II of existing Form 304, which request information on cash-market positions for cotton akin to the information requested in Form 204.[1122] As discussed in the 2020 NPRM, the Commission believed that eliminating these forms would reduce duplicative reporting requirements for market participants without hindering the Commission's ability to access cash-market information, which the exchanges would be required to collect and provide to the Commission under proposed §§ 150.3, 150.5, and 150.9.[1123]

For a market participant accustomed to filing series '04 reports the 2020 NPRM would result in a slight change in practice. Under the 2020 NPRM, such participant's bona fide hedge recognitions could still be self-effectuating for purposes of Federal position limits, provided that the market participant also separately applies for a bona fide hedge exemption from exchange-set limits established pursuant to proposed § 150.5(a), discussed above, and provided further that the participant submits the requisite cash-market information to the exchange as required by proposed § 150.5(a)(2)(ii)(A).

ii. Summary of the Commission Determination—Elimination of Form 204 and Cash-Reporting Elements of Form 304

The Commission has carefully considered the comments received and is eliminating existing Form 204 and Parts I and II of existing Form 304 as proposed.

iii. Comments—Elimination of Form 204 and Cash-Reporting Elements of Form 304

Numerous commenters supported the elimination of the Form 204 and Parts I and II of the Form 304.[1124] In particular, several commenters supported the proposed streamlined process that eliminates duplicative reporting requirements to both the Commission and the exchanges.[1125] ISDA additionally recommended that the Commission rely on its special call authority and relevant exchange authority to request additional information on an as-need basis.[1126]

Three commenters opposed the elimination of the series '04 reports. In particular, AFR and Rutkowski expressed concern that eliminating Form 204 will delegate position limit oversight and enforcement responsibilities to the exchanges.[1127] These commenters contended that the exchanges are financially disincentivized from imposing limits on speculation because the exchanges profit from trading volume.[1128] Similarly, Better Markets also opposed the elimination of the series '04 reports, contending that Federal law provides more substantial deterrents for misreporting information on a form provided to Federal agencies such as the Commission.[1129]

Better Markets also commented that the reporting changes would increase the industry's overall reporting burdens because market participants would have to report information to multiple exchanges.[1130] Better Markets suggested that the Commission should instead ''ensure that all cash positions reporting is automated'' and ''amenable to aggregation'' in order to provide such information to the exchanges.[1131]

iv. Discussion of Final Rule—Elimination of Form 204 and Cash-Reporting Elements of Form 304

The Commission is eliminating Form 204 and Sections I and II of existing Form 304, as proposed. For the reasons described below and as discussed in the 2020 NPRM, the Commission believes that the elimination of these forms will reduce duplication and inefficiency resulting from market participants submitting cash-market information to both the Commission and the exchanges under the existing framework.[1132] As described below, under the approach

[1117] *CFTC Form 204: Statement of Cash Positions in Grains, Soybeans, Soybean Oil, and Soybean Meal,* available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@forms/documents/file/cftcform204.pdf* (existing Form 204).

[1118] *CFTC Form 304: Statement of Cash Positions in Cotton,* available at *http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform304.pdf* (existing Form 304). Parts I and II of Form 304 address fixed-price cash positions used to justify cotton positions in excess of Federal position limits. As described below, Part III of Form 304 addresses unfixed-price cotton ''on-call'' information, which is not used to justify cotton positions in excess of limits, but rather to allow the Commission to prepare its weekly cotton on-call report.

[1119] 17 CFR 19.01.

[1120] *See, e.g.,* ICE Rule 6.29 and CME Rule 559.

[1121] For certain physically-delivered agricultural contracts, some exchanges may require that spot month exemption applications be renewed several times a year for each spot month, rather than annually.

[1122] Part III of Form 304, which addresses cotton-on-call, is discussed below.

[1123] 78 FR at 11694, 11655–11656.

[1124] *See, e.g.,* ACSA at 3; AMCOT at 2–3; ACA at 3; Canale Cotton at 3; Cargill at 9–10; CCI at 2; CEWG at 4; Chevron at 3; CHS at 2, 6; CMC at 12; COPE at 3–4; DECA at 2; East Cotton at 3; Ecom at 1; EEI at 7; EPSA at 7; FIA at 3; IMC at 3; ISDA at 9–10; Jess Smith at 3; LDC at 2; Mallory Alexander at 2; McMeekin at 2–3; Memtex at 2–3; Moody Compress at 2; Namoi at 1; NCFC at 2; Olam at 3; Omnicotton at 2–3; Parkdale at 2; SEMI at 3; Shell at 4; SCA at 3; SW Ag at 2–3; Texas Cotton at 2–3; Toyo at 2–3; Walcot at 3; WCSA at 3; White Gold at 2–3.

[1125] *See, e.g.,* Cargill at 9–10; CCI at 2; CEWG at 4; COPE at 3–4; ISDA at 10.

[1126] ISDA at 10.

[1127] AFR at 2–3; Rutkowski at 2.

[1128] *Id.*

[1129] Better Markets at 59–60.

[1130] *Id.* at 59.

[1131] *Id.* at 60.

[1132] 85 FR at 11694.

adopted herein, the Commission will receive any necessary information related to market participants' recognized bona fide hedges by leveraging existing expertise and processes at the exchanges, as well as information that market participants will be required to submit to exchanges under the Final Rule.

The Commission finds comments that the elimination of the series '04 reports would require the Commission to delegate authority to the exchanges to be misplaced for several reasons. First, by eliminating the series '04 reports, the Commission is not delegating any oversight or enforcement responsibilities to the exchanges. The CEA establishes the statutory framework under which the Commission operates.[1133] Even without the series '04 reports, the Commission will continue to administer the CEA to monitor and protect the derivatives markets, market users, and the public from fraud, manipulation, and other abusive practices that are prohibited by the CEA and Commission regulations. The Commission will continue to do so through its market surveillance program,[1134] rule enforcement reviews,[1135] and other regulatory tools. The Commission will also continue to investigate and prosecute persons who violate the CEA and Commission regulations in connection with derivatives trading on exchanges and related conduct in cash-market commodities.[1136]

Second, the elimination of Form 204 and the cash-market reporting portions of Form 304 will not hinder the Commission's access to the cash-market information needed for the Commission to effectuate its oversight and enforcement responsibilities. Instead, the Commission is ensuring that it will continue to have access to sufficient cash-market information by adopting several reporting and recordkeeping requirements in final §§ 150.3, 150.5, and 150.9.[1137] In particular, under § 150.5, an exchange will be required to collect applications, which must be updated at least on an annual basis, for purposes of granting bona fide hedge recognitions from exchange-set limits for contracts subject to Federal position limits,[1138] and for recognizing bona fide hedging positions for purposes of Federal position limits.[1139] Among other things, each application will be required to include: (1) Information regarding the applicant's activity in the cash markets for the underlying commodity; and (2) any other information to enable the exchange and the Commission to determine whether the exchange may recognize such position as a bona fide hedge.[1140] Additionally, consistent with existing industry practice for certain exchanges, exchanges will be required to file monthly reports to the Commission showing, among other things, for all bona fide hedges (whether enumerated or non-enumerated), a concise summary of the applicant's activity in the cash markets.[1141]

Collectively, final §§ 150.5 and 150.9 will provide the Commission with the same substantive information from monthly reports about all recognitions granted for purposes of contracts subject to Federal position limits, including cash-market information supporting the applications, and annual information regarding all month-by-month cash-market positions used to support a bona fide hedging recognition. These reports will help the Commission determine whether any person who claims a bona fide hedging position can demonstrate satisfaction of the relevant requirements. This information will also help the Commission perform market surveillance in order to detect and deter manipulation and abusive trading practices in physical commodity markets.

While the Commission will no longer receive the monthly snapshot data currently included on the series '04 reports, the Commission will have broad access, at any time, to the cash-market information described above, as well as any other data or information exchanges collect as part of their application processes.[1142] This will include any updated application forms and periodic reports that exchanges may require applicants to file regarding their positions. To the extent that the Commission observes market activity or positions that warrant further investigation, § 150.9 will also provide the Commission with access to any supporting or related records the exchanges will be required to maintain.[1143]

Furthermore, the Final Rule will not impact the Commission's existing provisions for gathering information through special calls relating to positions exceeding limits and/or to reportable positions. As discussed further below, under the Final Rule, all persons exceeding the Federal position limits set forth in final § 150.2, as well as all persons holding or controlling reportable positions pursuant to § 15.00(p)(1), must file any pertinent information as instructed in a special call.[1144]

In response to commenter concerns that elimination of the series '04 reports may increase reliance on exchanges which may lack incentives to impose position limits, the Commission does not view the question of whether exchanges impose speculative position limits in this context as a matter of incentives. Even with the elimination of the series '04 reports, exchanges will be under statutory and regulatory obligations, as they are today, to establish speculative position limits for all contracts subject to Federal position limits.[1145] Additionally, as discussed above, the Commission does not believe that exchanges generally lack proper incentives to maintain the integrity of their markets; to the contrary, they are subject to various statutory core principles and regulatory obligations

[1133] *See* 7 U.S.C. 2(a)(1).

[1134] *CFTC Market Surveillance Program,* U.S. Commodity Futures Trading Commission website, available at *https://www.cftc.gov/IndustryOversight/MarketSurveillance/CFTCMarketSurveillanceProgram/index.htm#P5_912.* The Commission's Market Surveillance Program is responsible for collecting market data and position information from registrants and large traders, and for monitoring the daily activities of large traders, key price relationships, and relevant supply and demand factors in a continuous review for potential market problems. *Id.*

[1135] The Commission conducts regular rule enforcement reviews of each exchange's audit trail, trade practice surveillance, disciplinary, and dispute resolution programs for ongoing compliance with the Core Principles. *See Rule Enforcement Reviews of Designated Contract Markets,* U.S. Commodity Futures Trading Commission website, available at *https://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/dcmruleenf.html.*

[1136] *Enforcement,* U.S. Commodity Futures Trading Commission website, available at *https://www.cftc.gov/LawRegulation/Enforcement/OfficeofDirectorEnforcement.html.*

[1137] As discussed earlier in this Final Rule, Final § 150.9 also includes reporting and recordkeeping requirements pertaining to spread exemptions. Those requirements will not be discussed again in this Section of the Final Rule, which addresses cash-market reporting in connection with bona fide hedges.

[1138] *See* Final § 150.5(a)(2)(ii)(A).

[1139] As discussed above in connection with Final § 150.9, market participants who wish to request a bona fide hedge recognition under § 150.9 will not be required to file such applications with both the exchange and the Commission. They will only file the applications with the exchange, which will then be subject to recordkeeping requirements in Final § 150.9(d), as well as Final §§ 150.5 and 150.9 requirements to provide certain information to the Commission on a monthly basis and upon demand.

[1140] *See* Final § 150.5(a)(2)(ii)(G).

[1141] *See* Final § 150.5(a)(4).

[1142] *See, e.g.,* Final § 150.9(d) (requiring that all such records, including cash-market information submitted to the exchange, be kept in accordance with the requirements of § 1.31), and Final § 19.00(b) (requiring, among other things, all persons exceeding speculative position limits who have received a special call to file any pertinent information as specified in the call).

[1143] *See* Final § 150.9(d).

[1144] *See* Final § 19.00(b).

[1145] *See* 7 U.S.C. 7(d)(5) and § 150.5(a).

that require them to maintain integrity in their markets.[1146] Further, exchanges will remain subject to regulatory oversight and enforcement responsibilities required for DCMs by CEA section 5(d) and part 38 of the Commission's regulations and for SEFs by CEA section 5h and part 37 of the Commission's regulations.[1147] Specifically, several existing Commission regulations in parts 38 and 37 require exchanges to monitor for violations of exchange-set position limits,[1148] and detect and prevent manipulation, price distortions and, where possible, disruptions of the physical-delivery or cash-settlement process.[1149]

In response to Better Markets' concern that eliminating the '04 reports will reduce deterrents for misreporting, the Commission believes that the false reporting provision in Section 9(a)(4) of the CEA, which makes it a felony to make any false statements to an exchange, is sufficient to deter market participants from misreporting cash-market information to exchanges.[1150]

Further, the Commission disagrees with Better Markets' concerns about increased burdens. Given that market participants are currently required both to file the series '04 reports with the Commission, and to submit cash-market information to the exchanges, eliminating the series '04 reports will reduce burdens on market participants.[1151] In fact, the Commission did not receive any comments opposing the elimination of the series '04 reports from traders who currently have an obligation to file such forms. While the Commission supports streamlined and automated reporting requirements whenever possible, Better Markets has not identified any practicable method or program that would permit the automated reporting of the kinds of disparate cash-market information currently reflected in Forms 204 and 304.

In addition to the justifications for eliminating the series '04 reports described above, the Commission has also determined that Form 204, including the timing and procedures for its filing, is inadequate for the reporting of cash-market positions relating to certain energy contracts, which will be subject to Federal position limits for the first time under the Final Rule. For example, when compared to agricultural contracts, energy contracts generally expire more frequently, have a shorter delivery cycle, and have significantly more product grades. The information required by Form 204, as well as the timing and procedures for its filing, reflects the way agricultural contracts trade, but is inadequate for purposes of reporting cash-market information involving energy contracts.

Finally, the Commission understands that the exchanges maintain regular dialogue with their participants regarding cash-market positions, and that it is common for exchange surveillance staff to make informal inquiries of market participants, including if the exchange has questions about market events or a participant's use of an exemption or recognition. The Commission encourages exchanges to continue this practice. Similarly, the Commission anticipates that its own staff will engage in dialogue with market participants, either through the use of informal conversations or, in limited circumstances, via special call authority.

3. Changes to Parts 15 and 19 To Implement the Elimination of Form 204 and Portions of Form 304

i. Background—Changes to Parts 15 and 19 To Implement the Elimination of Form 204 and Portions of Form 304

The market and large-trader reporting rules are contained in parts 15 through 21 of the Commission's regulations. Collectively, these reporting rules effectuate the Commission's market and financial surveillance programs by enabling the Commission to gather information concerning the size and composition of the commodity derivative markets and to monitor and enforce any established speculative position limits, among other regulatory goals.

ii. Summary of the 2020 NPRM—Changes to Parts 15 and 19 To Implement the Elimination of Form 204 and Portions of Form 304

To effectuate the proposed elimination of Form 204 and the cash-market reporting components of Form 304, the Commission proposed to eliminate: (a) Existing § 19.00(a)(1), which requires persons holding reportable positions which constitute bona fide hedging positions to file a Form 204; and (b) existing § 19.01, which, among other things, sets forth the cash-market information required on Forms 204 and 304.[1152] Based on the proposed elimination of existing §§ 19.00(a)(1) and 19.01 and Form 204, the Commission proposed conforming technical changes to remove related reporting provisions from: (i) The ''reportable position'' definition in § 15.00(p); (ii) the list of ''persons required to report'' in § 15.01; and (iii) the list of reporting forms in § 15.02.

iii. Comments and Summary of the Commission Determination—Changes to Parts 15 and 19 To Implement the Elimination of Form 204 and Portions of Form 304

The Commission did not receive any comments on the conforming changes to parts 15 and 19 that implement the elimination of Form 204 and Sections I and II of Form 304, and is adopting the changes as proposed.

4. Special Calls

i. Summary of the 2020 NPRM—Special Calls

Notwithstanding the proposed elimination of the series '04 reports, the Commission did not propose to make any significant substantive changes to information requirements relating to positions exceeding limits and/or to reportable positions. Accordingly, in proposed § 19.00(b), the Commission proposed that all persons exceeding the proposed limits set forth in § 150.2, as well as all persons holding or controlling reportable positions pursuant to § 15.00(p)(1), must file any pertinent information as instructed in a special call. This proposed provision is similar to existing § 19.00(a)(3), but would require any such person to file the information as instructed in the special call, rather than to file the information on a series '04 report.[1153]

The Commission also proposed to add language to existing § 15.01(d) to clarify that persons who have received a special call are deemed ''persons required to report'' as defined in § 15.01.[1154] The Commission proposed this change to clarify an existing requirement found in § 19.00(a)(3), which requires persons holding or controlling positions that are reportable

[1146] For further discussion, *see* Section II.B.3.iii.b(3)(iii) (addressing comments from Better Markets related to conflicts-of-interest).

[1147] *See* 7 U.S.C. 7(d); 17 CFR 38; 7 U.S.C. 7b–3(f); 17 CFR 37.

[1148] *See* 17 CFR 38.251(d); 17 CFR 37.205(b).

[1149] *See* 17 CFR 38.251(a); 17 CFR 37.205(a).

[1150] 7 U.S.C. 13(a)(4). The Commission has not hesitated to impose severe penalties on market participants that mislead exchanges about cash positions. *See, e.g., In the Matter of EMF Financial Products LLC,* CFTC Docket No. 10–02, U.S. Commodity Futures Trading Commission website, available at *https://www.cftc.gov/PressRoom/PressReleases/5751-09* (imposing a $4,000,000 civil monetary penalty on a firm that misled an exchange about the firm's cash positions in treasury futures). *See also supra* Section II.D.9. (discussing Commission enforcement of exchange-set position limits).

[1151] *See infra* Section IV.A.5.iii. (discussing the benefits of elimination of Form 204 and amendment of Form 304).

[1152] 17 CFR 19.01.

[1153] 17 CFR 19.00(a)(3).

[1154] 17 CFR 15.01.

pursuant to § 15.00(p)(1) who have received a special call to respond.[1155] The proposed changes to part 19 operate in tandem with the proposed additional language for § 15.01(d) to reiterate the Commission's existing special call authority without creating any new substantive reporting obligations. Finally, proposed § 19.03 delegated authority to issue such special calls to the Director of the Division of Enforcement, and proposed § 19.03(b) delegated to the Director of the Division of Enforcement the authority in proposed § 19.00(b) to provide instructions or to determine the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under part 19.

ii. Comments and Summary of the Commission Determination—Special Calls

The Commission did not receive any comments on these changes and is adopting the changes to §§ 15.01(d), § 19.00(b), and 19.03(b) as proposed.

5. Form 304 Cotton On-Call Reporting

i. Summary of the 2020 NPRM—Form 304 Cotton On-Call Reporting

With the proposed elimination of the cash-market reporting portions of Form 304 as described above, Form 304 would be used exclusively to collect the information needed to publish the Commission's weekly cotton on-call report, which shows the quantity of unfixed-price cash cotton purchases and sales that are outstanding against each cotton futures month.[1156] While the Commission did not propose to eliminate the cotton on-call portions of Form 304, or to stop publishing the cotton on-call report, the Commission did request comment about the implications of doing so.[1157]

In addition to requesting comment regarding continued collection of the Form 304 and publication of the cotton-on-call report, the Commission proposed a number of technical changes to the Form 304. Under the 2020 NPRM, the requirements pertaining to that report would remain in proposed §§ 19.00(a) and 19.02, with minor modifications to existing provisions. In particular, the Commission proposed to update cross references (including to renumber § 19.00(a)(2) as § 19.00(a)) and to clarify and update the procedures and timing for the submission of Form 304. Specifically, proposed § 19.02(b) would require that each Form 304 report be made weekly, dated as of the close of business on Friday, and filed not later than 9 a.m. Eastern Time on the third business day following that Friday using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission. The Commission also proposed some modifications to the Form 304 itself, including conforming and technical changes to the organization, instructions, and required identifying information.[1158]

ii. Summary of the Commission Determination—Form 304 Cotton On-Call Reporting

The Commission has determined to maintain the status quo as proposed by not eliminating the cotton on-call portions (currently Part III) of the Form 304, and by continuing to publish the cotton on-call report. The Commission is also adopting the proposed technical changes described above.

iii. Comments—Form 304 Cotton On-Call Reporting

Commenters were divided on the questions posed by the Commission on whether to retain Part III of the Form 304 and to continue publishing the weekly cotton on-call report.

CMC, along with numerous commenters from the cotton industry, believed the Commission should eliminate Form 304 in its entirety and stop publishing the cotton on-call report.[1159] For example, Namoi and ACSA both argued that the cotton on-call report allows market participants to see proprietary cash-market information for every other participant in the cotton market, which among other things, creates an opportunity for speculators to profit by trading against this publicly disclosed unfixed-price positions.[1160] Additionally, Namoi and ACSA each highlighted that the Commission does not collect or publish similar information for any other commodities.[1161] ACSA also argued that the cotton on-call report causes competitive harm to the U.S. cotton industry because, according to ACSA, foreign mills believe that the report imposes risks and costs and are therefore more likely to purchase cotton from outside of the United States in order to avoid completing Part III of Form 304.[1162] The NCTO suggested that textile mills are particularly harmed when speculators trade against the cash-market positions disclosed in the cotton on-call report because textile mills purchase the majority of their cotton on call.[1163]

Conversely, several commenters, including other cotton industry members, stated that the Commission should continue to collect the information required by Form 304 and to publish the cotton on-call report.[1164] For example, Glencore argued that discontinuing the report would reduce transparency, open the market to more manipulation, and harm smaller participants due to asymmetrical information.[1165] Similarly, AMCOT argued that without the report, large participants, who account for a significant amount of the cotton bought or sold on call, would have an informational advantage over small producers who have less visibility into a large portion of the cotton market.[1166]

iv. Discussion of Final Rule—Form 304 Cotton On-Call Reporting

After reviewing the comments discussed above, the Commission has decided to retain the cotton on-call portions (currently Section III) of existing Form 304 and to continue publishing its weekly cotton on-call report. Because the comments from cotton industry firms were divided, and

[1155] 17 CFR 19.00(a)(3).

[1156] *Cotton On-Call,* U.S. Commodity Futures Trading Commission website, available at *https://www.cftc.gov/MarketReports/CottonOnCall/index.htm* (weekly report).

[1157] Specifically, the Commission requested comments on the following issues: To what extent, and for what purpose, do market participants and others rely on the information contained in the Commission's weekly cotton on-call report; Whether publication of the cotton on-call report creates any informational advantages or disadvantages, and/or otherwise impact competition in any way; Whether the Commission should stop publishing the cotton on-call report, but continue to collect, for internal use only, the information required in Part III of Form 304 (Unfixed-Price Cotton ''On-Call''); Or alternatively, whether the Commission should stop publishing the cotton on-call report and also eliminate the Form 304 altogether, including Part III. *See* 85 FR at 11657.

[1158] Among other things, the proposed changes to the instructions would clarify that traders must identify themselves on Form 304 using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of Form 304. This change will help Commission staff to connect the various reports filed by the same market participants. This release includes a representation of the final Form 304, which is to be submitted in an electronic format published pursuant to this Final Rule, either via the Commission's web portal or via XML-based, secure FTP transmission.

[1159] ACA at 3; ACSA at 3, 9–11; Cargill at 10; CMC at 12; East Cotton at 3; McMeekin at 2–3; Namoi at 1–2; Omnicotton at 2–3; Texas Cotton at 2–3; Toyo at 2–3; Walcot at 3; and White Gold at 2.

[1160] Namoi at 1–2; ACSA at 9–11.

[1161] Namoi at 1–2.

[1162] ACSA at 9–11.

[1163] NCTO at 1–2.

[1164] VLM Comment Text; Eric Matsen Comment Text; AMCOT at 2–3; Gerald Marshall at 3; Lawson/O'Neill at 1; Glencore at 2; and Dunavant at 1.

[1165] Glencore at 2; Dunavant at 1.

[1166] AMCOT at 2.

because the cotton on-call report has been a part of the cotton market for more than 80 years, the Commission believes that it would be imprudent to eliminate the report based solely on the information provided in the comment letters, which do not include any concrete data, studies, or quantifiable financial harms. The Commission further notes that continued publication of the cotton on-call report will not change the existing dynamics of the cotton market.

In the future, the Commission may solicit comments to determine whether the cotton on-call report continues to benefit the market and whether the report hinders the competitiveness of U.S. firms in the global cotton market. The Commission may seek input from cotton market participants in the form of additional comments, data, studies, or information about specific financial harms that would warrant discontinuing the report. The Commission emphasizes that it remains open to continuing to discuss this important issue with market participants and to receive additional data and information that may more concretely demonstrate the competitive harms discussed by commenters above.

6. Proposed Technical Changes to Part 17

i. Summary of the 2020 NPRM—Proposed Technical Changes to Part 17

Part 17 of the Commission's regulations addresses reports by reporting markets, FCMs, clearing members, and foreign brokers.[1167] The Commission proposed to amend existing § 17.00(b), which addresses information to be furnished by FCMs, clearing members, and foreign brokers, to delete certain provisions related to position aggregation, because those provisions have become duplicative of aggregation provisions that were adopted in § 150.4 in the 2016 Final Aggregation Rulemaking.[1168] The Commission also proposed to add a new provision, § 17.03(i), which delegates certain authority under § 17.00(b) to the Director of the Office of Data and Technology.[1169]

ii. Comments and Summary of the Commission Determination—Proposed Technical Changes to Part 17

The Commission did not receive any comments addressing these changes and is adopting these technical changes as proposed.

*I. Removal of Part 151*

1. Summary of the 2020 NPRM—Removal of Part 151

Finally, the Commission proposed to remove and reserve part 151 in response to its *vacatur* by the U.S. District Court for the District of Columbia,[1170] as well as in light of the proposed revisions to part 150 that conform part 150 to the amendments made to CEA section 4a by the Dodd-Frank Act.

2. Comments and Summary of the Commission Determination—Removal of Part 151

The Commission did not receive any comments regarding these changes and is adopting these conforming changes as proposed.

## III. Legal Matters

This section of the release sets forth certain legal determinations by the Commission that underlie the determinations regarding the specifics of the Final Rule set forth previously in this preamble, as well as the reasons for those legal determinations and consideration of relevant comments. Specifically, Part A sets forth the Commission's determination that, in a rulemaking pursuant to CEA section 4a(a)(2), the Commission must find position limits to be "necessary" within the meaning of paragraph 4a(a)(1). Part B sets forth the Commission's interpretation of the criteria for finding position limits to be necessary within the meaning of the statute. Part C sets forth the Commission's necessity findings for the 25 core referenced futures contracts. Part D sets forth the Commission's necessity finding for futures contracts and options on futures contracts linked to a core referenced futures contract. Finally, Part E sets forth the Commission's necessity finding for spot and non-spot months.

*A. Interpretation of Statute Regarding Whether Necessity Finding Is Required for Position Limits Established Pursuant to CEA Section 4a(a)(2)*

1. The Commission's Preliminary Interpretation in the 2020 NPRM

In the 2020 NPRM the Commission considered whether CEA section 4a, as amended, requires the Commission to issue Federal position limits for all physical commodities other than excluded commodities without making its own antecedent finding that such position limits are necessary. This was in response to *ISDA,* in which the U.S. District Court for the District of Columbia held that the CEA was ambiguous in that respect. Specifically, the court held that where CEA section 4a(a)(2) ("paragraph 4a(a)(2)") states that the Commission shall issue such position limits "[i]n accordance with the standards set forth in paragraph (1)," [1171] it is unclear whether the "standards" include the requirement in paragraph (1) of CEA section 4a(a) ("paragraph 4a(a)(1)") that the Commission establish such limits as it "finds are necessary to diminish, eliminate, or prevent" specified burdens on interstate commerce.[1172] In the 2020 NPRM, the Commission preliminarily determined that paragraph 4a(a)(2) should be interpreted as incorporating the necessity requirement of paragraph 4a(a)(1).[1173] For the Final Rule, the Commission herein adopts that determination as final, along with the reasoning set forth in the 2020 NPRM.

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[1167] 17 CFR part 17.

[1168] *See* Final Aggregation Rulemaking, 81 FR at 91455. Specifically, the Commission proposes to delete paragraphs (1), (2), and (3) from § 17.00(b). 17 CFR 17.00(b).

[1169] Under § 150.4(e)(2), which was adopted in the 2016 Final Aggregation Rulemaking, the Director of the Division of Market Oversight is delegated authority to, among other things, provide instructions relating to the format, coding structure, and electronic data transmission procedures for submitting certain data records. 17 CFR 150.4(e)(2). A subsequent rulemaking changed this delegation of authority from the Director of the Division of Market Oversight to the Director of the Office of Data and Technology, with the concurrence of the Director of the Division of Enforcement. *See* 82 FR at 28763 (June 26, 2017). The proposed addition of § 17.03(i) would conform § 17.03 to that change in delegation.

[1170] *See supra* notes 10–11 and accompanying discussion.

[1171] Paragraph 4a(a)(1) of the CEA states, in relevant part:

"Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities, or swaps that perform or affect a significant price discovery function with respect to registered entities causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person, including any group or class of traders, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or swaps traded on or subject to the rules of a designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity as the Commission finds are necessary to diminish, eliminate, or prevent such burden."

[1172] Paragraphs 4a(a)(1) and 4a(a)(2)(A); *ISDA,* 887 F. Supp. 2d at 280–81.

[1173] 85 FR at 11659.

The Commission's preliminary determination was based on a number of considerations, set forth in detail in the 2020 NPRM.[1174] Consistent with the district court's instructions,[1175] the Commission based its determination both on analysis of the CEA's statutory language and on application of the Commission's experience and expertise to relevant facts and policy concerns.[1176] Among the most important factual and policy concerns relied upon by the Commission in the 2020 NPRM were:

a. Absent the necessity-finding requirement, the language of paragraph 4a(a)(2) would evidently require the imposition of some level of position limits for a physical commodity even if limits at any level would be likely to do more harm than good, including with respect to public interests specifically identified in paragraph 4a(a)(1) and elsewhere in section 4a or the CEA generally.[1177] In addition to being inconsistent with the thrust of section 4a taken as a whole, this approach makes little sense as a matter of policy.[1178]

b. Subparagraph 4a(a)(2)(A) requires that position limits be set ''as appropriate.'' At a minimum, this language requires the Commission to use its best judgment in determining the levels at which position limits are set. In addition, there is authority from case law that the word ''appropriate'' in a regulatory statute requires agencies to take into account the costs of regulation, if only in a rough or approximate way, and that consideration may preclude the considered action if the costs are highly disproportionate.[1179] The statute thus allows for the possibility that, in establishing position limit levels for some commodities or contracts, the Commission, in its judgment, may determine that the optimal level is no limit at all. This possibility does not harmonize with a requirement to impose limits for all physical commodities, but is consistent with a requirement to impose limits where they are necessary.

c. Requiring position limits without a necessity finding would be a ''sea change'' in derivatives regulation since it would involve a shift from Federal limits on a small number of agricultural commodities to limits on all physical commodities.[1180] The Commission was skeptical that Congress would have made such a change through ambiguous language.[1181] The Commission noted that there are currently over 1,200 listed futures contracts on physical commodities and that there is no indication that Congress had concerns about, or even considered, all of them.[1182] To the contrary, the legislative history suggests that enactment of paragraph 4a(a)(2) was driven, in part, by studies of potential excessive speculation in a small number of particularly important commodities.[1183] This history is consistent with an interpretation of the statute as requiring position limits for commodities where controlling excessive speculation is most important, absent statutory language that unambiguously requires limits for all commodities.

d. A necessity finding allows the Commission to apply its experience and expertise to impose position limits where they are likely to do the most good, taking into consideration the fact that even well-crafted position limits create compliance costs and potentially may have a negative effect on liquidity and forms of speculation that benefit the market.[1184]

In the 2020 NPRM, the Commission recognized that it was proposing to change its interpretation regarding whether paragraph 4a(a)(2) incorporates a requirement to find position limits necessary.[1185] The Commission noted that, in the preamble to the 2011 Final Rulemaking as well as the Commission's subsequent position limits proposals,[1186] the Commission had interpreted paragraph 4a(a)(2) to mandate the imposition of position limits without the need for a necessity finding.[1187] As part of its preliminary determinations in the 2020 NPRM that the CEA *does* require a necessity finding, the Commission explained in detail why the reasons it had previously given for the ''mandate'' approach do not compel that interpretation of the statute. Taken as a whole, such reasons are insufficiently persuasive to outweigh the factors that favor a necessity finding.[1188]

2. Comments on the Commission's Preliminary Interpretation in the 2020 NPRM and Commission Responses

In response to the Commission's preliminary interpretation provided in the 2020 NPRM, a number of commenters stated that the Commission must make a necessity finding before establishing position limits under paragraph 4a(a)(2).[1189] These commenters generally asserted that this result was required by the language of the statute, although they did not provide a detailed analysis of that language beyond that set forth in the 2020 NPRM.[1190] Some commenters also asserted that a necessity finding is important to avoid imposing unwarranted costs on market participants, a position consistent with the policy concerns that entered into the Commission's preliminary determination that paragraph 4a(a)(2) requires a necessity finding.[1191]

A number of other commenters stated that the statute does not require a necessity finding for the establishment of position limits pursuant to paragraph 4a(a)(2).[1192] These commenters made the following points:

a. Some commenters asserted that the language of paragraph 4a(a)(2) requires the Commission to establish position limits for all physical commodities without first determining that limits are necessary.[1193] Commenters making this point emphasized the language of subparagraph 4a(a)(2)(A) stating that the Commission ''shall'' impose position limits on physical commodities and the

[1174] *Id.* at 11659–11661.

[1175] The court directed the Commission, on remand, to resolve the ambiguity not by ''rest[ing] simply on its parsing of the statutory language'' but by ''bring[ing] its experience and expertise to bear in light of the competing interests at stake.'' 85 FR at 11659, quoting *ISDA,* 887 F. Supp. 2d at 281.

[1176] 85 FR at 11659–11661.

[1177] *Id.* at 11659, citing as examples CEA sections 5, 4a(a)(2)(C), and 4a(a)(3)(B).

[1178] *Id.* at 11660.

[1179] *See Michigan* v. *EPA,* 132 S.Ct. 2699, 2707–08, 2711 (2015) (agency could not disregard major costs under statute requiring that regulation be ''appropriate,'' but use of this word did not require formal cost-benefit analysis).

[1180] 85 FR at 11660.

[1181] *Id.*

[1182] *Id.*

[1183] 85 FR at 1160 (discussing Congressional staff studies of potential excessive speculation in oil, natural gas, and wheat).

[1184] 85 FR at 11660.

[1185] *Id.* at 11658.

[1186] *See supra* Section I.A.

[1187] 85 FR at 11658.

[1188] 85 FR at 11661–64. CEA Section 4a(a)(2), which was enacted as part of the Dodd-Frank Act, directs the Commission to ''establish'' limits on positions. The Commission does not interpret this directive to apply to the nine legacy agricultural contracts included in the list of core referenced futures contracts because they are already subject to Federal position limits that have existed for decades based on prior necessity findings pursuant to CEA Section 4a(a)(1). Nevertheless, as discussed *infra* at Section III.C, the Commission has determined that such limits are necessary.

[1189] *E.g.,* Citadel at 2; EEI at 2–3; ISDA at 3; MFA/AIMA at 1, 14; SIFMA AMG at 1–2.

[1190] *Id.*

[1191] *E.g.,* EEI at 3.

[1192] *E.g.,* AFR at 1; Better Markets at 3–4, 64; IATP at 4; NEFI at 2–3.

[1193] *E.g.,* Better Markets at 64 (incorporating by reference amicus brief by Senators Levin et al. in the *ISDA* litigation). The statute applies to all physical commodities ''other than excluded commodities.'' 7 U.S.C. 6a(a)(2). The Commission here refers to ''all physical commodities'' for purposes of brevity only, and does not mean to imply that the statute covers excluded commodities.

language of subparagraph 4a(a)(2)(B) referring to position limits ''required'' by subparagraph 4a(a)(2)(A).[1194] However, while these words are suggestive of a mandatory requirement of some kind, they do not dictate the conclusion that paragraph 4a(a)(2) requires position limits across-the-board without a necessity finding, and to conclude otherwise would contradict the holding in *ISDA* that the statutory text is ambiguous.[1195] The requirements of paragraph 4a(a)(2) are subject to the condition that position limits be imposed ''[i]n accordance with the standards set forth in paragraph [4a(a)(1)].'' The meaning of *that* text, and specifically the meaning of ''the standards,'' is the primary issue for the Commission to resolve here. For reasons explained above and in the 2020 NPRM, these standards are best interpreted as including the paragraph 4a(a)(1) necessity requirement.[1196]

b. Some commenters asserted that the legislative history of paragraph 4a(a)(2) supports imposing limits on all physical commodities without requiring a necessity finding.[1197] Among the points emphasized by commenters were that (1) certain bill language that ultimately became paragraph 4a(a)(2) evolved from using the permissive word ''may'' to the mandatory word ''shall''; and (2) the House Committee on Agriculture voted out a predecessor bill containing language similar to that of paragraph 4a(a)(2), and there are indications that members of the committee viewed this language as requiring limits for all physical commodities.[1198] In the view of the Commission, neither of these points is sufficient to resolve the ambiguity in the language of paragraph 4a(a)(2) or dictate the conclusion that the statute mandates position limits without a necessity finding.

With regard to the first point, there is no question that the final version of paragraph 4a(a)(2) states that the Commission ''shall'' impose position limits. But, as explained above, this mandatory language is explicitly subject to a requirement that limits be imposed in accordance with the standards of paragraph 4a(a)(1), and that condition is ambiguous. The commenters' second point was addressed in detail in the 2020 NPRM.[1199] Briefly, the House Committee on Agriculture bill described by commenters was never approved by the full House of Representatives.[1200] Its language on position limits was included in the Dodd-Frank Act, but discussion of this language in the floor debate and conference committee report did not characterize it as requiring limits for all physical commodities.[1201] And nothing in the legislative history specifies that the word ''standards'' in paragraph 4a(a)(2) excludes the paragraph 4a(a)(1) necessity requirement. As a result, the legislative history, taken as a whole, does not resolve the ambiguity in the statute.

c. Some commenters asserted that to require a necessity finding construes the Dodd-Frank Act's amendment to section 4a as narrowing the Commission's power to impose position limits, which is implausible as an interpretation given the overall thrust of the Dodd-Frank Act and the legislative history of paragraph 4a(a)(2).[1202] However, the CEA already required the Commission to find position limits necessary before the Dodd-Frank Act, so continuing to require such a finding is not a new constraint on the Commission.[1203] And, even with a necessity requirement, paragraph 4a(a)(2) imposes an important new duty on the Commission: to affirmatively proceed to establish position limits for physical commodities where limits are necessary, within a specified period of time, including as to economically equivalent swaps, and to report to Congress on the effects of those limits, if any.[1204] So the Commission's preliminary interpretation of the statute is consistent with legislative history indicating that Congress wanted the Commission to take action on the subject of position limits.

d. Some commenters asserted that a necessity finding creates unnecessary administrative obstacles to establishing position limits.[1205] In the view of the Commission, any extra needed administrative activity is a reasonable tradeoff for the flexibility and public policy benefits of imposing position limits only where they are economically justified as an efficient means of addressing the concerns Congress expressed in section 4a(a)(1). One commenter went further and suggested that a requirement to find necessity could make implementation and enforcement of position limits ''nigh to impossible.'' [1206] However, that commenter premised this assertion on a different necessity standard, that the Commission is not adopting in this rulemaking.[1207] In the view of the Commission, the necessity standard it is adopting herein is both consistent with the statute and workable in practice, as demonstrated by the necessity findings below. The workability of the Commission's standard is supported by a commenter who was opposed to a requirement to find necessity but nevertheless acknowledged that the necessity standard preliminarily adopted in the 2020 NPRM is ''unlikely to limit the CFTC's practical ability to impose Federal position limits.'' [1208]

Commenters who opposed a necessity-finding requirement also set forth a number of justifications for broad use of Federal position limits without asserting specifically that these concerns require limits for all physical commodities or justify imposing limits without finding them to be necessary. For example, commenters pointed out that unjustified volatility in derivatives markets can have negative consequences for price discovery and hedging in related non-financial markets.[1209] The Commission agrees with this point and agrees that preventing these consequences is the major reason why the CEA provides for position limits.[1210] However, this observation does not justify limits for all physical commodities since (a) the importance of the link between derivatives markets and associated cash markets can vary for

[1194] *E.g.,* Better Markets at 64; NEFI at 1. Better Markets stated that the Commission should adopt the legal views set forth in the amicus brief filed by certain U.S. Senators in the *ISDA* case. Better Markets at 64. However, in *ISDA,* the district court stated that ''[g]iven the fundamental ambiguities in the statute,'' it was ''not persuaded by their arguments.'' *ISDA,* 887 F. Supp. 2d at 283.

[1195] *ISDA,* 887 F. Supp. 2d at 274.

[1196] Other arguments against a necessity requirement made by commenters based on the statutory wording have previously been addressed in the 2020 NPRM. Compare Better Markets at 64 (incorporating by reference amicus brief by Senators Levin et al. in the *ISDA* litigation) with 85 FR at 11661–64.

[1197] *E.g.,* Better Markets at 64 (incorporating by reference amicus brief by Senators Levin et al. in the *ISDA* litigation).

[1198] *Id.*

[1199] 85 FR at 11663.

[1200] *Id.*

[1201] *Id.*

[1202] *E.g.* AFR at 1.

[1203] *See* paragraph 4a(a)(1). The House Committee on Agriculture summarized this provision as giving the government ''the power, after due notice and opportunity for hearing and a finding of a burden on interstate commerce caused by such speculation, to fix and proclaim limits on futures trading . . .'' H.R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935), stated more specifically in the statutory text as authority to diminish, eliminate, or prevent burdens that are ''undue and unnecessary.'' Public Law 74–675 section 5.

[1204] *See* paragraphs 4a(a)(2) and 4a(a)(5), 7 U.S.C. 6a(a)(2), 6a(a)(5); Public Law 111–203 § 719(a).

[1205] *E.g.,* Better Markets at 4.

[1206] IATP at 5.

[1207] *Id.* IATP assumed the use of a necessity standard, which it attributed to an industry group, requiring the Commission to, among other things, ''determine the likelihood that a specific limit would curtail excessive speculation in a specific market.'' *Id.* The Commission has determined that the statute does not require that. 85 FR at 11664–66 and *infra.*

[1208] Better Markets at 4.

[1209] *Id.* at 25–29.

[1210] *See* Congressional finding in first sentence of paragraph 4a(a)(1), 7 U.S.C. 6a(a)(1).

different commodities; and (b) good policy requires consideration of the costs and burdens associated with position limits as well as their potential preventative effects.[1211] These points are discussed further in sections of this release dealing with the Commission's legal standard for necessity, necessity findings, and consideration of costs and benefits pursuant to CEA section 15(a).

Commenters opposed to a necessity-finding requirement also asserted that exchanges cannot always be relied upon to establish optimal position limits since they may benefit from revenue generated from high levels of speculation, including, in some instances, high levels of speculation by individual market participants.[1212] To the extent that this is so, it is a reason for Congress to authorize, and the Commission to implement, position limits where needed. But it is not a reason to apply them to physical commodities across the board for the reasons just stated: The importance of unjustified volatility in derivatives markets for the non-financial economy can vary, and position limits have associated costs and burdens. Moreover, as discussed earlier in the preamble, exchanges are subject to statutory and regulatory obligations to establish position limits or position accountability and must do so in accordance with standards established by the Commission. Further, any incentives for exchanges to impose suboptimal position limits are reduced because an exchange that leaves itself open to an enhanced risk of excessive speculation, manipulation, or other forms of unjustified pricing is likely to lose business from traders seeking a stable market that reflects fundamental conditions.[1213]

3. Commission Determination

Having reviewed the comments and further considered the issue, the Commission has determined that the interpretation of paragraph 4a(a)(2) as incorporating the requirement of paragraph 4a(a)(1) to find position limits necessary before imposing them is the best interpretation of the statute, and the Commission adopts this interpretation as its interpretation under the Final Rule. This determination is based on the reasons set forth above and in the relevant portion of the 2020 NPRM.[1214] The Commission further recognizes that this determination is a change from the Commission's earlier interpretation of paragraph 4a(a)(2) as not requiring a necessity finding. The Commission has determined that the reasons previously given for such an interpretation of paragraph 4a(a)(2) are not compelling for the reasons stated above and in the relevant portion of the 2020 NPRM.[1215] The specifics of what the term ''necessary'' means in this context are discussed in the next section, followed by the Commission's final necessity finding.

*B. Legal Standard for Necessity Finding*

For the reasons discussed above, paragraph 4a(a)(2) requires the Commission to establish position limits to the extent they are ''necessary'' to ''diminish, eliminate, or prevent'' the burden on interstate commerce in a commodity from ''sudden or unreasonable fluctuations or unwarranted changes in the price'' of the commodity caused by excessive speculation in futures contracts (and options thereon) or swaps.[1216] In the 2020 NPRM the Commission preliminarily interpreted this requirement and preliminarily reached several conclusions about what sort of necessity finding the statute requires. This section of the preamble (1) reviews the preliminary conclusions set forth in the 2020 NPRM with some additional clarification and elaboration;[1217] (2) reviews and evaluates important points made in comments regarding the CEA's statutory standard for finding necessity; and (3) sets forth the Commission's conclusions for this Final Rule on the legal standard for finding position limits to be necessary within the meaning of CEA section 4a.

1. Preliminary Legal Standard for Necessity in 2020 NPRM

In the 2020 NPRM, the Commission reached a number of conclusions: First, the CEA does not require the Commission to determine whether excessive speculation in general may create a risk of sudden or unreasonable fluctuations or unwarranted changes in the price of a commodity or whether position limits are an effective tool for controlling or preventing these potential effects.[1218] Section 4a(a)(1) of the CEA contains a Congressional finding that ''[e]xcessive speculation . . . causing sudden or unreasonable fluctuations or unwarranted changes in . . . price . . . is an undue and unnecessary burden on interstate commerce in such commodity'' and prescribes position limits for the purpose of ''diminishing, eliminating, or preventing'' that burden.[1219] The analysis in the 2020 NPRM accepted those premises as established by Congress.

Second, the word ''necessary'' has a spectrum of legal meanings from absolute physical necessity to merely useful or convenient.[1220] The 2020 NPRM explained that it is unlikely Congress intended either extreme.[1221] The Commission preliminarily determined in the 2020 NPRM that the necessity requirement is best interpreted as a directive to establish position limits where they are economically justified as an efficient mechanism to advance the Congressional goal of preventing undue burdens on commerce in an underlying commodity caused by excessive speculation in the associated futures or swaps markets.[1222]

Under this approach, the Commission explained, position limits are necessary where diminishing, eliminating, or preventing burdens on commerce in a commodity caused by excessive speculation in the associated derivatives market is likely to offer the greatest benefits to the cash market for the commodity and the economy, and not where the benefit of controlling or preventing such burdens is likely to be less significant or to be accompanied by disproportionate costs or negative consequences, including negative

[1211] In reaching this conclusion, the Commission draws upon its experience and expertise in considering costs and benefits before promulgating a rule, pursuant to 7 U.S.C. 19(a). The Commission believes that such consideration (which need not be mathematical) leads to better outcomes.

[1212] Better Markets at 22–24.

[1213] *See supra* Section II.B.2.iv.b., for additional discussion of exchange incentives and related statutory and regulatory obligations to maintain market integrity.

[1214] 85 FR at 11658–61.

[1215] *Id.* at 11661–64.

[1216] The first sentence of paragraph 4a(a)(1) is a Congressional finding that ''excessive speculation in any commodity'' under futures contracts or certain swaps ''causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity'' is ''an undue and unnecessary burden on interstate commerce in such commodity.'' 7 U.S.C. 6a(a)(1). The second sentence of paragraph 4a(a)(1), referring back to the burden on interstate commerce found in the first sentence, states that the Commission shall establish such position limits ''as the Commission finds are necessary to diminish, eliminate, or prevent such burden.'' *Id.*

[1217] Certain points relevant to the legal standard for necessity that were made in a number of different sections of the NPRM are integrated into the discussion of the legal standard here.

[1218] 85 FR at 11664.

[1219] *See Commodity Futures Trading Com'n* v. *Hunt,* 592 F.2d 1211, 1215 (7th Cir. 1979) (''Congress concluded that excessive speculation in commodity contracts for future delivery can cause adverse fluctuations in the price of a commodity, and authorized the Commission to restrict the positions held or trading done by any individual person or by certain groups of people acting in concert.'').

[1220] 85 FR at 11664.

[1221] *Id.*

[1222] *Id.* at 11665.

consequences with respect to Congress's stated purpose, to prevent the burdens of sudden or unreasonable fluctuations or unwarranted changes in price that burden interstate commerce.[1223] For example, it may be that for a given commodity, high levels of sudden or unreasonable fluctuation or unwarranted changes in the price of a commodity would have little overall impact on commerce in the cash commodity market or the national economy. If the burdens or negative economic consequences associated with position limits for that commodity, as discussed in the Commission's consideration of costs and benefits, are out of proportion to the likely economic benefits of position limits, it would be unwarranted to impose them.[1224] However, there are markets in which sudden or unreasonable fluctuations or unwarranted changes in the price of a commodity caused by excessive speculation would have significantly negative effects on the cash commodity market or the broader economy. Even if such disruptions would be unlikely due to the particular characteristics of the relevant derivatives market, the Commission may nevertheless determine that position limits are necessary as a prophylactic measure given the potential magnitude or impact of the unlikely event.[1225]

The Commission's proposed test in the 2020 NPRM thus focused on the Congressional purpose implicit in the finding in the first sentence of paragraph 4a(a)(1): Protecting the cash commodity markets from such sudden or unreasonable fluctuations or unwarranted changes in the price. The Commission specified that this standard cannot be determined by a mathematical formula, but requires judgment by the Commission, taking into account available facts but also based on the Commission's experience and expertise.[1226] The Commission further specified that this standard includes consideration of costs and benefits under CEA section 15(a), insofar as the Commission is required by that section to consider the costs and benefits of its discretionary choices.[1227]

In applying this necessity standard in the 2020 NPRM, the Commission identified two primary factors to be used in identifying commodities where using position limits in derivatives markets to control or prevent injury to the underlying commodity market would be most valuable:

The first primary factor is the importance of the derivatives market for a commodity to the operation of the market for the cash commodity itself.[1228] Examples of links between derivatives markets and cash markets that exemplify this factor include:

a. The extent to which volatility in the derivatives market is likely to result in sudden or unreasonable fluctuations or unwarranted changes in the price in the cash commodity market including, in particular, the extent to which participants in the cash market rely on the derivatives market as a price discovery mechanism. This includes the use of futures prices for pricing cash-market transactions and the use of futures prices for planning purposes, such as when farmers decide what crops to plant or manufacturers estimate the cost of inputs to their production processes.[1229]

b. The extent to which participants in the cash market use the derivatives market for hedging.[1230] The second primary factor specified in the 2020 NPRM is the importance of the underlying commodity to the economy as a whole.[1231] In the view of the Commission, evidence demonstrating either one of these primary factors is sufficient to establish that position limits are necessary. This is so because each primary factor identifies circumstances that present an undue risk that disruptions to derivatives markets for a commodity will have consequences for industries that produce and use the relevant commodity and, ultimately, the general public that invests in and is employed by those industries and purchases their end-products.[1232] Thus, each of the primary factors relates to the statutory objective of diminishing, eliminating, or preventing undue and unnecessary burdens on interstate commerce in a commodity arising from excessive speculation in associated derivatives contracts. Of course, to the extent that both factors are present, a necessity finding will be strengthened.

In the 2020 NPRM, the Commission emphasized that a necessity determination cannot be reduced to a mathematical formula, though data may of course be highly relevant. To the extent that the primary factors identified by the Commission cannot be directly measured, the Commission, in the exercise of its judgment, may look to market data or qualitative information that correlates with these factors for guidance in applying them.[1233]

With respect to futures contracts and options contracts linked to core referenced futures contracts, the Commission determined that position limits are necessary for linked contracts because such position limits are likely to make position limits for core referenced futures contracts more effective in preventing manipulation and other sources of sudden or unreasonable fluctuations or unwarranted changes in the price in the underlying commodity.[1234]

The Commission's preliminary necessity finding in the 2020 NPRM also took into consideration economic differences between derivatives positions held during spot months and those held during other months that affect the extent to which position limits are an efficient mechanism for controlling or preventing sudden or unreasonable fluctuations or unwarranted changes in the price in underlying commodities. Specifically, the Commission stated that corners and squeezes can occur only during the spot month.[1235] Thus, certain important sources of sudden or unreasonable fluctuations or unwarranted changes in the price are present only during the spot month. While the fact that certain types of disruptions in a given market may be unlikely is not dispositive of the necessity question,[1236] the Commission judged that the impossibility of corners and squeezes in non-spot months diminished the likelihood of excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price in underlying commodities to such an extent as to reduce the benefit of position limits for those months below the point where, in the Commission's judgment, position limits would be justified under the necessity standard.[1237] Nevertheless, the Commission did not rescind existing non-spot month limits for legacy

[1223] 85 FR at 11665.

[1224] *Id.*

[1225] *Id.*

[1226] 85 FR at 11665.

[1227] *Id.* For further discussion of the cost-benefit implications of the Commission's necessity finding with respect to the 25 core referenced futures contracts, *see infra* Section IV.A.2. For further discussion of the cost-benefit implications of Federal position limits in light of existing exchange-set limits, *see infra* Section IV.A.6.

[1228] 85 FR at 11665, 11666.

[1229] 85 FR at 11665, 11666.

[1230] *Id.* at 11666.

[1231] *Id.* at 11665, 11666.

[1232] *See Id.* at 11664, fn. 471, 11666–11670 (giving examples as part of necessity finding).

[1233] See discussion in findings section below.

[1234] 85 FR at 11619–11620. *See also supra* at Section II.A.16.iii.

[1235] 85 FR at 11629.

[1236] *Id.* at 11665.

[1237] 85 FR at 11628. The Commission also believes that the relevant benefits and burdens indicate that no level of new non-spot-month limits is ''appropriate'' as that term is used in Section 4a(a)(2)(A). *See* discussion at Section IV.A.6.iii.b.

agricultural contracts, because it did not observe problems that would give a reason to eliminate them at this time.[1238]

2. Comments and Commission Responses

Relatively few commenters addressed the substance of the Commission's legal interpretation of what CEA section 4a requires in order for the Commission to determine that position limits are necessary for a particular commodity or contract. Major points made by commenters, and the Commission's evaluation of these points include:

a. Several commenters stated that the necessity finding must be ''robust and data-driven.'' [1239] The Commission agrees that the agency is required to consider available data, to the extent that it is relevant, in determining whether to establish position limits. At the same time, the Commission interprets the statute as requiring it to exercise judgment regarding the need for position limits where data is not available. The statute does not specify the use of any particular methodology, quantitative or otherwise, in determining whether position limits are necessary.

In addition, the Commission must implement CEA section 4a in a fashion consistent with the finding regarding excessive speculation and its effects on commerce in the first sentence of paragraph 4a(a)(1) and the directive in paragraph 4a(a)(2) that the Commission ''shall'' promptly establish position limits for physical commodities, albeit subject to the necessity-finding requirement. These provisions imply that the Commission must act on position limits, even if available data is imperfect, so long as it has a reasonable basis for determining limits to be necessary. Other language of CEA section 4a further supports the conclusion that Congress intended the Commission to consider available data but also to exercise judgment in establishing position limits. For example, paragraph 4a(a)(2) requires that limits be established ''as appropriate,'' which implies consideration of a broad range of relevant factors, but subject to the reasonable exercise of subjective judgment.[1240] Similarly, paragraph 4a(a)(3)(B) lists policy objectives for position limits that the Commission must achieve ''to the maximum extent possible'' but specifies that the Commission must do this ''in its discretion.'' The Commission also believes it is better policy to interpret ''as necessary'' to permit flexibility in response to imperfect available data, so long as there is a reasonable basis for its decisions.[1241] Such flexibility may facilitate achieving the objectives of the statute, whether by determining that position limits either are necessary or not necessary in particular circumstances.

b. One commenter, MGEX, supported the Commission's general approach of focusing on the relationship between the derivatives market and the underlying commodity in making necessity determinations.[1242] This commenter stated, ''As the Commission appropriately points out, it is important to focus on derivatives that are vital to price discovery and distribution of the underlying commodity so that any excessive speculation may have a small impact.'' [1243] The Commission agrees with that statement.

c. One commenter, Citadel, asserted that the statute required a different test for a finding of necessity than that used by the Commission.[1244] According to this commenter, for each commodity subject to position limits, the Commission must establish ''when and how holding a large position in a given commodity could allow a market participant to exert undue market power or influence.'' [1245] The commenter criticized the Commission for relying on the role core referenced futures contracts play in price discovery and the fact that they require physical delivery.[1246] According to the commenter, the Commission proposed position limits on certain commodities ''based merely on their size or importance'' and ''did not explain why size or importance, without more'' justifies position limits.[1247] The commenter expressed concern that the Commission's standard could set a precedent for the establishment of position limits for additional commodities in the future without adequate justification and therefore could reduce investor participation in commodity markets in a fashion that would impair the use of those markets for risk management and commercial decision making.[1248]

The Commission disagrees with Citadel's interpretation of the CEA section 4a necessity requirement and criticism of the Commission's interpretation for several reasons, most of which have been stated previously.

i. The statutory language does not state a requirement to make the particular findings Citadel claims are necessary. To the contrary, it includes a Congressional finding that excessive speculation can cause sudden or unreasonable fluctuations or unwarranted changes in the price that are a burden on interstate commerce in commodities. The Commission is required to establish position limits in light of that finding, and neither Congress nor the Commission have ever required the sort of showing Citadel suggests here with respect to individual commodities.[1249] It is not reasonable to surmise that Congress intended Citadel's test to apply without saying so, particularly under the Dodd-Frank Act's amendments, which reflect a Congressional intent, or at least expectation, that the position limits regime be expanded. The Commission also notes that Citadel set forth its proposed standard for necessity in just a few sentences and did not spell out what sort of data would be needed to comply with it in practice and how such data would be used.[1250] If there were any evidence that Congress intended Citadel's approach, or if a case could be made that the Commission should prefer it, such specifics would have been readily available.

[1238] 85 FR at 11628. Specifics of the Commission's findings with regard to the need for limits during spot and non-spot months are in the 2020 NPRM at 85 FR 11596, 11628, and *supra* at Sections II.B.3. and II.B.4.

[1239] *E.g.* ISDA at 3; SIFMA AMG at 2. *See also* MFA/AIMA at 4 (advocating for individualized necessity findings based on detailed analyses for each contract).

[1240] *See Michigan* v. *EPA,* 576 U.S.C. 743, 752 (2015).

[1241] 7 U.S.C. 6a(a)(3)(B).

[1242] MGEX at 1.

[1243] *Id.*

[1244] Citadel at 2–4. Somewhat similar views have been expressed by other commenters in earlier phases of the Commission's efforts to promulgate a position limits rule under paragraph 4a(a)(2). *See, e.g.,* IATP at 5 (describing views of ISDA/SIFMA AMG in connection with *ISDA* litigation).

[1245] Citadel at 2.

[1246] *Id.*

[1247] *Id.*

[1248] *Id.*

[1249] The Commission has made similar determinations in connection with requirements for DCMs to impose position limits or position accountability levels by DCM rule. *E.g.,* Establishment of Speculative Position Limits, 46 FR 50938, 50940 (Oct. 16, 1981) (''it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited''). *See also* 2020 NPRM, 85 FR at 11665–11666 (Commission has repeatedly found that all markets in physical commodities are ''susceptible to the burdens of excessive speculation'' because they ''have a finite ability to absorb the establishment and liquidation of large speculative positions in an orderly manner,'' but this characteristic of these markets is not sufficient to establish that limits are necessary within the meaning of paragraph 4a(a)(1) for all physical commodities).

[1250] Citadel at 2–3.

ii. The Congressional finding at the beginning of paragraph 4a(a)(1) makes clear that Congress's primary concern was the effect of excessive speculation in derivatives markets on the related cash markets for the associated commodities. The Commission's focus on the role the core referenced futures contracts play in price discovery and hedging and the importance of certain commodities to the economy as a whole therefore is directly responsive to the statutory purpose of position limits. The Commission's focus on hedging and price discovery is further supported by CEA section 3, which sets forth the purpose of the CEA. Subsection 3(a) contains a Congressional finding that the transactions subject to the CEA serve a ''national public interest'' by providing a means for ''managing and assuming price risks'' (*i.e.,* hedging and supporting hedging) ''discovering prices'' and ''disseminating pricing information.'' Subsection 3(b) states that the purpose of the CEA, among other things, is to ''serve the public interests'' described in subsection 3(a).[1251] The Commission's focus is thus consistent with the Congressional intent.

The Commission's consideration of the size of the futures market for the core referenced futures contracts also is consistent with the statutory purpose. As explained below,[1252] contracts with a large volume of trading, generally speaking, are contracts that are likely to be heavily used for price discovery and hedging by participants in the cash market. It is rational to conclude that position limits are unnecessary for contracts that play little role in price discovery or for commodities that have a lesser economic footprint. In addition, imposing position limits based on the size or importance of futures markets is a rational way to avoid imposing compliance costs related to position limits on futures contracts and related options contracts that are relatively inactive or otherwise a minor part of the market.

iii. As for Citadel's claim that the Commission's standard for necessity will set a precedent for imposing position limits on additional commodities in the future without adequate justification, if the Commission were to establish additional position limits in the future, it would need to justify that decision through reasoned decision making in a new rulemaking, which would be subject to public comment and judicial review to the same extent as other rules.

iv. Citadel's concern with adequate investor participation in the derivatives markets applies to varying degrees with respect to all position limits. The Commission has considered such effects, including on liquidity and bona fide hedging, throughout this rulemaking, including in its consideration of costs and benefits and in connection with the determination of position limit levels.[1253]

c. One commenter, IATP, endorsed a dissenting Commissioner's criticism of the necessity standard set forth in the 2020 NPRM.[1254] The criticism was to the effect that the standard ''boils down'' to the assertion that the core referenced futures contracts are large and critically important to the underlying cash markets.[1255] However, for reasons set forth above and in the 2020 NPRM, this is an incomplete characterization of the Commission's standard. Moreover, as also explained above and in the 2020 NPRM, importance to the cash market is a criterion for necessity that flows directly from the statutory purpose and, for reasons explained in the necessity findings section, the amount of trading in a contract, generally speaking, is likely to correlate with factors relevant to the statutory purpose, including use of the contract for price discovery and hedging.

While critical of the Commission's standard, IATP was even more critical of a standard like that proposed by Citadel that would require the Commission to ''determine the likelihood that a specific limit would curtail excessive speculation in a specific market.'' [1256] According to IATP, such a standard, in combination with a requirement to avoid undue costs, would make implementation of position limits ''nigh to impossible.'' [1257] However, whether or not such a standard is possible to apply, the Commission has determined that the statute does not require it, and that the Commission's approach to the necessity finding is the one most consistent with the statutory language and purpose.

d. Many commenters asserted that necessity findings needed to be made for each contract or commodity subject to position limits.[1258] The Commission agrees with this interpretation of the statute, subject to a number of clarifications and provisos.

i. While the Commission must find position limits necessary for each contract, it may do so based on different criteria for different types of contracts so long as the criteria are reasonable and consistent with the Commission's overall interpretation of the necessity provision. For example, as described above, the Commission has determined that, where limits are necessary for a core referenced futures contract, position limits for contracts linked to the core referenced futures contract are also necessary to enable position limits on the associated core referenced futures contract to function as intended.[1259]

ii. The statute does not require a necessity finding for economically equivalent swaps for which position limits are required pursuant to paragraph 4a(a)(5) of the CEA.[1260] While a necessity finding is required for position limits established under paragraph 4a(a)(2) because the Commission must apply ''the standards set forth in paragraph [4a(a)(1)],'' no similar language appears in paragraph 4a(a)(5). To the contrary, paragraph 4a(a)(5)(A) states that position limits for economically equivalent swaps must be established ''[n]otwithstanding any other provision of this section.'' Moreover, the statute requires the Commission to develop position limits for economically equivalent swaps ''concurrently'' with position limits established under paragraph 4a(a)(2), and establish those limits ''simultaneously'' with those established under paragraph 4a(a)(2).[1261] The necessity finding provision of paragraph 4a(a)(1) therefore does not apply to economically equivalent swaps. Rather, when position limits are necessary under paragraph 4a(a)(2), the requirement to establish them for economically equivalent swaps is automatically triggered under CEA section 4a(a)(5).

In addition to being compelled by the statutory language, this is a reasonable

[1251] 7 U.S.C. 5(a), (b).

[1252] *See infra* Section III. (discussing necessity finding).

[1253] *See* 7 U.S.C. 6a(a)(3)(B)(iii) (position limits should be set at level that ensures sufficient market liquidity for bona fide hedgers to the maximum extent practicable in the discretion of the Commission).

[1254] IATP at 4 (quoting dissenting statement of Commissioner Berkovitz).

[1255] *Id.*

[1256] IATP at 5. IATP did not refer specifically to Citadel's comment but to similar concepts in connection with the *ISDA* litigation.

[1257] IATP at 5.

[1258] *E.g.,* ISDA at 3 (necessity determination must be made ''in connection with any specific position limits that are adopted''); PIMCO at 3 (necessity determination should be made on a ''commodity-by-commodity and product-by-product basis''); MFA/AIMA at 4 (advocating ''for individualized necessity findings based on detailed analyses for each contract . . . including a more specific necessity finding for each contract'').

[1259] For further discussion on contracts linked to core referenced futures contracts, *see* Sections II.A.16. and III.D.

[1260] 7 U.S.C. 6a(a)(5).

[1261] 7 U.S.C. 6a(a)(5)(B).

interpretation of the statute in policy terms because Congress could reasonably have determined that the necessity finding for position limits for futures contracts (and options thereon) carries over to economically equivalent swaps by virtue of the fact that they are economically equivalent.[1262] The Commission notes that, while paragraph 4a(a)(5) does not require the Commission to make a necessity finding for economically equivalent swaps, it requires the Commission to make policy judgments with respect to such swaps in connection with the definition of what swaps are economically equivalent and the requirement that limit levels be established ''as appropriate.'' [1263] The relevant discussion with respect to the determination of what swaps that are deemed to be ''economically equivalent swaps'' is set forth elsewhere in this preamble.[1264]

e. Some commenters asked the Commission to clarify that it finds position limits not to be necessary for futures contracts other than the referenced contracts specified in the rule.[1265] The Commission agrees that, for commodities falling within the scope of this rulemaking, *i.e.,* ''physical commodities other than excluded commodities'' for which position limits are required by paragraph 4a(a)(2), the Commission has determined that position limits are necessary only for the 25 core referenced futures contracts and any associated referenced contracts on futures contracts or options on futures contracts, but not for other futures contracts or options on futures contracts.[1266] As with any rulemaking, the necessity determinations made in connection with this rule may change in the future based on market developments, new information or analysis, or changes in Commission policy.

3. Commission Determination Regarding Necessity Standard

For these reasons and those set forth in the 2020 NPRM, the Commission adopts the interpretation of ''necessity'' set forth in the 2020 NPRM and clarified and elaborated upon here.

### *C. Necessity Finding as to the 25 Core Referenced Futures Contracts*

1. Introduction

This Final Rule imposes Federal position limits on 25 core referenced futures contracts, any futures contracts or options on futures contracts directly or indirectly linked to the core referenced futures contracts, and any economically equivalent swaps. As discussed above, the Commission bases its necessity analysis on the following propositions reflected in the text of CEA section 4a(a)(1). First, that excessive speculation in derivatives markets can cause sudden or unreasonable fluctuations or unwarranted changes in the price of an underlying commodity. Second, that such price fluctuations and changes are an undue and unnecessary burden on interstate commerce in that commodity. Third, that position limits can diminish, eliminate, or prevent that burden. With these propositions established by Congress, the Commission makes a further determination of whether it is necessary to use position limits, Congress's prescribed tool to address those burdens on interstate commerce, in light of the facts and circumstances.

The Commission finds that position limits on the 25 core referenced futures contracts identified in the 2020 NPRM are necessary to prevent the economic burdens on interstate commerce associated with excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.[1267] As in the 2020 NPRM, this necessity determination is based on two interrelated factors: The importance of the 25 core referenced futures contracts to their respective underlying cash markets, including that they require physical delivery of the underlying commodity; and the particular importance to the national economy of the commodities underlying the 25 core referenced futures contracts. The Commission analyzes both factors in turn below.

2. Importance of the 25 Core Referenced Futures Contracts to Their Respective Underlying Cash Markets

a. Link Between the Derivatives Market and Its Underlying Cash-Market

As explained in the 2020 NPRM, the Commission has determined that position limits are necessary for physical commodities only where there exists a physically-settled futures contract for two reasons. First, physical settlement establishes a direct link between the futures market and the cash market since futures contracts, while normally closed out by offset, may be settled by delivery of the commodity itself. This link helps to force convergence between futures contract settlement prices and cash-market prices by ensuring that futures prices in the delivery period reflect supply and demand in the cash-market, whereas cash-settled futures contracts do not provide a direct link because physical-delivery is not an option.[1268] As a result, in many circumstances, commercial participants use physically-settled futures contracts for price discovery. Illustrative of this point, at the May 2020 public meeting of the Commission's Energy and Environmental Markets Advisory Committee, an industry representative discussing application of position limits to power markets observed, ''In futures markets, where physically-settled contracts are established, such as natural gas or crude oil, these physical contracts effectively serve as the most important price discovery tool for the spot market at baseload supply and demand for the delivery month is managed with the physical futures or physical deals linked to it.'' [1269]

Second, physically-settled contracts may be at risk of corners and squeezes, because the settlement mechanism of the contract requires participants with short positions to deliver the underlying commodity at expiration.[1270] Physical

[1262] Some commenters stated that the statute requires a necessity finding for swaps. *E.g.,* ISDA at 4. The Commission generally agrees with this position for swaps, but not for economically equivalent swaps for the reasons stated herein.

[1263] 7 U.S.C. 6a(a)(5)(A), (B).

[1264] *See* Section II.A.4.

[1265] *E.g.* SIFMA AMG at 5 (''spot month limits should apply only to physically settled futures contracts (*i.e.,* the core referenced futures contracts), and the Commission should not make any determinations on, or adopt final rules applicable to, financially settled futures at this time.''); ISDA at 4 (stating that the Commission should start with final rules only for physically-settled contracts during the spot month.)

[1266] As discussed above, while economically equivalent swaps are encompassed within the ''referenced contract'' definition, such swaps are subject to Federal position limits pursuant to 7 U.S.C. 6a(a)(5) and therefore are not subject to a necessity determination.

[1267] *See supra* Section III.B.

[1268] *See* 85 FR at 11667. Many participants rely on the possibility of settlement by physical delivery to foster convergence at expiration of the futures contract. *Id.* Because of imperfect contract design or other factors, the convergence mechanism does not always work as hoped in practice. *Id.* at 11676, fn. 575. Such malfunctions are considered to be a public policy concern because bona fide hedgers and other participants seek to hedge cash-market prices with futures contract prices. *Id.* at 11667.

[1269] *See* Transcript of Committee Meeting at 46:19–47:06, Comment by Nodal Exchange, Inc., U.S. Commodity Futures Trading Commission Energy and Environmental Markets Advisory Committee (2020), *https://www.cftc.gov/sites/default/files/2020/06/1591218221/eemactranscript050720.pdf.*

[1270] 85 FR at 11672. For example, based on its general experience, the Commission recognizes that if the underlying commodity is ''cornered'' and the

Continued

settlement therefore may increase the sources of the risk of sudden or unreasonable fluctuations or unwarranted changes in the price of the underlying commodity arising from excessive speculation.[1271] Applying position limits to commodities where there is a physically-settled core referenced futures contract therefore is consistent with the Commission's interpretation of the paragraph 4a(a)(1) necessity requirement as directing the Commission to impose limits where they are most likely to be an efficient mechanism for achieving the statutory objectives.[1272]

b. The 25 Core Referenced Futures Contracts Are Used for Hedging and Price Discovery

In the 2020 NPRM, the Commission presented information supporting its determination that the proposed 25 core referenced futures contracts are used extensively for hedging and price discovery, thus establishing a close link between the markets for these futures contracts and commerce in the relevant commodities.[1273] The Commission's conclusions on this point are further supported by comments discussing the use of particular core referenced futures contracts for hedging and price discovery, or discussing more generally the use of futures contracts for hedging and price discovery in the context of the Commission's proposed rule.[1274]

The 25 core referenced futures contracts also serve as key benchmarks for use in pricing cash-market and other transactions.[1275] For example, NYMEX NY Harbor RBOB Gasoline (RB) is the main benchmark used for pricing gasoline in the U.S. petroleum products market, a huge physical market with total U.S. refinery capacity of approximately 9.5 million barrels per day of gasoline.[1276] Similarly, the NYMEX NY Harbor ULSD Heating Oil (HO) contract is the main benchmark used for pricing the distillate products market, which includes diesel fuel, heating oil, and jet fuel.[1277] The utility of the price discovery function for these futures contracts is thus impactful for commercial participants regardless of whether they are actively trading in the futures market.

There is also evidence that the 25 core referenced futures contracts are the physically-settled contracts in physical commodities traded on U.S. exchanges that, by and large, are most used for hedging and price discovery by cash-market participants. Unfortunately, the Commission does not have information that permits a direct comparative measurement of the extent to which each of the actively traded futures contracts is used for hedging and price discovery. However, available statistics from exchanges show that the 25 core referenced futures contracts, with the partial exception of CBOT Oats (O), a legacy contract, are the most actively traded physically-settled contracts in physical commodities, as measured by open interest and trading volume. As discussed in detail further below, the most actively traded futures contracts will usually be the contracts that are most used for hedging and price discovery.

participant with the short position does not already have the commodity to deliver, then the short participant must exit its position through an offsetting long position. As a consequence, the participant will likely have to bid up the price of the futures contract to exit the market, thus ''squeezing'' the short to pay a higher price for the offsetting long position. Conversely, for a cash-settled contract, a market participant who has cornered the cash market for an underlying commodity cannot squeeze someone who is short the cash-settled futures contract because the short does not have to acquire the underlying commodity to make delivery to the long in a cash-settled contract.

[1271] *See* 7 U.S.C. 6a(a)(3)(B)(ii) (identifying deterrence and prevention of corners and squeezes as one of the objectives of position limits required by 7 U.S.C. 6a(a)(2)).

[1272] *See* ISDA at 3–4 (suggesting that the Commission ''finalize the proposed Federal position limits rules only for physically delivered spot month futures contracts, in the first phase . . . as the Commission finds are necessary to . . . prevent [e]xcessive speculation . . . .'')

[1273] 85 FR at 11666–71.

[1274] *See, e.g.,* ASR at 1 (stating that ICE Sugar No. 11 and ICE Sugar No. 16 are commonly used by commercial participants for hedging.); NGSA at 12 (''Physical market participants currently hedge Henry Hub price risk through both physically settled and financially-settled futures contracts.''); Cargill at 2 (''Commercial end-users . . . rely on the futures and derivatives markets to perform vital functions including price discovery and risk management related to significant physical commodity origination, production and processing, transportation, purchasing and sales, among other things.''); EEI/EPSA at 2 (''The Joint Associations members are not financial entities. Rather, they are physical commodity market participants that rely on futures and swaps to hedge and mitigate their commercial risk.''); ADM at 2 (''Many . . . [futures] transactions are critical elements of risk management, price discovery and hedging while also playing a role in the acquisition of physical commodities.''); CMC at 1 (noting that commercial participants ''use futures markets to hedge risk exposures related to commercial activities in physical commodities.''); DECA at 2 (''The [Cotton] CT contract plays an indispensable role in the global cotton ecosystem and it is needed to provide price discovery for all market participants.''); AFIA at 2 (''As commercial end-users, AFIA's members prioritize the need for [futures] markets to work well for their primary function of price discovery and risk management.); NGFA at 2 (''The NGFA's member firms are bona fide hedgers who hedge physical commodity risk and depend on futures markets for price discovery and risk management.''); ACSA at 5 (''. . . the futures delivery process is essential to maintaining functioning agricultural markets, price discovery, and convergence.''); PMAA at 1 (''For decades, petroleum marketers have been utilizing oil and refined product futures markets for their hedging needs to protect customers from volatility and price spikes. Well-functioning markets are critical to commodity price discovery.''); CCI at 3 (''In addition to covering timing differentials in commodity prices, intra-commodity spreads perform an important function in energy markets by, among other things, promoting price discovery and convergence as well as providing liquidity for priced-linked, physically-settled and cash-settled Referenced Contracts in the same underlying commodity during the spot month as market participants manage their risks across markets.''). *See also* NFP Electric Associations, Comment Letter on Proposed Rule on Position Limits for Derivatives and Aggregation of Positions (July 3, 2014), *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59934&SearchText=* (noting that the ''[energy] markets . . . provide commercial risk management opportunities and achieve price convergence between futures and cash-market prices for the benefit of commercial hedgers and their counterparties.'').

[1275] *See, e.g.,* USDA Economic Research Service, *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities,* Agricultural Economic Report No. 837, at 6 (Nov. 2004), *https://www.ers.usda.gov/webdocs/publications/41702/14700_aer837_1_.pdf?v.=41061* (one-third of all U.S. agricultural production is produced under contracts using pricing formulas determined by reference to futures prices); *see also* Paul Peterson, *Fixing Prices and Fixing Markets,* farmdoc daily (4): 118, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign (June 25, 2014), *https://farmdocdaily.illinois.edu/2014/06/fixing-prices-and-fixing-markets.html* (explaining that futures markets provide price discovery for cash grain spot markets and how price discovery through negotiated prices has diminished over time).

[1276] *See* 85 FR at 11669.

[1277] *Id.*

To follow up on the discussion of trading activity in the 2020 NPRM,[1278] the Commission analyzed average total open interest[1279] and average notional open interest[1280] for all physically-settled futures contracts for the period between January 2019 and December 2019.[1281] From that data, the Commission assessed the 30 largest physically-settled contracts in terms of average total open interest and average notional open interest for comparison.[1282] These 30 contracts comprised the 25 core referenced futures contracts, and the five physically-settled physical commodity contracts with the next-highest amounts of average total open interest and average notional open interest. As shown in the tables below, there is a significant drop in open interest between CBOT Oats (O), which has the lowest open interest of the core referenced futures contracts, and CME Random Length Lumber (LBS), which is the 27th largest physically-settled futures contract and has the second highest open interest of the five contracts not selected from the group of 30 contracts.[1283] Specifically, average total open interest in CBOT Oats (O) (5,630 OI) is almost twice the size of average total open interest in CME Random Length Lumber (LBS) (3,025 OI).[1284]

With the exception of CBOT Oats (O),[1285] as shown in the tables below, the average notional open interest values for the 25 core referenced futures contracts are all substantially larger and more valuable than the five contracts that were not selected. Specifically, outstanding futures average notional values range from approximately $ 33 billion for CBOT Corn (C) to approximately $ 80 million for CBOT Oats (O), with the other core referenced futures contracts on agricultural commodities all falling somewhere in between.[1286] Outstanding futures average notional values of the core referenced futures contracts on metal commodities range from approximately $ 80 billion in the case of COMEX Gold (GC), to approximately $ 3.6 billion in the case of NYMEX Platinum (PL), with the other metals core referenced futures contracts all falling somewhere in between.[1287] With regard to energy commodities, futures average notional values range from $ 116.7 billion in the case of NYMEX Light Sweet Crude Oil (CL) to $ 28.3 billion in the case of NYMEX NY Harbor RBOB Gasoline (RB).[1288]

[1278] *See id.* at 11666, 11668–70.

[1279] Open interest refers to the total number of outstanding futures contracts that have not been offset at the end of the trading day.

[1280] Notional value means the value of average open interest without adjusting for delta in options.

[1281] The 25 core referenced futures contract are all long-standing, established contracts. Generally speaking, for purposes of this Final Rule, the Commission focused on mature contract markets with at least five years of reported open interest and volume. For example, the Commission notes that the ICE Canola Futures (RS) and NYMEX WTI Houston Crude Oil Futures (HCL) contracts appear to have characteristics similar to those which the Commission has found support a necessity finding, but these contracts are both much newer, and the Commission finds that this militates against finding a position limit necessary until their respective markets mature further. The Commission may consider a position limit necessary for one or both in the future, as it revisits these issues from time to time as required by statute.

[1282] As discussed in the 2020 NPRM, the Commission also analyzed FIA end of month open interest data for December 2019 and FIA 12-month total trading volume data (January 2019 through December 2019) and reached the same conclusion as discussed herein. *See* 85 FR at 11670.

[1283] Many commenters suggested that the Commission's final rule should demonstrate that position limits are necessary on a ''commodity-by-commodity basis'' as supported by empirical evidence or data. *See, e.g.* PIMCO at 3; ISDA at 3; SIFMA AMG at 2; MFA/AIMA at 4. As discussed in Section III.B.2.a., *supra,* the Commission agrees that the agency is required to consider relevant data, where available, in determining whether to establish position limits. The Commission however notes that the CEA does not specify the use of any particular methodology, quantitative or otherwise, in determining whether position limits are necessary.

[1284] During the period January 1, 2019 through December 31, 2019, the NYMEX Loop Crude Oil Storage (LPS) futures contract had higher open interest than four of the 25 core referenced futures contracts and the remaining largest contracts that were not selected, as shown in the chart below. The Commission, however, notes that the contract is a capacity allocation contract, which gives the buyer of the contract the legal right to store crude oil at a storage facility in Louisiana for a specified calendar month. The Commission further notes that the contract is a newer one, has fewer reportable traders, and significantly lower average daily trading volume (NYMEX Loop Crude Oil Storage (LPS) 131 Vol.) and average notional value than any of the 25 core referenced futures contracts during this same period. In addition, open interest in the contract has dropped precipitously between January 1, 2020 and September 30, 2020. The Commission finds that all of these reasons militate against finding a position limit necessary for this contract until its market matures further. The Commission may consider a position limit necessary for this contract in the future, as it revisits these issues from time to time as required by statute.

[1285] *See supra* Section II.B.1. (discussing CBOT Oats (O) legacy contract status).

[1286] Calculations are based on data submitted to the Commission pursuant to part 16 of the Commission's regulations.

[1287] *Id.*

[1288] *Id.*

# TABLES-ALL FUTURES COMBINED OPEN INTEREST FOR 2019[1289]

| Core referenced futures contract | 2019 Average Total Open Interest | 2019 Average Notional Open Interest |
|---|---|---|
| **Legacy Agricultural Contracts** | | |
| CBOT Corn (C) | 1,681,524 | 33,256,731,844 |
| CBOT Oats (O) | 5,629 | 80,425,033 |
| CBOT Soybeans (S) | 717,978 | 32,647,008,431 |
| CBOT Soybean Meal (SM) | 451,076 | 13,969,781,979 |
| CBOT Soybean Oil (SO) | 493,452 | 8,981,864,994 |
| CBOT Wheat (W) | 421,345 | 9,721,238,192 |
| CBOT KC Hard Red Winter Wheat (KW) | 300,269 | 6,746,361,931 |
| MGEX Hard Red Spring Wheat (MWE) | 62,515 | 1,704,862,973 |
| ICE Cotton No. 2 (CT) | 217,966 | 7,430,284,704 |
| **Other Agricultural Contracts** | | |
| CME Live Cattle (LC) | 369,823 | 17,132,068,083 |
| CBOT Rough Rice (RR) | 8,245 | 190,068,234 |
| ICE Cocoa (CC) | 272,805 | 6,556,679,464 |
| ICE Coffee C (KC) | 296,343 | 11,755,636,294 |
| ICE FCOJ–A (OJ) | 19,443 | 313,912,369 |
| ICE Sugar No. 11 (SB) | 947,198 | 13,535,036,765 |
| ICE Sugar No. 16 (SF) | 8,485 | 250,447,669 |
| **Metals Contracts** | | |
| COMEX Gold (GC) | 568,515 | 80,407,265,733 |
| COMEX Silver (SI) | 213,561 | 17,416,579,853 |
| COMEX Copper (HG) | 255,720 | 17,433,897,618 |
| NYMEX Platinum (PL) | 83,485 | 3,635,951,198 |
| NYMEX Palladium (PA) | 24,526 | 3,733,139,669 |
| **Energy Contracts** | | |
| NYMEX Henry Hub Natural Gas (NG) | 1,264,698 | 32,528,434,977 |
| NYMEX Light Sweet Crude Oil (CL) | 2,077,213 | 116,730,625,086 |
| NYMEX New York Harbor ULSD Heating Oil (HO) | 413,880 | 33,632,235,028 |
| NYMEX New York Harbor RBOB Gasoline (RB) | 398,129 | 28,331,340,324 |
| **Largest Contracts Not Selected** | | |
| COMEX Aluminum (ALI) | 290 | 12,857,652 |
| CBOT Ethanol (EH) | 1,139 | 45,360,015 |
| CME Random Length Lumber (LBS) | 3,025 | 123,368,066 |
| NYMEX Mont Belvieu Spot Ethylene In-Well (MBE) | 493 | 8,463,276 |
| NYMEX Loop Crude Oil Storage (LPS) | 22,995 | 1,188,630 |

In addition to open interest and notional value, the Commission analyzed average daily trading volume[1290] for the period January 1, 2019 through December 31, 2019 and notes that trading volume on the 25 core referenced futures contracts is also generally larger than trading volume on the five contracts that were not selected. For example, the CBOT Corn (C) and CBOT Soybean (S) contracts trade over 409,000 and 211,000 contracts respectively per day.[1291] The COMEX Gold (GC) contract trades approximately 343,288 contracts daily.[1292] The NYMEX Light Sweet Crude Oil (CL) contract, which is the world's most liquid and actively traded crude oil contract, trades nearly 1.2 million contracts a day, and the NYMEX Henry Hub Natural Gas (NG) contract trades on average approximately 409,480 contracts daily.[1293] In contrast, the CME Random Length Lumber (LBS), CBOT Ethanol (EH), COMEX Aluminum (ALI), and NYMEX Mont Belvieu Spot Ethylene In-Well (MBE) contracts, which were not selected, trade approximately 645, 315, 123, and 15.7 contracts respectively per day.[1294]

[1289] *Id.*

[1290] Daily trading volume represents the total quantity of futures contracts traded within a day.

[1291] Calculations are based on data submitted to the Commission pursuant to part 16 of the Commission's regulations.

[1292] *Id.*

[1293] *Id.*

[1294] *Id.* The average daily trading volume for CBOT Oats (O) (645.04 Vol) is approximately the same as the average daily trading volume for CME Random Length Lumber (LBS) (645.56 Vol), which is the largest contract in terms of volume of the five contracts that were not selected. While the average daily trading volume for ICE Sugar No. 16 (SF) (307.32 Vol), which is the smallest of the 25 core contracts in terms of volume, is less than the average daily trading volume for both CME Random Length Lumber (LBS) (645.56 Vol) and CBOT Ethanol (EH) (315.7 Vol), the Commission notes that many commercial participants frequently use both ICE Sugar No. 16 (SF) and ICE Sugar No. 11 (SB) together for hedging and price discovery because the underlying commodity is the same for both contracts. *See infra* Section III.C.5. (discussing the ICE Sugar No. 16 (SF) and ICE Sugar No. 11 (SB) contracts).

There are a number of reasons to expect that, generally speaking, the most actively traded futures contracts will usually be the contracts that are most used for hedging and price discovery. First, it is generally accepted that successful futures contracts usually require active market participation by hedgers as well as speculators.[1295] It is therefore reasonable to expect that some significant proportion of the activity in the most active futures contracts will normally consist of hedging and not solely consist of purely speculative trading. In addition, the most active futures contracts are likely to be the most liquid, at least most of the time. Such contracts are likely to be heavily relied upon as sources of price information because their prices reflect the collective opinion of more traders and are therefore likely to be a more accurate representation of the underlying cash-market price conditions.[1296] While the correlation between the magnitude of trading activity and use of a contract for hedging and price discovery is likely imperfect, it provides reason to expect that the 25 core referenced futures contracts are, on the whole, the physically-settled contracts in physical commodities traded on U.S. exchanges that are most used for hedging and price discovery. This is particularly true given the very large gap in activity levels between most of the 25 core referenced futures contracts and physically-settled contracts not included as core referenced futures contracts.

c. Conclusion Regarding Importance of the 25 Core Referenced Futures Contracts to Their Respective Underlying Cash Markets

Based on the information set forth in the NPRM and supplemented here, the Commission concludes that the importance of the 25 core referenced futures contracts to their respective underlying cash markets supports the conclusion that position limits are necessary for these contracts.

3. Importance of the Commodities Underlying the 25 Core Referenced Futures Contracts to the National Economy

With respect to the second factor, importance of the cash commodity to the U.S. economy as a whole, the 2020 NPRM set forth information demonstrating that each of the 25 core referenced futures contracts is important to the U.S. economy in various ways.[1297] Many of the 25 core referenced futures contracts involve commodities that are among the most important physical commodities for the U.S. economy, among those commodities for which physically-settled contracts are traded on U.S. exchanges.[1298]

For example, in the agricultural sector, three of the top five commodities in the United States, as measured by cash receipts, underlie core referenced futures contracts, including cattle, corn, and soybeans.[1299] An additional commodity that underlies several core referenced contracts, wheat, is in the top ten.[1300] Primary energy commodities that underlie core referenced futures contracts, specifically crude oil and natural gas, account for over half of U.S. energy production.[1301] Two additional core referenced futures contracts in the energy space, NYMEX New York Harbor ULSD Heating Oil (HO) and NYMEX New York Harbor RBOB Gasoline (RB), relate, in turn, to commodities that are among the most widely used byproducts of crude oil.[1302]

Thus, based on the information set forth in the NPRM and supplemented here, the importance of the underlying commodity to the national economy supports the conclusion that position limits are necessary for the 25 core referenced futures contracts.

4. Commodity Indices

As an independent check on its selection of core referenced futures contracts, the Commission has compared its list with the lists of commodities included in several widely-tracked third-party commodity indices: The Bloomberg Commodity Index, the S&P GSCI index, and the Rogers International Commodity Index. Based on the criteria used to create these indices, inclusion of a commodity in the index is an indication that the commodity is important to the world or U.S. economy, and that futures prices for the commodity are considered to be an important source of price information. In particular, Bloomberg states that it selects commodities for its Bloomberg Commodity Index that in its view are ''sufficiently significant to the world economy to merit consideration,'' that are ''tradeable through a qualifying related futures contract'' and that generally are the ''subject of at least one futures contract that trades on a U.S. exchange.'' [1303] Similarly, S&P's GSCI index is, among other things, ''designed to reflect the relative significance of each of the constituent commodities to the world economy.'' [1304] Likewise, the Rogers International Commodity Index ''represents the value of a basket of commodities consumed in the global economy'' that are ''tracked via futures contracts on 38 different exchange-traded physical commodities'' and that ''aims to be an effective measure of the price action of raw materials not just in the United States but also around the world.'' [1305]

Applying these criteria, Bloomberg, S&P, and Rogers have all deemed eligible for inclusion in their indices lists of commodities that overlap significantly with the Commission's 25 core referenced futures contracts. In particular, Bloomberg, S&P, and Rogers include 17, 15, and 22 contracts respectively per index of the 25 contracts selected by the Commission.[1306] Independent index

[1295] *See, e.g.,* Holbrook Working, *Futures Trading and Hedging,* 43 a.m. Econ. Rev. 314, 319–320 (June 1953), *https://www.jstor.org/stable/1811346?seq=1&cid=pdf-reference#references_tab_contents. See also* William L. Silber, *Innovation, Competition, and New Contract Design in Futures Markets,* 1 J. of Futures Markets 129, 131 (Summer 1981), *https://onlinelibrary.wiley.com/doi/abs/10.1002/fut.3990010205.*

[1296] *See, e.g.,* 85 FR at 11669, fn. 522–523. *See generally* William L. Silber, *The Economic Role of Financial Futures, in* Futures Markets: Their Economic Role 83, 89–90 (A. Peck ed., Am. Enter. Inst. for Pub. Pol'y Rsch. 1985), *https://legacy.farmdoc.illinois.edu/irwin/archive/books/Futures-Economic/Futures-Economic_chapter2.pdf* (discussing the price discovery and hedging functions of futures markets).

[1297] *See* 85 FR at 11666–11671.

[1298] *See, e.g.,* 85 FR at 11668 (discussing agricultural commodities and their downstream uses), *id.* at 11669–70 (discussing energy contracts).

[1299] USDA Economic Research Service, *Cash receipts by State, commodity ranking and share of U.S. total, 2019 Nominal (current dollars), https://data.ers.usda.gov/reports.aspx?ID=17843.*

[1300] *Id.*

[1301] U.S. Energy Information Administration, *Annual Energy Review, Primary Energy Production by Source, Table 1.2* (last updated Sept. 2020), *https://www.eia.gov/totalenergy/data/monthly/pdf/sec1_5.pdf.*

[1302] *See, e.g.,* U.S. Energy Information Administration, *U.S. petroleum flow,* 2018, *https://www.eia.gov/totalenergy/data/monthly/pdf/flow/petroleum.pdf.*

[1303] *The Bloomberg Commodity Index Methodology,* Bloomberg, at 16–17 (Jan. 2020), *https://data.bloomberglp.com/professional/sites/10/BCOM-Methodology.pdf.*

[1304] *S&P GSCI Methodology,* S&P Dow Jones Indices, at 8 (May 2020), *https://www.spglobal.com/spdji/en/indices/commodities/sp-gsci/#overview.*

[1305] *The RICI Handbook,* The Guide to the Rogers International Commodity Index, at 4–5 (Aug. 2020), *http://www.rogersrawmaterials.com/documents/RICIHndbk_01.31.19.pdf.*

[1306] The 17 Bloomberg contracts are ICE Coffee C (KC), COMEX Copper (HG), CBOT Corn (and Mini-Corn) (C), ICE Cotton No. 2 (CT), COMEX Gold (GC), NYMEX New York Harbor ULSD Heating Oil (HO), CME Live Cattle (LC), NYMEX Henry Hub Natural Gas (NG), NYMEX New York Harbor RBOB Gasoline (RB), COMEX Silver (SI), CBOT Soybeans (and Mini-Soybeans) (S), CBOT Soybean Meal (SM), CBOT Soybean Oil (SO), ICE Sugar No. 11 (SB), CBOT Wheat (and Mini-Wheat) (W), CBOT KC HRW Wheat (KW), and NYMEX Light Sweet Crude Oil (CL). *See https://data.bloomberglp.com/professional/sites/10/BCOM-Methodology.pdf.*

Continued

providers thus appear to have arrived at similar conclusions to the Commission's necessity finding regarding the relative importance of certain commodity markets for the economy and price discovery. The indices, taken individually or as a whole, support the Commission's conclusion that position limits are necessary for the 25 core referenced futures contracts.

5. Comments on Proposed Necessity Finding for Core Referenced Futures Contracts

While some commenters asserted that position limits are mandatory for all physical commodities, no commenter argued that the necessity finding should apply to any particular contract other than the 25 core referenced futures contracts.[1307]

Only one commenter advocated that the Commission remove commodities from the proposed list of 25 core referenced futures contracts. That commenter, IFUS, objected to imposing Federal position limits on its Sugar No. 11 (SB) contract.[1308] IFUS argued that the Sugar No. 11 (SB) contract does not have ''a major significance to U.S. interstate commerce'' because the contract prices the physical delivery of raw cane sugar for more than 30 delivery points around the world and only a *de minimis* amount of the raw sugar represented by the contract can be imported into the U.S. under U.S. sugar tariff-rate quotas.[1309] In addition, IFUS stated that the Commission's necessity finding does not establish that ICE Sugar No. 11 (SB) is used for price discovery for sugar produced and consumed in the United States.[1310]

The Commission has considered the comments and is adopting the list of the 25 core referenced futures contracts as proposed, including incorporating the ICE Sugar No. 11 (SB) contract as a core referenced futures contract. In response to IFUS' comment, the Commission recognizes that ''Sugar No. 11 (SB) is primarily an international benchmark.'' [1311] The Commission, however, disagrees with IFUS' comment that the Sugar No. 11 (SB) contract does not have a major significance to U.S. interstate commerce or play a role in price discovery for sugar produced and consumed in the United States.[1312]

For several reasons, the Commission finds that the ICE Sugar No. 11 (SB) contract has sufficient connection to the domestic sugar market to warrant Federal position limits. First, USDA data reflects that roughly one-quarter of the annual U.S. raw sugar supply is imported.[1313] While U.S. imports may be a small percentage of the total sugar represented by open interest in the ICE Sugar No. 11 (SB) contract, U.S. imports still account for a significant percentage of the total U.S. raw sugar supply. As described below, Commission data suggests that the ICE Sugar No. 11 (SB) contract is used for price discovery and hedging within the United States. Thus, when the contract is being used by commercial participants for price discovery or hedging in the domestic raw sugar market, it is therefore reasonable to expect that any sudden or unreasonable fluctuations or unwarranted changes in the global price of raw sugar could impose significant disruptions or harms to the domestic raw sugar markets. Because the ICE Sugar No. 11 (SB) contract represents a material portion of the U.S. sugar market, the Commission determines that it is necessary to include it as a core referenced futures contract to protect against any sudden or unreasonable fluctuations or unwarranted changes, which could result in undue burdens on the U.S. economy. Additionally, as further discussed below, since the ICE Sugar No. 11 (SB) contract represents a material portion of the U.S. raw sugar supply, the Commission concludes that disruptions to this contract potentially could harm both the price discovery process for the domestic sugar markets as well as the physical delivery of the underlying commodity.

Second, the ICE Sugar No. 11 (SB) contract is listed on IFUS, a DCM registered with the Commission that lists derivatives contracts for trading by U.S. participants in the United States, among others. Data reported to the Commission through Form 102s reflects that domestic firms account for approximately 20% of commercial market participants and 65%–70% of the non-commercial market participants trading in the ICE Sugar No. 11 (SB) contract.[1314] This data supports the Commission's finding that the ICE Sugar No. 11 (SB) contract is ''used for price discovery and hedging within the United States.'' [1315]

Finally, as the Commission noted in the 2020 NPRM, the Commission believes that the ICE Sugar No. 11 (SB) and ICE Sugar No. 16 (SF) contracts together ''[a]s a pair'' are ''crucial tools for risk management and for ensuring reliable pricing.'' [1316] The Commission's view is informed by the fact that both ICE Sugar No. 11 (SB) and ICE Sugar No. 16 (SF) call for delivery of the same size and quality of raw cane sugar, with the

The 15 S&P GSCI contracts are ICE Cocoa (CC), ICE Coffee C (KC), CBOT Corn (and Mini-Corn) (C), ICE Cotton No. 2 (CT), COMEX Gold (GC), NYMEX New York Harbor ULSD Heating Oil (HO), CME Live Cattle (LC), NYMEX Henry Hub Natural Gas (NG), NYMEX New York Harbor RBOB Gasoline (RB), COMEX Silver (SI), CBOT Soybeans (and Mini-Soybeans) (S), ICE Sugar No. 11 (SB), CBOT Wheat (and Mini-Wheat) (W), CBOT KC HRW Wheat (KW), and NYMEX Light Sweet Crude Oil (CL). *See S&P GSCI Methodology,* S&P Dow Jones Indices, at 26 (May 2020), *https://www.spglobal.com/spdji/en/indices/commodities/sp-gsci/#overview.* The 22 Rogers contracts are ICE Cocoa (CC), ICE Coffee C (KC), COMEX Copper (HG), CBOT Corn (and Mini-Corn) (C), ICE Cotton No. 2 (CT), COMEX Gold (GC), NYMEX New York Harbor ULSD Heating Oil (HO), CME Live Cattle (LC), NYMEX Henry Hub Natural Gas (NG), CBOT Oats (O), ICE FCOJ–A (OJ), NYMEX Palladium (PA), NYMEX Platinum (PL), NYMEX New York Harbor RBOB Gasoline (RB), CBOT Rough Rice (RR), COMEX Silver (SI), CBOT Soybeans (and Mini-Soybeans) (S), ICE Sugar No. 11 (SB), CBOT Wheat (and Mini-Wheat) (W), CBOT KC HRW Wheat (KW), MGEX Hard Red Spring Wheat (MWE), and NYMEX Light Sweet Crude Oil (CL). *See http://www.rogersrawmaterials.com/weight.asp.*

[1307] *E.g.,* NEFI at 2 (supporting Federal position limits for all 25 core referenced futures contracts, but stating that the list is too limited because it included only four energy contracts and that Congress imposed a clear mandate to establish limits on all commercially-traded energy derivatives); Better Markets at 64.

[1308] IFUS at 3. The ICE Sugar No. 11 (SB) ''contract prices the physical delivery of raw cane sugar free-on-board the receiver's vessel to a port within the country of origin of the sugar.'' *See* Sugar No. 11 Futures Product Specs, Intercontinental Exchange website, available at *https://www.theice.com/products/23/Sugar-No-11-Futures.* The United States is one of the delivery points for the ICE Sugar No. 11 (SB) contract because U.S. origin raw cane sugar is one of the 29 deliverable origins under the contract. *Id.*

[1309] IFUS at 3–4.

[1310] IFUS at Exhibit 1, No. 52.

[1311] 85 FR at 11668, fn. 507.

[1312] The Commission notes that IFUS did not object to the inclusion of ICE Sugar No. 16 (SF) as a core referenced futures contract in the 2020 NPRM. The ICE Sugar No. 16 (SF) ''contract prices physical delivery of US-grown (or foreign origin with duty paid by deliverer) raw cane sugar at one of five U.S. refinery ports as selected by the receiver.'' *See* Sugar No. 16 Futures Product Specs, Intercontinental Exchange website, available at *https://www.theice.com/products/914/Sugar-No-16-Futures.* The same commodity, raw centrifugal cane sugar based on 96 degrees average polarization, underlies both ICE Sugar No. 16 (SF) and ICE Sugar No. 11 (SB) contracts. *Id. See also* Sugar No. 11 Futures Product Specs, Intercontinental Exchange website, available at *https://www.theice.com/products/23/Sugar-No-11-Futures.* Both contracts also trade on IFUS in units of 112,000 pounds per contract. *Id.*

[1313] USDA Economic Research Service, *Sugar and Sweeteners Yearbook Tables, World Production, Supply, and Distribution,* at Table 1 (July 19, 2018), *https://www.ers.usda.gov/data-products/sugar-and-sweeteners-yearbook-tables.* For example, between 2009 and 2019, the United States has imported between 22.7% and 28.6% of its raw sugar from other countries. *Id.* In 2019, the United States imported approximately 3 million metric tons of sugar from other countries whose sugar is deliverable under the ICE Sugar No. 11 (SB) contract. *See* USDA, *U.S. Sugar Monthly Import and Re-Exports, Final Report, Fiscal Year 2019* (Oct. 2019), *https://www.fas.usda.gov/sites/default/files/2020-01/fy_2019_final_sugar_report.pdf.*

[1314] *See also* ASR at 1 (stating that the ICE Sugar No. 11 (SB) and ICE Sugar No. 16 (SF) contracts are commonly used by commercial participants for hedging).

[1315] 85 FR at 11668, fn. 507.

[1316] *Id.*

former contract calling for delivery from 29 different country origins of growth, including the United States, and the latter contract calling for delivery of domestic origin.[1317] This implies that there is likely to be a common group of market participants trading in both contracts. Based on its experience in other markets, the Commission understands that U.S. firms may utilize both contract markets to hedge cash positions and offset other related risks even if their inventories cannot be delivered against both contracts.

In that regard and as discussed above in Section III.C.2.b, the Commission analyzed average open interest and average notional values for ICE Sugar No. 11 (SB) and ICE Sugar No. 16 (SF) for the period January 1, 2019 through December 31, 2019. Specifically, average open interest in ICE Sugar No. 11 (SB) (947,198 OI) is more than 100 times the size of average open interest in ICE Sugar No. 16 (SF) (8,485 OI).[1318] Similarly, the average notional value for ICE Sugar No. 11 (SB) ($13,535,036,765 Notional OI) is roughly 54 times greater than the average notional value for ICE Sugar No. 16 (SF) ($250,447,669 Notional OI).[1319] In terms of average trading volume for the same time period, the ICE Sugar No. 11 (SB) contract trades approximately 146,077 contracts per day, whereas the ICE Sugar No. 16 (SF) contract trades approximately 307 contracts per day.[1320] Accordingly, the Commission believes, and the data supports, that U.S. commercial participants use the more-liquid ICE Sugar No. 11 (SB) contract to hedge domestically sourced raw sugar or domestic inventories and for price discovery for sugar produced and consumed in the United States. [1321]

6. Commission Determination

For the reasons stated in the 2020 NPRM and further discussed here, the Commission finds that position limits are necessary for the 25 core referenced futures contracts.

*D. Necessity Finding as to Linked Contracts*

The Commission finds that position limits on futures and options on futures contracts that are linked to core referenced futures contracts are necessary to enable position limits to function effectively for commodities where position limits have been found to be necessary in connection with the relevant core referenced futures contracts. As explained in detail above at Section II.A.16, due to the nature of the linkages specified in the definition of ''referenced contract'' in § 150.1, and the resulting possibilities for arbitrage, contracts linked to core referenced futures contracts, including cash-settled linked contracts, function together with the linked core referenced futures contract as part of one market.[1322] As a result, without position limits on such linked contracts, excessive speculative positions in these contracts can affect associated core referenced futures contracts and cash commodity markets in a variety of ways that undermine the effectiveness of position limits on the core contracts.

For example, large positions in linked contracts can serve as a vehicle for profiting from manipulation of the prices of core referenced futures contracts and cash commodities.[1323] Conversely, excessive speculation that artificially affects the price of a linked contract can distort pricing, liquidity, and delivery in the market for the core referenced futures contract and cash commodity to which the contract is linked.[1324] Finally, physically-settled indirectly linked contracts, if not subject to position limits, can serve as a vehicle for evasion through the creation of contracts that are economically equivalent to core referenced futures contracts.[1325]

The Commission therefore finds that position limits for futures contracts and options on futures contracts that are linked to core referenced futures contracts are necessary within the meaning of paragraph 4a(a)(1) where limits are necessary for the associated core referenced futures contracts.

*E. Necessity Finding for Spot/Non-Spot Month Position Limits*

As discussed above in Section II.B.2. and in the 2020 NPRM, the Commission preliminarily determined that Federal position limits should only apply to spot month positions except with respect to the nine legacy agricultural contracts, where non-spot month position Federal position limits have been in place for many years. As discussed above, the Commission is adopting this aspect of the rule as proposed. Consistent with this policy determination, the Commission finds that position limits are necessary during all months for the nine legacy agricultural contracts. The Commission further finds that position limits are necessary only during the spot month for the 16 non-legacy core referenced futures contracts and unnecessary outside of the spot month.[1326]

The Commission makes this necessity finding for substantially the reasons set forth above, including in responses to comments on the spot/non-spot month issue. Briefly, certain potential sources of sudden or unreasonable fluctuations or unwarranted changes in commodity prices caused by excessive speculation, particularly corners, squeezes, and certain convergence problems, are associated primarily with large positions held during spot months.[1327] And, to the extent that these problems may arise in prior months, they are mitigated by exchange policies including exchange-set position limits and position accountability.[1328] As a result, even if position limits may have benefits outside the spot month, restricting Federal position limits to spot months for most commodities is consistent with the Commission's interpretation of the paragraph 4a(a)(1) necessity requirement as directing the Commission to impose position limits where they are most economically justified as an efficient mechanism for achieving the statutory objectives.

The Commission similarly finds position limits in non-spot months to be necessary for the legacy agricultural contracts for substantially the reasons discussed above.[1329] These limits were put in place pursuant to past statutory necessity findings and have been in place for decades without the Commission observing problems that

[1317] *See* ICE Sugar No. 16 Futures Product Specs, Intercontinental Exchange website, available at *https://www.theice.com/products/914/Sugar-No-16-Futures; see also* Sugar No. 11 Futures Product Specs, Intercontinental Exchange website, available at *https://www.theice.com/products/23/Sugar-No-11-Futures*.

[1318] Calculations are based on data submitted to the Commission pursuant to part 16 of the Commission's regulations and does not include delta adjusted option on futures contracts.

[1319] *Id.*

[1320] *Id.*

[1321] USDA data reflects that each year, U.S. commercial firms hold over 1 million metric tons of raw sugar as inventory (after accounting for all imports, production, and use during the year).

[1322] For further discussion of referenced contracts and linked contracts, *see supra* Section II.A.16.

[1323] *Id.* (discussing the use of linked contracts to manipulate prices of physically-settled contracts and the use of cash-market transactions to affect prices of physically-settled futures contracts and their linked counterparts).

[1324] *Id.*

[1325] *See supra* Section II.A.16. (discussing referenced contracts).

[1326] At least one commenter asked to Commission to explicitly clarify this point, *see* ISDA at 3.

[1327] *See supra* Section II.B.2. (discussing Final Rule provisions).

[1328] *Id.*

[1329] *See supra* Section II.B.2. (discussing Final Rule provisions).

would give reasons to remove them.[1330] And they are generally supported by many market participants.[1331] Because no commenters argued that the Commission should eliminate Federal non-spot month position limits for the nine legacy agricultural contracts and because these limits have been in existence for decades, the Commission believes that it would be imprudent to eliminate them absent any specific reason in support thereof, particularly insofar as maintaining them, by definition, will result in no new costs or burdens. The Commission further notes that maintaining non-spot month limits for the nine legacy agricultural contracts will not change the existing dynamics of these markets.

The Commission is therefore satisfied that these limits remain an efficient mechanism for achieving the objectives of CEA section 4a.

**IV. Related Matters**

*A. Cost-Benefit Considerations*

1. Introduction

Section 15(a) of the Commodity Exchange Act (''CEA'' or ''Act'') requires the Commodity Futures Trading Commission (''Commission'') to consider the costs and benefits of its actions before promulgating a regulation under the CEA.[1332] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively, the ''section 15(a) factors'').[1333]

The Commission interprets section 15(a) to require the Commission to consider only those costs and benefits of its changes that are attributable to the Commission's discretionary determinations (*i.e.,* changes that are not otherwise required by statute) compared to the existing status quo baseline requirements. For this purpose, the status quo requirements, which serve as the baseline for the consideration of the costs and benefits of the regulations adopted in this final position limits rulemaking (''Final Rule''), include the CEA's statutory requirements as well as any applicable existing Commission regulations.[1334] As a result, any changes to the Commission's regulations that are required by the CEA or other applicable statutes are not deemed to be discretionary changes for purposes of discussing related costs and benefits of the Final Rule.

The Commission anticipates that the Final Rule will affect market participants differently depending on their business models and scale of participation in the commodity contracts that are covered by the Final Rule.[1335] The Commission also anticipates that the Final Rule may result in ''programmatic'' costs to some market participants. Generally, affected market participants may incur increased costs associated with developing or revising, implementing, and maintaining compliance functions and procedures. Such costs might include those related to the monitoring of positions in the relevant referenced contracts; related filing, reporting, and recordkeeping requirements; and the costs of changes to information technology systems.

The Commission has determined that it is not feasible to quantify the costs or benefits with reasonable precision and instead has identified and considered the costs and benefits qualitatively.[1336] The Commission believes that, for many of the costs and benefits, quantification is not feasible with reasonable precision, because quantification requires understanding all market participants' business models, operating models, cost structures, and hedging strategies, including an evaluation of the potential alternative hedging or business strategies that could be adopted under the Final Rule. Further, while Congress has tasked the Commission with establishing such Federal position limits as the Commission finds are ''necessary,'' some of the benefits, such as mitigating or eliminating manipulation or excessive speculation, may be very difficult or infeasible to quantify. These benefits, moreover, will likely manifest over time and be distributed over the entire market.

In light of these limitations, to inform its consideration of costs and benefits of the Final Rule, the Commission in its discretion relies on: (1) Its experience and expertise in regulating the derivatives markets; (2) information gathered through public comment letters[1337] and meetings with a broad range of market participants; and (3) certain Commission data, such as the Commission's Large Trader Reporting System and data reported to swap data repositories.

The Commission considers the benefits and costs discussed below in the context of international markets, because market participants and exchanges subject to the Commission's jurisdiction for purposes of position limits may be organized outside of the United States; some industry leaders typically conduct operations both within and outside the United States; and market participants may follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of benefits and costs below refers to the effects of the Final Rule on all activity subject to it, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with, or effect on, U.S. commerce under CEA section 2(i).[1338]

The Commission sought comments on all aspects of the cost and benefit considerations in the 2020 NPRM, including: (1) Identification and assessment of any costs and benefits not discussed in the 2020 NPRM; (2) data and any other information to assist or otherwise inform the Commission's

[1330] *Id.*

[1331] *Id.* The Commission notes that while ISDA did not specifically address the nine legacy agricultural contracts, it suggested that the Commission ''should finalize the proposed Federal position limits rules only for physically delivered spot month futures contracts, in the first phase.'' *See* ISDA at 3–4.

[1332] 7 U.S.C. 19(a).

[1333] *Id.*

[1334] This cost-benefit consideration section is divided into seven parts, including this introductory section, with respect to any applicable CEA or regulatory provisions.

[1335] For example, the Final Rule could result in increased costs to market participants who may need to adjust their trading and hedging strategies to ensure that their aggregate positions do not exceed Federal position limits, particularly those who will be subject to Federal position limits for the first time (*i.e.,* those who may trade contracts for which there are currently no Federal position limits). On the other hand, existing costs could decrease for those existing market participants whose positions would fall below the new Federal position limits and therefore such market participants would not be required to adjust their trading strategies and/or apply for exemptions from the limits, particularly if the Final Rule improves market liquidity or other metrics of market health. Similarly, for those market participants who would become subject to the Federal position limits, general costs would be lower to the extent such market participants can leverage their existing compliance infrastructure in connection with existing exchange position limit regimes, relative to those market participants that do not currently have such systems.

[1336] With respect to the Commission's analysis under its discussion of its obligations under the Paperwork Reduction Act (''PRA''), the Commission has endeavored to quantify certain costs and other burdens imposed on market participants related to collections of information as defined by the PRA. *See generally* Section IV.B. (discussing the Commission's PRA determinations).

[1337] While the general themes contained in comments submitted in response to prior proposals informed this rulemaking, the Commission withdrew the 2013 Proposal, the 2016 Supplemental Proposal, and the 2016 Reproposal. *See supra* Section I.A.

[1338] 7 U.S.C. 2(i).

ability to quantify or qualify the costs and benefits of the 2020 NPRM; and (3) substantiating data, statistics, and any other information to support positions posited by comments with respect to the Commission's consideration of costs and benefits.[1339] The Commission also requested specific comments regarding its considerations of the benefits and costs of proposed §§ 150.3 and 150.9, as well as comments on whether a Commission-administered exemption process, such as the process in proposed § 150.3, would promote more consistent and efficient decision-making or whether an alternative to proposed § 150.9 would result in a superior cost-benefit profile.[1340] Last, the Commission requested comment on all aspects of the Commission's discussion of the 15(a) factors for the 2020 NPRM.[1341]

The Commission identifies and discusses the costs and benefits of the Final Rule organized conceptually by topic, and certain topics may generally correspond with a specific regulatory section. The Commission's discussion is organized as follows: (1) This introduction discussion section; (2) a discussion of the Commission's necessity finding with respect to the 25 core referenced futures contracts that are subject to the Federal position limits framework; (3) the Federal position limit levels (final § 150.2), and the definitions of ''referenced contract'' and ''economically equivalent swap''; (4) the Commission's exemptions from Federal position limits (final § 150.3), including the Federal bona fide hedging definition (final § 150.1); (5) the streamlined process for the Commission to recognize non-enumerated bona fide hedges (final § 150.9) and to grant other exemptions for purposes of Federal position limits (final § 150.3) and related reporting changes to part 19 of the Commission's regulations; (6) the exchange-set position limits framework and exchange-granted exemptions thereto (final § 150.5); and (7) the section 15(a) factors.

2. Costs and Benefits of Commission's Necessity Finding for the 25 Core Referenced Futures Contracts With Respect to Liquidity and Market Integrity and Resulting Impact on Market Participants and Exchanges

Rather than discussing the general costs and benefits of the Federal position limits framework in this section, the Commission will instead address the potential costs and benefits resulting from the Commission's necessity finding with respect to the 25 core referenced futures contracts.[1342] The discussion in this section begins with an overview of the Commission's Federal position limits framework in part one followed by an overview of the Commission's interpretation of the criteria for finding position limits necessary within the meaning of CEA section 4a(a)(1) in part two. An overview of the Commission's necessity finding for the 25 core referenced futures contracts, linked ''referenced contracts,'' and spot/non-spot month position limits is discussed in part three. Finally, part four includes a discussion of the potential costs and benefits of the Commission's necessity finding for the 25 core referenced futures contracts with respect to (a) the liquidity and integrity of the futures and related options markets; and (b) market participants and exchanges.

i. Federal Position Limits Framework

The Commission currently enforces and sets Federal spot and non-spot month position limits only for futures and options on futures contracts on the nine legacy agricultural commodities.[1343] The Final Rule expands the scope of commodity derivative contracts subject to the Commission's existing Federal position limits framework[1344] to include (a) futures contracts and options on futures contracts on 16 additional contracts during the spot month only, for a total of 25 core referenced futures contracts,[1345] (b) futures contracts and options on futures contracts directly or indirectly linked to one of the 25 core referenced futures contracts, and (c) swaps that are ''economically equivalent'' to certain referenced contracts.[1346] Under this Final Rule, Federal non-spot month position limits will continue to apply only to futures and options on futures on the nine legacy agricultural commodities. As discussed above in Section III.B.2., while economically equivalent swaps are encompassed within the ''referenced contract'' definition, such swaps are subject to Federal position limits pursuant to CEA section 4a(a)(5) and therefore not subject to a necessity determination. The cost-benefit implications of the Commission's ''economically equivalent swap'' definition are discussed further below.

ii. The Commission's Interpretation of Section 4a

As previously discussed, the Commission interprets CEA section 4a to require that the Commission make an antecedent ''necessity'' finding that establishing Federal position limits is ''necessary'' to diminish, eliminate, or prevent certain burdens on interstate commerce with respect to the physical commodities in question.[1347] As the statute does not define the term ''necessary,'' the Commission must apply its expertise in construing this term, and, as discussed further below, must do so consistent with the policy

[1339] 85 FR 11671, 11698.

[1340] 85 FR 11693.

[1341] 85 FR 11700.

[1342] This Section does not address the cost-benefit implications for imposing position limits on futures contracts and options thereon that are directly or indirectly linked to a core referenced futures contract. That discussion is below in Section IV.A.4. Further, this Section does not address the cost-benefit implications for maintaining non-spot month position limits on the nine legacy agricultural contracts. The Commission is of the view that the Final Rule should not have any cost-benefit consideration impacts due to the existence of Federal non-spot month position limits on the nine legacy agricultural commodities since the Commission is maintaining the status quo with respect to the existence of such limits for those contracts. As a result, the Commission does not expect there to be a change with respect to the costs and benefits of its approach by simply finding that Federal position limits continue to be necessary during the non-spot months for the nine legacy agricultural commodities. However, with the exception of CBOT Oats (O), CBOT KC HRS Wheat (KW), and MGEX HRS Wheat (MWE), the final rule will result in higher non-spot month position limit levels for the remaining legacy agricultural commodities. *See infra* Section IV.A.4. (addressing the costs and benefits of generally increased non-spot month position limit levels for the legacy agricultural contracts).

[1343] The nine legacy agricultural contracts currently subject to Federal spot and non-spot month limits are: CBOT Corn (C), CBOT Oats (O), CBOT Soybeans (S), CBOT Wheat (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX Hard Red Spring Wheat (MWE), ICE Cotton No. 2 (CT), and CBOT KC Hard Red Winter Wheat (KW).

[1344] 17 CFR 150.2. Because the Commission had not yet implemented the Dodd-Frank Act's amendments to the CEA regarding position limits, except with respect to aggregation (*see generally* Final Aggregation Rulemaking, 81 FR at 91454) and the vacated 2011 Position Limits Rulemaking's amendments to 17 CFR 150.2 (*see ISDA,* 887 F. Supp. 2d 259 (2012)), the existing baseline or status quo consisted of the provisions of the CEA relating to position limits immediately prior to effectiveness of the Dodd-Frank Act amendments to the CEA and the relevant provisions of existing parts 1, 15, 17, 19, 37, 38, 140, and 150 of the Commission's regulations, subject to the aforementioned exceptions.

[1345] The 16 new products that are subject to Federal spot month position limits for the first time include seven agricultural (CME Live Cattle (LC), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ–A (OJ), ICE Sugar No. 11 (SB), and ICE Sugar No. 16 (SF)), four energy (NYMEX Light Sweet Crude Oil (CL), NYMEX New York Harbor ULSD Heating Oil (HO), NYMEX New York Harbor RBOB Gasoline (RB), NYMEX Henry Hub Natural Gas (NG)), and five metals (COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Palladium (PA), and NYMEX Platinum (PL)) contracts.

[1346] *See supra* Section II.A.4. (defining the term ''economically equivalent swap'' for purposes of the Federal position limits framework under the Final Rule).

[1347] *See supra* Section III.B. (discussing legal standard for necessity finding).

goals articulated by Congress, including in CEA sections 4a(a)(2)(C) and 4a(a)(3), as noted throughout this discussion of the Commission's cost-benefit considerations.[1348]

Under this Final Rule, the Commission is establishing position limits on 25 core referenced futures contracts [1349] and any futures contracts or options on futures contracts directly or indirectly linked to the core referenced futures contracts,[1350] on the basis that position limits on such contracts are ''necessary'' to achieve the purposes of the CEA. In reaching this conclusion, the Commission analyzed (1) the importance of these contracts to the operation of the underlying cash commodity market, including that they require physical delivery; and (2) the importance of the underlying commodity to the economy as a whole.[1351] As discussed above, the Commission is of the view that evidence demonstrating one or both of these factors is sufficient to establish that position limits are necessary because each factor relates to the statutory objective identified in paragraph 4a(a)(1).[1352] As a result, the Commission has concluded that it must exercise its judgment in light of facts and circumstances, including its experience and expertise, in determining whether Federal position limit levels are economically justified.[1353]

iii. The Commission's Necessity Finding

With respect to the first factor of the Commission's necessity analysis, the Commission focused on physically-settled futures contracts because they perform an important price discovery function for many cash-market participants and may be affected by corners and squeezes, which can occur near the expiration of these contracts, compared to cash-settled contracts.[1354] Based on the above discussion, the Commission determined that the 25 core referenced futures contracts are important to their respective underlying cash markets because they (1) are the physically-settled contracts in physical commodities traded on U.S. exchanges that are the most used for hedging and price discovery by commercial participants, as measured by open interest, notional value, and trading volume; and (2) serve as key benchmarks for use in pricing cash-market and other transactions.[1355] Upon consideration of the second factor, as discussed in further detail above, the Commission has determined that the cash markets underlying the 25 core referenced futures contracts are all, to varying degrees, vitally important to the U.S. economy because many of the commodities underlying the 25 contracts are among the most important physical commodities, as measured by production and use, for commodities for which physically-settled futures contracts are traded on U.S. exchanges.[1356] For these reasons, the Commission finds that position limits are necessary for the 25 core referenced futures contracts to achieve the purposes of the CEA.[1357]

As noted previously, the Commission has determined that position limits for futures and options on futures contracts that are linked to core referenced futures contracts are necessary within the meaning of paragraph 4a(a)(1) because such position limits are likely to make position limits for core referenced futures contracts more effective in preventing manipulation and other sources of sudden or unreasonable fluctuations or unwarranted changes in the price of the underlying commodity.[1358]

Further, the Commission has determined that position limits are necessary during all months for the nine legacy agricultural contracts, where non-spot month Federal position limits have been in place for decades, and only necessary during the spot month for the 16 additional core referenced futures contracts.[1359] Specifically, the Commission found that certain potential sources of sudden or unreasonable fluctuations or unwarranted changes in commodity prices caused by excessive speculation, particularly corners, squeezes, and certain convergence problems, are associated primarily with large positions held during spot months.[1360] And, to the extent that these problems may arise in prior months, they are mitigated by exchange policies including exchange-set position limits and position accountability.[1361] As a result, even if position limits may have benefits outside the spot month, restricting Federal position limits to spot months for most commodities is consistent with the Commission's interpretation of the CEA section 4a(a)(1) necessity requirement as directing the Commission to impose position limits where they are economically justified as an efficient mechanism for achieving the statutory objectives.

The Commission similarly found position limits in non-spot months to be necessary for the nine legacy agricultural contracts for the reasons previously stated above.[1362] Briefly, these limits were put in place pursuant to past statutory necessity findings and have been in place for decades without the Commission observing problems or concerns by market participants that would give reasons to remove them.[1363] For these reasons, the Commission has determined that it would be imprudent to eliminate them absent any specific reason in support thereof.

iv. Potential Costs and Benefits of the Commission's Necessity Finding for the 25 Core Referenced Futures Contracts

In this section, the Commission will discuss potential costs and benefits resulting from the Commission's necessity finding with respect to: (1) The liquidity and integrity of the futures and related options markets; and (2) market participants and exchanges. The Commission discusses each factor in turn below.

a. Potential Impact of the Scope of the Commission's Necessity Findings on Market Liquidity and Integrity

The Commission has determined that the 25 core referenced futures contracts included in its necessity finding are

[1348] In promulgating the position limits framework, Congress instructed the Commission to consider several factors: First, CEA section 4a(a)(3) requires the Commission when establishing position limits, to the maximum extent practicable, in its discretion, to (i) diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for bona fide hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted. Second, CEA section 4a(a)(2)(C) requires the Commission to strive to ensure that any limits imposed by the Commission will not cause price discovery in a commodity subject to position limits to shift to trading on a foreign exchange.

[1349] *See supra* Section III.C. (discussing necessity finding for the 25 core referenced futures contracts).

[1350] *See supra* Section III.D. (discussing necessity finding for linked contracts).

[1351] *See supra* Section III.B. (discussing and adopting legal standard for necessity finding in 2020 NPRM).

[1352] *Id.*

[1353] *Id.*

[1354] *See supra* Section III.C.2.a. (discussing the link between the derivatives markets and underlying cash-markets).

[1355] *See supra* Section III.C.2.b. (discussing the Commission's determination that the 25 core referenced futures contracts are used extensively for hedging and price discovery, thus establishing a close link between both markets).

[1356] *See supra* Section III.C.3. (discussing second factor of necessity analysis).

[1357] *See supra* Section III.C. (discussing necessity finding for 25 core referenced futures contracts).

[1358] *See supra* Section III.D. (discussing necessity finding for linked contracts).

[1359] *See supra* Section III.E. (discussing necessity finding for spot/non-spot month position limits).

[1360] *See supra* Section III.C.2.a. (discussing link between derivatives market and cash markets).

[1361] *See supra* Section III.E. (discussing necessity finding for spot/non-spot month position limits).

[1362] *Id.*

[1363] *Id.*

among the most liquid physical commodity contracts, as measured by open interest and trading volume,[1364] and, therefore, imposing positions limits on these contracts may impose costs on market participants by constraining liquidity because a trader may be prevented from trading due to a position limit reducing liquidity on the other side of the contract. However, to the extent that the nine legacy agricultural contracts already are subject to existing Federal position limits, the Final Rule does not represent a change to the status quo baseline (although, as noted below, the applicable Federal position limits will increase under the Final Rule for most of the nine legacy agricultural contracts and the associated costs and benefits are discussed thereunder). Nonetheless, the Commission believes that any potential harmful effect on liquidity will be muted, as a result of the generally high levels of open interest and trading volumes of the respective 25 core referenced futures contracts. This is so because, all other things being equal, large, liquid markets tend to have more participants and tend to be less concentrated. As a result, in such markets, if position limits on some occasion restrict trading by one or a small number of large traders, it is highly likely that other traders will be participating in the market in sufficient volume for the purpose of providing liquidity on reasonable terms.

The Commission has determined that, as a general matter, focusing on the 25 core referenced futures contracts may benefit market integrity since these contracts generally are amongst the largest physically-settled contracts with respect to relative levels of open interest and trading volumes.[1365] The Commission therefore believes that excessive speculation or potential market manipulation in such contracts is more likely to affect additional market participants and therefore potentially more likely to cause an undue and unnecessary burden (*e.g.,* potential harm to market integrity or liquidity) on interstate commerce. Because each core referenced futures contract is physically-settled, as opposed to cash-settled, the Final Rule focuses on preventing corners and squeezes in those contracts where such market manipulation could cause significant harm in the price discovery process for their respective underlying commodities.[1366]

While the Commission recognizes that market participants may engage in market manipulation through cash-settled futures contracts and options on futures contracts, the Commission has determined that focusing on the physically-settled core referenced futures contracts will benefit market integrity by reducing the risk of corners and squeezes in particular. In addition, not imposing position limits on additional commodities may foster non-excessive speculation, leading to better prices and more efficient resource allocation in these commodities. This may ultimately benefit commercial end users and possibly be passed on to the general public in the form of better pricing. As noted above, the scope of the Commission's necessity finding with respect to the 25 core referenced futures contracts allows the Commission to focus on those contracts that, in general, the Commission recognizes as having particular importance in the price discovery process for their respective underlying commodities as well as potentially acute economic burdens that would arise from excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the commodity prices underlying these contracts.[1367]

To the extent the Commission did not include additional commodities in its necessity finding, those markets will not receive the benefits intended from the Final Rule's Federal position limits framework. It is conceivable that this could entice bad actors to turn to those markets for illegal schemes. On the other hand, markets outside the 25 core referenced futures contracts are not left totally exposed. Some of the potential harms to market integrity associated with not including additional commodities within the Federal position limits framework could be mitigated to an extent by exchanges, which can use tools other than position limits, such as margin requirements or position accountability at lower levels than the Federal position limits adopted in the Final Rule, to defend against certain market behavior.

Further, burdens related to potential market manipulation for markets outside the 25 core referenced futures contracts may be mitigated through exchanges also establishing exchange-set position limits. Under final § 150.5(a) and (b), exchanges are required to adopt exchange-set position limits both (i) for contracts subject to Federal position limits and (ii) during the spot month for physical commodity contracts not subject to Federal position limits.[1368] Final § 150.5(b) also requires exchanges to adopt position limits or position accountability outside the spot month for those physical commodity contracts not subject to Federal position limits outside of the spot month.

Exchange-set position limits, including amendments to existing limits, are reviewed by Commission staff via submissions under part 40 of the Commission's regulations, and must meet standards established by the Commission, including in §§ 150.1 and 150.5.[1369] While the review of exchange-set limits is focused on the adequacy of the exchange-set position limit to minimize the potential for manipulation, it isn't reviewed considering all of the CEA section 4a(a)(3)(B) factors as Federal position limits require. Thus, exchange-set limits may be set at a more restrictive level than a Federal speculative position limit might be set for the same contract if it were subject to Federal limits and therefore may have higher compliance and liquidity costs than Federal limits on the same contract for periods of time. Exchange limits may be updated much faster and more frequently than Federal limits can be updated.[1370] Therefore, any added compliance and liquidity costs may only be realized in the short-term relative to any compliance and liquidity costs from a Federal limit on the same contract.

[1364] *See supra* Section III.C.2.b. (discussing average open interest and average daily trading volume for the 25 core referenced futures contracts for the period January 1, 2019 through December 31, 2019).

[1365] *Id.*

[1366] The Commission must also make this determination in light of its limited available resources and responsibility to allocate taxpayer resources in an efficient manner to meet the goals of CEA section 4a(a)(1), 7 U.S.C. 6a(a)(1), and the CEA generally.

[1367] *See supra* Section III.C.2.b.

[1368] As discussed earlier in this release, final § 150.5(a) requires exchange-set limits for contracts subject to Federal limits to be no higher than the Federal limit. Final § 150.5(b)(1) requires exchanges to establish position limits for spot-month contracts in physical commodities that are not subject to Federal position limits at a level that is "necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index." *See supra* Section II.D. (discussing Final § 150.5).

[1369] Further, as part of the submission process, exchanges are encouraged to determine exchange-set limits based on the guidance in Appendix C to part 38 ("Demonstration of compliance that a contract is not readily susceptible to manipulation"). *See* 17 CFR part 38, Appendix C. Appendix C provides guidance on calculating deliverable supply for physical commodity contracts based on the terms and conditions of the futures contract and also refers to part 150 for specific information regarding the establishment of speculative position limits including exchange-set speculative position limits.

[1370] Exchanges can self-certify amendments to exchange-set limits under § 40.6. Federal position limits are updated only through the rulemaking process.

Although the Commission does not find that exchange-set limits render Federal position limits unnecessary for the 25 core referenced futures contracts and associated markets, due to their overall importance, these tools do diminish the potential costs of refraining from imposing Federal position limits outside of the 25 core referenced futures contracts. Bad actors may also be deterred by the Commission's anti-manipulation authority and the Commission's authority to purse violations of exchange-set limits.[1371]

b. Potential Impact of the Scope of the Commission's Necessity Findings on Market Participants and Exchanges

The Commission acknowledges that the Final Rule's Federal position limits framework could impose certain administrative, logistical, technological, and financial burdens on exchanges and market participants, especially with respect to developing or expanding compliance systems and the adoption of monitoring policies.[1372] The Commission, however, believes that these burdens will be mostly incremental as many of the fixed costs have already been incurred by exchanges and market participants. For example, exchanges are currently required to comply with comparable requirements such as calculating average daily trading volume. Further, market participants are required to comply with existing requirements such as existing Federal position limits and exchange-set limits and accountability levels.[1373]

The Commission further believes that these potential burdens are mitigated by (1) the compliance date of January 1, 2022 in connection with the Federal position limits for the 16 non-legacy core referenced futures contracts, and (2) the compliance date of January 1, 2023 for both (a) economically equivalent swaps that are subject to Federal position limits under the Final Rule and (b) the elimination of previously-granted risk management exemptions (*i.e.,* market participants may continue to rely on their previously-granted risk management exemptions until January 1, 2023).[1374] These delayed compliance deadlines should mitigate compliance costs by permitting the update and build out of technological and compliance systems more gradually. They may also reduce the burdens on market participants not previously subject to position limits, who will have a longer period of time to determine whether they may qualify for certain bona fide hedging recognitions or other exemptions, and to possibly alter their trading or hedging strategies.[1375] Further, the delayed compliance dates will reduce the burdens on exchanges, market participants, and the Commission by providing each with more time to resolve technological and other challenges for compliance with the new regulations. In turn, the Commission anticipates that the extra time provided by the delayed compliance dates will result in more robust systems for market oversight, which should better facilitate the implementation of the Final Rule and avoid unnecessary market disruptions while exchanges and market participants prepare for its implementation. However, the delayed compliance deadlines will extend the time it will take to realize the benefits identified above.

This January 1, 2022 compliance date also applies to exchange obligations under final § 150.5, and market participants' related obligation to temporarily continue providing Forms 204/304 in connection with bona fide hedges. Furthermore, with respect to exchanges' implementation of § 150.9, the Commission is clarifying that exchanges may choose to implement the streamlined process for non-enumerated bona fide hedge applications as soon as the Final Rule's effective date,[1376] or anytime thereafter (or not at all).

CME expressed concern that it may receive an influx of exemption applications at the end of the compliance period, and therefore suggested a rolling process where market participants are grandfathered into their current exemptions, permitting them to file for those exemptions on the same annual schedule.[1377] ISDA urged the Commission to recognize the burdens associated with implementing a new set of rules, and adopt a phase-in to minimize market disruptions and increases in compliance costs.[1378] As noted above, the Commission seeks to alleviate the compliance burdens on exchanges associated with the Final Rule by providing for a compliance date of January 1, 2022 for exchanges with respect to their obligations under § 150.5. The Commission believes CME's concern is mitigated since exchanges, at their discretion, may implement final § 150.9 as soon as the Effective Date, which will allow exchanges to review non-enumerated bona fide hedges on a rolling basis between the Effective Date and the end of the compliance period rather than having to process a large number of applications at once. Furthermore, market participants with existing Commission-granted non-enumerated or anticipatory bona fide hedge recognitions are *not* required to reapply to the Commission for a new recognition under the Final Rule. The delayed compliance should better facilitate the implementation of the Final Rule by preventing unnecessary market disruptions and reducing the burdens on exchanges, market participants, and the Commission by providing each with more time to resolve technological and other challenges for compliance with the new regulations.

The 2020 NPRM did not provide a specific date as the compliance date but rather stated ''365 days after publication . . . in the **Federal Register**,'' and did not provide a separate compliance date for economically equivalent swaps or related to previously-granted risk management exemptions. In response, several commenters requested the that Commission further extend the compliance date for swaps to provide market participants additional time to identify which swaps would be deemed economically equivalent to a referenced contract, refine their compliance

[1371] *See, e.g., In the Matter of Sukarne SA de CV,* CFTC No. 20–60, 2020 WL 5701586 (Sept. 18, 2020) (imposing a $35,000 civil monetary penalty for a one-day violation of exchange-set position limits in CME live cattle futures).

[1372] *See, e.g.,* ISDA at 4 (''new Federal position limits rulemaking will involve significant compliance costs and burdens . . . that the CFTC can mitigate . . . by starting with final rules only for physically-delivered spot month futures contracts in a first phase.'').

[1373] *See* NFPEA at 6 and 14 (explaining that the Federal position limits framework would ''place unnecessary regulatory burdens and costs on the NFP Energy Entities, without providing the Commission with useful or usable information about speculators, speculative transactions or speculative positions'' and asserting that ''[t]here is no regulatory benefit in terms of reducing the burdens of excessive speculation on CFTC-regulated markets to balance against the costs and burdens for NFP Energy Entities (on-speculators) to study, understand and apply the Commission's Speculative Position Limits rules to their transactions and positions''). *See also supra* Section II.C.14.i. (discussing NFPEA's request for an exemption from the Federal position limits framework and how the Final Rule addresses many of the concerns raised by NFPEA).

[1374] *See supra* Section I.D. (discussing effective date and compliance date of the Final Rule).

[1375] Commenters on the Commission's notice of a proposed rulemaking for a new position limits proposal issued on February 27, 2020 (''2020 NPRM'') and prior proposals have requested a sufficient phase-in period. *See supra* Section I.D.iv. (discussing comments regarding compliance period of Final Rule); *see also* 81 FR at 96815 (implementation timeline).

[1376] The Final Rule's effective date is March 15, 2021 (the ''Effective Date'').

[1377] CME Group at 8.

[1378] ISDA at 2.

systems, and manage other operational and administrative challenges.[1379] These commenters generally stressed that burdens related to economically equivalent swaps may be greater than related futures contracts and options thereon.[1380] The Commission generally agrees with commenters that additional time would reduce burdens associated with establishing compliance and monitoring systems, and has therefore extended the compliance date for economically equivalent swaps until January 1, 2023. Because the Commission understands that risk management positions tend to also involve OTC swap positions, the Commission believes that having the same compliance date as economically equivalent swaps in connection with the elimination of the risk management exemption would similarly reduce burdens.

3. Federal Position Limit Levels (Final § 150.2)

i. General Approach

Existing § 150.2 establishes Federal position limit levels that apply net long or net short to futures and, on a futures-equivalent basis, to options on futures contracts on nine legacy physically-settled agricultural contracts.[1381] The Commission has previously set separate Federal position limits for: (i) The spot month, and (ii) a single month and all-months-combined (*i.e.,* ''non-spot months'').[1382] For the existing spot month Federal position limit levels, the contract levels are based on, among other things, 25% or lower of the estimated deliverable supply (''EDS'').[1383] For the existing non-spot month position limit levels, the levels are generally set at 10% of open interest for the first 25,000 contracts of open interest, with a marginal increase of 2.5% of open interest thereafter (the ''10/2.5% formula'').

Final § 150.2 revises and expands the existing Federal position limits framework as follows. First, during the spot month, § 150.2: (i) Subjects 16 additional core referenced futures contracts and their associated referenced contracts to Federal spot month position limits, which are based on, among other things, the Commission's existing approach of establishing limit levels at 25% or lower of EDS, for a total of 25 core referenced futures contracts (and their associated referenced contracts) subject to Federal spot month position limits (*i.e.,* the nine legacy agricultural contracts plus the 16 additional contracts);[1384] and (ii) updates the existing spot month levels for the nine legacy agricultural contracts based on, among other things, revised EDS.[1385]

Second, for non-spot month position limit levels, final § 150.2 revises the 10/2.5% formula so that: (i) The incremental 2.5% increase takes effect after the first 50,000 contracts of open interest, rather than after the first 25,000 contracts under the existing rule (the ''marginal threshold level''); and (ii) the limit levels are calculated by applying the updated 10/2.5% formula to open interest data for the two 12-month periods from July 2017 to June 2018 and July 2018 to June 2019 of the applicable futures contracts and delta-adjusted options on futures contracts.[1386] The 12-month period yielding the higher limit is selected as the non-spot month limit for that legacy agricultural commodity.

Third, the final Federal position limits framework expands to cover (i) any cash-settled futures and related options on futures contracts directly or indirectly linked to any of the 25 proposed physically-settled core referenced futures contracts as well as (ii) any economically equivalent swaps.

For spot month positions, the Federal position limits in final § 150.2 apply separately, net long or short, to cash-settled referenced contracts and to physically-settled referenced contracts in the same commodity. This results in a separate net long/short position for each category so that cash-settled contracts in a particular commodity are netted with other cash-settled contracts in that commodity, and physically-settled contracts in a given commodity are netted with other physically-settled contracts in that commodity; a cash-settled contract and a physically-settled contract may not be netted with one another during the spot month. Outside the spot month, cash and physically-settled contracts in the same commodity are netted together to determine a single net long/short position.

Fourth, final § 150.2 subjects pre-existing positions, other than pre-enactment swaps and transition period swaps, to Federal position limits during the spot month and non-spot months.

In setting the Federal position limit levels, the Commission seeks to advance the enumerated statutory objectives with respect to position limits in CEA section 4a(a)(3)(B).[1387] The Commission recognizes that relatively high Federal position limit levels may be more likely to support some of the statutory goals and less likely to advance others. For instance, a relatively higher Federal position limit level may be more likely to benefit market liquidity for hedgers or ensure that the price discovery of the underlying market is not disrupted, but may be less likely to benefit market integrity by being less effective at diminishing, eliminating, or preventing excessive speculation or at deterring and preventing market manipulation, corners, and squeezes. In particular, setting relatively high Federal position limit levels may result in excessively large speculative positions and/or increased volatility, especially during speculative showdowns (when two market participants disagree about the proper market price and trade aggressively in large quantities

[1379] MFA/AIMA at 8; NCFC at 6; NGSA at 15–16; SIFMA AMG at 9–10; and Citadel at 9.

[1380] *Id.*

[1381] The nine legacy agricultural contracts subject to existing Federal spot and non-spot month position limits were: CBOT Corn (C), CBOT Oats (O), CBOT Soybeans (S), CBOT Wheat (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX Hard Red Spring Wheat (MWE), ICE Cotton No. 2 (CT), and CBOT KC Hard Red Winter Wheat (KW).

[1382] For clarity, limits for single and all-months-combined apply separately. However, the Commission previously has applied the same limit levels to the single month and all-months-combined. Accordingly, the Commission will discuss the single and all-months limits, *i.e.,* the non-spot month limits, together.

[1383] *See supra* Section II.B.1—Existing § 150.2 (discussing that establishing spot month levels at 25% or less of EDS is consistent with past Commission practices).

[1384] The 16 new products that are subject to Federal spot month position limits for the first time include seven agricultural (CME Live Cattle (LC), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ–A (OJ), ICE Sugar No. 11 (SB), and ICE Sugar No. 16 (SF)), four energy (NYMEX Light Sweet Crude Oil (CL), NYMEX NY Harbor ULSD Heating Oil (HO), NYMEX NY Harbor RBOB Gasoline (RB), and NYMEX Henry Hub Natural Gas (NG)), and five metals (COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Palladium (PA), and NYMEX Platinum (PL)) contracts.

[1385] The Final Rule maintains the current spot month limits on CBOT Oats (O).

[1386] As discussed below, for most of the legacy agricultural commodities, this results in a higher non-spot month limit. However, the Commission is not changing the non-spot month limits for either CBOT Oats (O) or MGEX Hard Red Spring Wheat (MWE) based on the revised open interest since this would result in a reduction of non-spot month limits from 2,000 to 700 contracts for CBOT Oats (O) and 12,000 to 5,700 contracts for MGEX HRS Wheat (MWE). Similarly, the Commission also is maintaining the current non-spot month limit for CBOT KC Hard Red Winter Wheat (KW). Furthermore, the Commission is adopting a separate single month position limit level of 5,950 contracts for ICE Cotton No. 2 (CT). The all-months-combined position limit level for ICE Cotton No. 2 (CT) is set at 11,900 contracts, based on the modified 10/2.5% formula and updated open interest figures.

[1387] *See supra* Sections II.B.3.ii.a(1) and II.B.4.iii.a(4) (further discussing the CEA's statutory objectives for the Federal position limits framework).

expressing their view causing the market price to be volatile), which may cause some market participants to retreat from the commodities markets due to perceived decreases in market integrity. In turn, fewer market participants may result in lower liquidity levels for hedgers and harm to the price discovery function in the underlying markets.

Conversely, setting a relatively lower Federal position limit level may be more likely to diminish, eliminate, or prevent excessive speculation, but may also limit the availability of certain hedging strategies, adversely affect levels of liquidity, and increase transaction costs.[1388] Additionally, setting Federal position limits too low may cause non-excessive speculation to exit a market, which could reduce liquidity, cause ''choppy'' [1389] prices and reduced market efficiency, and increase option premia to compensate for the more volatile prices. The Commission in its discretion has nevertheless endeavored to set Federal position limit levels, to the maximum extent practicable, to benefit the statutory goals identified by Congress.

As discussed above, the contracts that are subject to the Federal position limits adopted in the Final Rule are currently subject to either Federal or exchange-set position limits (or both). To the extent that the Federal position limit levels in final § 150.2 are higher than the existing Federal position limit levels for either the spot or non-spot month, market participants currently trading these contracts could engage in additional trading under the Federal position limit levels in final § 150.2 that otherwise would be prohibited under existing § 150.2.[1390] On the other hand, to the extent an exchange—set position limit level is lower than its corresponding Federal position limit level in final § 150.2, the Federal position limit does not affect market participants since market participants are required to comply with the lower exchange—set position limit level (to the extent that the exchanges maintain their current levels).[1391]

ii. Spot Month Levels

The Commission is maintaining 25% of EDS as a ceiling for Federal spot month position limits, except for cash-settled NYMEX Henry Hub Natural Gas (''NYMEX NG'') referenced contracts, which is discussed below. Based on the Commission's experience overseeing Federal position limits for decades, and overseeing exchange-set position limits submitted to the Commission pursuant to part 40 of the Commission's regulations, none of the Federal spot month position limit levels listed in final Appendix E of part 150 of the Commission's regulations: (i) Are so low as to reduce liquidity for bona fide hedgers or disrupt the price discovery function of the underlying market; [1392] or (ii) so high as to invite excessive speculation, manipulation, corners, or squeezes because, among other things, any potential economic gains resulting from the manipulation may be insufficient to justify the potential costs, including the costs of acquiring, and ultimately offloading, the positions used to effect the manipulation.[1393]

The Commission considered alternative Federal spot month position limit levels provided by Better Markets, which requested a standard Federal spot month position limit level of 10% of EDS, which could be adjusted as needed.[1394] The Commission believes that this across-the-board approach fails to take into account the differences between the core referenced futures contracts and could result in material costs to certain types of referenced contracts without concomitant benefits. For example, the Commission has determined to set the Federal spot month position limit levels for eight core referenced futures contracts below 10% of EDS. Raising the levels to 10% of EDS for some of these contracts could increase the risk of market manipulation. As an example, raising the Federal position limit level to 10% of EDS would result in an increase of approximately 46% over the proposed and final Federal spot month position limit level for CBOT KC HRS Wheat (KW). The Commission believes that, despite the increased potential for market manipulation, this would result in a negligible improvement in liquidity, because the level for CBOT KC HRS Wheat (KW) is being set as a ceiling within the Federal position limits framework.

On the other end of the spectrum, for some core referenced futures contracts with proposed and final Federal position limit levels higher than 10% of EDS, decreasing the levels to 10% of EDS could have a material negative impact on liquidity. For example, this would result in a reduction in the Federal spot month position limit levels by approximately 60% for the seven core referenced futures contracts for which the Commission is adopting a Federal spot month position limit level of 25% of EDS.[1395] This could cause a significant decrease in liquidity in those markets, as speculative traders may not be of sufficient size and quantity to take the other side of bona fide hedgers' positions. This may impact the price discovery function and hedging utility of those contracts because hedgers could not transact at better prices provided by the presence of the speculative traders. Furthermore, it could severely restrict the breadth of exchange-set spot month position limit levels that an exchange may set, which would provide less

[1388] For example, relatively lower Federal position limits may adversely affect potential hedgers by reducing liquidity. In the case of reduced liquidity, a potential hedger may face unfavorable spreads and prices, in which case the hedger must choose either to delay implementing its hedging strategy and hope for more favorable spreads in the near future or to choose immediate execution (to the extent possible) at a less favorable price.

[1389] ''Choppy'' prices often refer to illiquidity in a market where transacted prices bounce between the bid and the ask prices. Market efficiency may be harmed in the sense that transacted prices might need to be adjusted for the bid-ask bounce to determine the fundamental value of the underlying contract.

[1390] For the spot month, all the legacy agricultural contracts other than CBOT Oats (O) have higher Federal position limit levels. For the non-spot months, all the legacy agricultural contracts other than CBOT Oats (O), MGEX HRS Wheat (MWE), and CBOT KC HRW Wheat (KW), have higher Federal position limit levels.

[1391] While the Final Rule generally either increases or maintains the Federal position limits for both the spot months and non-spot months compared to existing Federal position limits, where applicable, and exchange limits, the Federal spot month position limit level for COMEX Copper (HG) is below the existing exchange-set level. Accordingly, market participants may have to change their trading behavior with respect to COMEX Copper (HG), which could impose compliance and transaction costs on these traders, to the extent their existing trading exceeds the lower Federal spot month position limit levels.

[1392] The Federal spot month position limit levels adopted in the Final Rule are set at, or higher than, existing Federal spot month position limit levels (for the nine legacy agricultural contracts) or at, or higher than, existing exchange-set spot month position limit levels (for the 16 non-legacy core referenced futures contracts). As a result, the Commission does not believe that liquidity will be reduced with respect to the core referenced futures contracts and their associated referenced contracts. Consequently, the Commission also believes that the Federal spot month position limit levels will be less burdensome on market participants. *See* AFIA at 1.

[1393] This is driven primarily by the Federal spot month position limit levels being set at or below 25% of EDS.

[1394] Better Markets at 41. Other commenters, such as PMAA and AFR, generally suggested lowering Federal spot month position limit levels. However, neither provided specific levels or a formula for determining alternative levels. As a result, the Commission is unable to engage in a cost-benefit analysis with respect to their suggestions.

[1395] The seven such core referenced futures contracts are: (1) MGEX HRS Wheat (MWE); (2) ICE Cocoa (CC); (3) ICE Coffee C (KC); (4) ICE FCOJ–A (OJ); (5) ICE Sugar No. 11 (SB); (6) ICE Sugar No. 16 (SF); and (7) NYMEX Henry Hub Natural Gas (NYMEX NG).

flexibility to the exchanges to respond to rapidly changing market conditions.

The Commission also considered PMAA's statement that ''the spot-month limit of 25 percent of deliverable supply is not sufficiently aggressive to deter excessive speculation.'' [1396] However, PMAA provides no defined alternative for the Commission to consider, which makes it difficult to compare the costs and benefits of PMAA's suggested approach. Nonetheless, the Commission acknowledges that, as a general principle, lowering position limit levels may decrease the likelihood of excessive speculation.[1397] However, that may come at the cost of liquidity for bona fide hedgers. The Commission notes that PMAA's suggestion would apply to only seven of the 25 core referenced futures contracts that have Federal spot month position limit levels set at 25% of EDS in the Final Rule.[1398] The others are all set well below 25% of EDS, with the highest being 19.29% of EDS for CBOT Oats (O). For all core referenced futures contracts, including ones that have Federal spot month position limit levels set at 25% of EDS, the Commission reviewed the methodology underlying the EDS figures and the Federal spot month position limit levels, and determined that they advance the objectives of CEA section 4a(a)(3), including preventing excessive speculation and manipulation, while also ensuring sufficient market liquidity for bona fide hedgers. Finally, the Final Rule's position limits framework also leverages the exchanges' expertise and ability to quickly set and adjust their exchange-set spot month position limits at any level lower than the Federal spot month position limit levels in response to market conditions, which relieves some of the potential costs of setting the Federal spot month position limit levels at 25% of EDS (*i.e.,* a higher likelihood of excessive speculation compared to lower levels) for the seven core referenced futures contracts discussed above.

The Commission also considered CME Group's recommendation with respect to the non-CME Group-listed core referenced futures contracts ''that the Commission not adopt final spot month position limit levels at 25% of deliverable supply as a rigid formula and, based on the factors previously described above, work with the exchange to determine an appropriate limit based on the market dynamics previously described.'' [1399] CME Group commented that, ''[t]aking an across-the-board approach by setting a Federal limit at the full 25 percent of deliverable supply could have a significant negative impact on many markets across all asset classes. . . . For example, setting a uniform and high Federal limit without regard to the unique characteristics of a particular contract market can encourage exchanges to set limits for competitive reasons rather than for regulatory purposes . . . [and] that perverse incentive structure could lead to a race to the bottom and undermine the statutory goals of deterring manipulation and excessive speculation through position limits.'' [1400] The Commission agrees that mechanically applying a Federal spot month position limit level of 25% of EDS can undermine the statutory goals of CEA section 4a(a)(3). However, in proposing the Federal spot month position limit levels, the Commission did not mechanically apply 25% of EDS as a rigid formula for the non-CME Group-listed core referenced futures contracts. Instead, as it did for the CME Group-listed core referenced futures contracts, the Commission reviewed the methodology underlying the EDS figures and the Federal spot month position limit levels, and determined that they advance the objectives of CEA section 4a(a)(3), including preventing excessive speculation and manipulation, while also ensuring sufficient market liquidity for bona fide hedgers. The Commission also considered the Federal spot month position limit levels in the context of the Final Rule's position limits framework, which leverages the exchanges' expertise and ability to quickly set and adjust their exchange-set spot month position limits at any level lower than the Federal spot month position limit levels in response to market conditions, which relieves some of the potential costs of setting the Federal spot month position limit levels at 25% of EDS. Furthermore, the Commission considered comments received in response to the 2020 NPRM before finalizing the Federal spot month position limit levels. This is evidenced in the changes to the Federal spot month position limit levels with respect to NYMEX Henry Hub Natural Gas (NG) and ICE Cotton No. 2 (CT), the latter of which is set at 12.95% of EDS in the Final Rule.

The Commission also recognizes comments from Better Markets and NEFI, which state that exchanges have incentives to maximize shareholder profits, which could be accomplished by, among other things, maximizing trading.[1401] One way exchanges could spur trading in the context of setting Federal spot month position limit levels in this rulemaking is by taking steps to ensure that the Federal spot month position limit levels are set as high as possible by providing higher EDS figures and recommending higher Federal spot month position limit levels. A potential cost of extremely high Federal spot month position limit levels is harm to market integrity through excessive speculation and manipulation. However, the Commission believes that these costs are mitigated through a number of mechanisms. First, the Commission independently assessed and verified the exchanges' EDS estimates, which included: (1) Working closely with the exchanges to independently verify that all EDS methodologies and figures are reasonable; [1402] and (2) reviewing each exchange-recommended level for compliance with the requirements established by the Commission and/or by Congress, including those in CEA section 4a(a)(3)(B).[1403] Second, the Commission conducted its own analysis of the exchange-recommended Federal spot month position limit levels and determined that the levels adopted herein are: (1) Low enough to diminish, eliminate, or prevent excessive speculation and also protect price discovery; (2) high enough to ensure that there is sufficient market liquidity for bona fide hedgers; (3) fall within a range of acceptable limit levels; and (4) are properly calibrated to account for differences between markets. Third, the Commission notes that exchanges have significant incentives and obligations to maintain well-functioning markets as self-regulatory organizations that are themselves subject to regulatory requirements. Specifically, the DCM and

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[1396] PMAA at 2.

[1397] However, based on the Commission's past experience in setting Federal speculative position limits, the Commission notes that it is very unlikely that there will be excessive speculation if the Federal spot month position limit level is set at 25% or less of EDS.

[1398] The seven such core referenced futures contracts are: (1) MGEX HRS Wheat (MWE); (2) ICE Cocoa (CC); (3) ICE Coffee C (KC); (4) ICE FCOJ–A (OJ); (5) ICE Sugar No. 11 (SB); (6) ICE Sugar No. 16 (SF); and (7) NYMEX Henry Hub Natural Gas (NYMEX NG).

[1399] CME Group at 5. CME considered the following factors: contract specifications, market participation, physical market fundamentals, delivery process, convergence, market liquidity, volatility, market participant concentration, and market participant feedback.

[1400] CME Group at 5.

[1401] Better Markets at 22–23; NEFI at 3.

[1402] As discussed in detail in Section II.B.3.iii.b., the verification involved: confirming that the methodology and data for the underlying commodity reflected the commodity characteristics described in the core referenced futures contract's terms and conditions; replicating exchange EDS figures using the methodology provided by the exchange; and working with the exchanges to revise the methodologies as needed.

[1403] *See supra* Section II.B.3.ii.a(1).

SEF Core Principles require exchanges to, among other things, list contracts that are not readily susceptible to manipulation, and surveil trading on their markets to prevent market manipulation, price distortion, and disruptions of the delivery or cash-settlement process.[1404] Fourth, exchanges also have significant incentives to maintain well-functioning markets to remain competitive with other exchanges. Market participants may choose exchanges that are less susceptible to sudden or unreasonable fluctuations or unwarranted changes caused by corners, squeezes, and manipulation, which could, among other things, harm the price discovery function of the commodity derivative contracts and negatively impact the delivery of the underlying commodity, bona fide hedging strategies, and market participants' general risk management.[1405] In addition, several academic studies, including one concerning futures exchanges and another concerning demutualized stock exchanges, support the conclusion that exchanges are able to both satisfy shareholder interests and meet their self-regulatory organization responsibilities.[1406] Finally, the Commission itself conducts general market oversight through, among other things, its own surveillance program to ensure well-functioning markets.

a. NYMEX Henry Hub Natural Gas (NYMEX NG) Cash-Settled Referenced Contracts

Based on comments received [1407] and based on the existing exchange-set practices with respect to the NYMEX NG core referenced futures contract and its associated cash-settled referenced contracts, the Commission is permitting market participants to hold a position in cash-settled NYMEX NG referenced contracts up to the Federal spot month position limit level of 2,000 referenced contracts per exchange and another position in cash-settled economically equivalent NYMEX NG OTC swaps that has a notional amount of up to 2,000 equivalent-sized contracts. This is: (i) A modification from the proposed Federal spot month position limit level for NYMEX NG referenced contracts, in which market participants would be able to hold only 2,000 cash-settled NYMEX NG referenced contracts aggregated between all exchanges and the OTC swaps market; but (ii) a continuation of the existing exchange-set spot month position limit framework that has been in place for over a decade. The Commission believes that this modification from the 2020 NPRM will, relative to the proposed approach, help minimize liquidity costs for market participants trading in both cash and physically-settled natural gas derivatives markets, in which the markets for cash-settled NYMEX NG referenced contracts is significantly more liquid than the market for the physically-settled NYMEX NG core referenced futures contract during the spot month. This is, in part, because this modification will continue to allow existing market participants ''to optimize the proportion of physically-settled and cash-settled natural gas contracts that they wish to hold.'' [1408] Finally, although the Commission acknowledges that market participants may hold an aggregate position in the cash-settled NYMEX NG referenced contracts that is in excess of 25% of EDS, the Commission does not believe that this will lead to excessive speculation and volatility in the natural gas markets, because of the highly liquid nature of the cash-settled natural gas markets and the Commission's experience in overseeing the exchange-set framework with respect to cash-settled natural gas contracts.

b. ICE Cotton No. 2 (CT)

The Commission also modified the Federal spot month position limit level for ICE Cotton No. 2 (CT) by adopting a level of 900 contracts, instead of 1,800 contracts as proposed. The Commission is adopting the level of 900 contracts based on its analysis of the alternatives suggested by bona fide hedgers using the ICE Cotton No. 2 (CT) core referenced futures contract.[1409] The Commission received two defined alternatives to the proposed level of 1,800 contracts—300 contracts and 900 contracts. Specifically, based on those comments, the Commission believes that it could further improve protections against corners and squeezes without materially sacrificing liquidity for bona fide hedgers by reducing the Federal spot month position limit level from the proposed 1,800 contracts to 900 contracts. However, the Commission believes that retaining the existing Federal spot month limit level of 300 contracts may cause concerns about adequate liquidity, especially because it would be the lowest Federal spot month position limit level, by far, in terms of percent of EDS, among all core referenced futures contracts, and the Commission has observed illiquidity during the early part of the spot month.[1410]

iii. Levels Outside of the Spot Month

a. The 10/2.5% Formula

The Commission has determined that the existing 10/2.5% formula generally has functioned well for the existing nine legacy agricultural contracts, and has successfully benefited the markets by taking into account the competing goals of facilitating both liquidity formation and price discovery, while also protecting the markets from harmful market manipulation and excessive speculation. However, since the existing Federal non-spot month position limit levels are based on open interest levels from 2009 (except for CBOT Oats (O), CBOT Soybeans (S), and ICE Cotton No. 2 (CT), for which existing levels are based on the respective open interest from 1999), the Commission is revising the levels based on the periods from July 2017 to June 2018 and July 2018 to June 2019 to reflect the general increases in open interest [1411] that have

[1404] 17 CFR 38.200; 17 CFR 38.250; 17 CFR 37.300; and 17 CFR 37.400.

[1405] Kane, Stephen, *Exploring price impact liquidity for December 2016 NYMEX energy contracts,* n.33, U.S. Commodity Futures Trading Commission website, available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_priceimpact.pdf.*

[1406] *See* David Reiffen and Michel A. Robe, *Demutualization and Customer Protection at Self-Regulatory Financial Exchanges,* Journal of Futures Markets, Vol. 31, 126–164 (in many circumstances, an exchange that maximizes shareholder (rather than member) income has a greater incentive to aggressively enforce regulations that protect participants from dishonest agents); and Kobana Abukari and Isaac Otchere, *Has Stock Exchange Demutualization Improved Market Quality? International Evidence,* Review of Quantitative Finance and Accounting, Dec 09, 2019, *https://doi.org/10.1007/s11156-019-00863-y* (demutualized exchanges have realized significant reductions in transaction costs in the post-demutualization period).

[1407] *See* MFA/AIMA at 11–12; Citadel at 7–8; and SIFMA AMG at 10–11.

[1408] MFA/AIMA at 11–12.

[1409] AMCOT at 1–2; ACSA at 8; Ecom at 1; Southern Cotton at 2; NCC at 1; Mallory Alexander at 2; Canale Cotton at 2; IMC at 2; Olam at 3; DECA at 2; Moody Compress at 1; ACA at 2; Choice at 1; East Cotton at 2; Jess Smith at 2; McMeekin at 2; Memtex at 2; NCC at 2; Omnicotton at 2; Toyo at 2; Texas Cotton at 2; Walcot at 2; White Gold at 1; LDC at 1; SW Ag at 2; NCTO at 2; Parkdale at 2; and IFUS—Estimated Deliverable Supply—Cotton Methodology, August 2020, IFUS Comment Letter (Aug. 14, 2020).

[1410] At 300 contracts, the Federal spot month position limit level for ICE Cotton No. 2 (CT) would be set at 4.32% of EDS. CBOT KC HRS Wheat (KW) generally has the lowest Federal spot month position limit level in terms of percentage of EDS at 6.82%, which is 58% higher than 4.32%. However, following the close of trading on the business day prior to the last two trading days of the contract month, CME Live Cattle (LC) has the lowest Federal spot month position limit level in terms of percentage of EDS at 5.29%, which is 22% higher than 4.32%.

[1411] The Commission notes that NGFA commented ''NGFA still is not completely convinced that open interest is the best yardstick for this exercise,'' because ''[a]s volume and open occurred over time in the nine legacy agricultural contracts (other than CBOT Oats (O), MGEX HRS Wheat (MWE), and CBOT KC HRW Wheat (KW)).[1412]

Since the increase for most of the Federal non-spot position limits is predicated on the increase in open interest, as reflected in the revised data reviewed by the Commission, the Commission believes that the increases may enhance, or at least should maintain, general liquidity, which the Commission believes may benefit those with bona fide hedging positions, and commercial end users in general. On the other hand, the Commission believes that many market participants, especially commercial end users, generally accept that the existing Federal non-spot month position limit levels for the nine legacy agricultural commodities function well, including promoting liquidity and facilitating bona fide hedging in the respective markets. As a result, the Final Rule may in some cases result in higher Federal non-spot month position limits, which could increase speculation without achieving any concomitant benefits of increased liquidity for bona fide hedgers compared to the status quo.

The Commission also recognizes that there could be potential costs to keeping the existing 10/2.5% formula (even if revised to reflect current open interest levels) compared to alternative formulae that would result in even higher Federal position limit levels. First, while the 10/2.5% formula may have reflected ''normal'' observed market activity through 1999 when the Commission adopted it, there have been changes in the markets themselves and the entities that participate in those markets. When adopting the 10/2.5% formula in 1999, the Commission's experience in these markets reflected aggregate futures and options open interest well below 500,000 contracts, which no longer reflects market reality.[1413] As the nine legacy agricultural contracts (with the exception of CBOT Oats (O)) all have open interest well above 25,000 contracts, and in some cases above 500,000 contracts, the existing formula may act as a negative constraint on liquidity formation relative to the higher revised formula. Further, if open interest continues to increase over time, the Commission anticipates that the existing 10/2.5% formula could impose even greater marginal costs on bona fide hedgers by potentially constraining liquidity formation (*i.e.,* as the open interest of a commodity contract increases, a greater relative proportion of the commodity's open interest is subject to the 2.5% limit level rather than the initial 10% limit). In turn, this may increase costs to commercial firms, which may be passed to the public in the form of higher prices.

Further, to the extent there may be certain liquidity constraints, the Commission has determined that this potential concern could be mitigated, at least in part, by the Final Rule's change to increase the marginal threshold level from 25,000 contracts to 50,000 contracts, which the Commission believes should provide an appropriate increase in the Federal non-spot month position limit levels for most contracts to better reflect the general increase observed in open interest across futures markets. The Commission acknowledges that, as an alternative, the Commission could have adopted a marginal threshold level above 50,000 contracts, but notes that each increase of 25,000 contracts in the marginal threshold level would only increase the permitted non-spot month level by 1,875 contracts (*i.e.,* (10% of 25,000 contracts) − (2.5% of 25,000 contracts) = 1,875 contracts). The Commission has observed based on current data that changing the marginal threshold to 50,000 contracts could benefit several market participants per legacy agricultural commodity who otherwise would bump up against the non-spot month position limit levels based on the status quo threshold of 25,000 contracts. As a result, the Commission has determined that changing the marginal threshold level could result in marginal benefits and costs for many of the legacy agricultural commodities, but the Commission acknowledges the change is relatively minor compared to revising the existing 10/2.5% formula based on updated open interest data.

Second, the Commission recognizes that an alternative formula that allows for higher Federal non-spot month position limit levels, compared to the existing 10/2.5% formula, could benefit liquidity and market efficiency by creating a framework that is more conducive to the larger liquidity providers that have entered the market over time.[1414] Compared to when the Commission first adopted the 10/2.5% formula, today there are relatively more large non-commercial traders, such as banks, managed money traders, and swap dealers, which generally hold long positions and act as aggregators or market makers that provide liquidity to short positions (*e.g.,* commercial hedgers).[1415] These dealers also function in the swaps market and use the futures market to hedge their exposures. Accordingly, to the extent that larger non-commercial market makers and liquidity providers have entered the market—particularly to the extent they are able to take offsetting positions to commercial short interests—a hypothetical alternative formula that would permit higher Federal non-spot month position limit levels might provide greater market liquidity, and possibly increased market efficiency, by allowing for greater market-making activities.[1416]

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interest grow, Federal non-spot limits expand correspondingly . . . which leads to yet higher volume and open interest . . . which again prompts expanded Federal non-spot limits . . . and so on.'' However, NGFA did not provide any alternatives to utilizing open interest for determining Federal non-spot month position limit levels. As discussed previously in the Final Rule, the Commission believes that open interest is an appropriate way of measuring market activity for a particular contract and that a formula based on open interest, such as the 10/2.5% formula: (1) Helps ensure that positions are not so large relative to observed market activity that they risk disrupting the market; (2) allows speculators to hold sufficient contracts to provide a healthy level of liquidity for hedgers; and (3) allows for increases in position limits and position sizes as markets expand and become more active. Furthermore, the Commission notes that under the Final Rule, Federal non-spot month position limit levels do not automatically increase with higher open interest levels. In order to make any amendments to the Federal position limit levels, the Commission is required to engage in notice-and-comment rulemaking.

[1412] For most of the legacy agricultural commodities, this results in a higher non-spot month limit. However, the Commission is not changing the non-spot month limits for either CBOT Oats (O) or MGEX HRS Wheat (MWE) based on the revised open interest since this would result in a reduction of non-spot month limits from 2,000 to 700 contracts for CBOT Oats (O) and 12,000 to 5,700 contracts for MGEX HRS Wheat (MWE). Similarly, the Commission also is maintaining the current non-spot month limit for CBOT KC HRW Wheat (KW). *See supra* Section II.B.4.—Federal Non-Spot Month Position Limit Levels for further discussion.

[1413] *See* 64 FR at 24038, 24039 (May 5, 1999). As discussed in the preamble, the data show that by the 2015–2018 period, five of the nine legacy agricultural contracts had maximum open interest greater than 500,000 contracts. The contracts for CBOT Corn (C), CBOT Soybeans (S), and CBOT KC HRW Wheat (KW) saw increased maximum open interest by a factor of four to five times the maximum open interest during the years leading up to the Commission's adoption of the 10/2.5% formula in 1999. Similarly, the contracts for CBOT Soybean Meal (SM), CBOT Soybean Oil (SO), CBOT Wheat (W), and MGEX HRS Wheat (MWE) saw increased maximum open interest by a factor of three to four times. *See supra* Section II.B.4., Federal Non-Spot Month Position Limit Levels, for further discussion.

[1414] *See supra* Section II.B.4., Federal Non-Spot Month Position Limit Levels, for further discussion.

[1415] *Id.*

[1416] For example, the Commission is aware of several market makers that either have left particular commodity markets, or reduced their market making activities. *See, e.g.,* McFarlane, Sarah, *Major Oil Traders Don't See Banks Returning to the Commodity Markets They Left,* The Wall Street Journal (Mar. 28, 2017), available at *https://www.wsj.com/articles/major-oil-traders-dont-see-banks-returning-to-the-commodity-markets-they-*

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However, the Commission believes that any purported benefits related to a hypothetical alternative formula, or a suggested alternative such as the one provided by ISDA,[1417] that would allow for higher Federal non-spot month position limits would be minimal at best. Liquidity providers are still able to maintain, and possibly increase, market making activities under the Final Rule since the Federal non-spot month position limits are generally still increasing under the existing 10/2.5% formula to reflect the increase in open interest. Further, to the extent that the Final Rule's elimination of the risk management exemption could theoretically force liquidity providers to reduce their trading activities, the Commission believes that certain liquidity-providing activity of the existing risk management exemption holders may still be permitted under the Final Rule, either as a result of the pass-through swap provision or because of the general increase in limits based on the revised open interest levels.[1418] Furthermore, bona fide hedgers and end-users generally have not requested a revised formula to allow for significantly higher Federal non-spot month position limits. The Commission also recognizes an additional benefit to market integrity of the Final Rule compared to a hypothetical alternative formula: While the Commission believes that the pass-through swap provision is narrowly-tailored to enable liquidity providers to continue providing liquidity to bona fide hedgers, in contrast, an alternative formula that would allow higher limit levels for all market participants would potentially permit increased excessive speculation and increase the probability of market manipulation or harm the underlying price discovery function.[1419]

Additionally, some [1420] have voiced general concern that permitting increased Federal non-spot month limits in the nine legacy agricultural contracts (at any level), especially in connection with commodity indices, could disrupt price discovery and result in a lack of convergence between futures and cash prices, resulting in increased costs to end users, which ultimately could be borne by the public. The Commission has not seen data demonstrating this causal connection, but acknowledges arguments to that effect.[1421]

Third, if the Final Rule's Federal non-spot position limits are too high for a commodity, the Final Rule might be less effective in deterring excessive speculation and market manipulation for that commodity's market. Conversely, if the Commission's Federal position limit levels are too low for a commodity, the Final Rule could unduly constrain liquidity for bona fide hedgers or result in a diminished price discovery function for that commodity's underlying market. In either case, the Commission would view these as costs imposed on market participants. However, to the extent the Commission's Federal non-spot month position limit levels could be too high, the Commission believes these costs could be mitigated because exchanges would potentially be able to establish lower non-spot month position limit levels.[1422] Moreover, these concerns may be mitigated further to the extent that exchanges use other tools for protecting markets aside from position limits, such as establishing position accountability levels below Federal position limit levels or imposing liquidity and concentration surcharges to initial margin if vertically integrated with a derivatives clearing organization. Further, as discussed below, the Commission is maintaining current Federal non-spot month position limit levels for CBOT Oats (O), MGEX HRS Wheat (MWE), and CBOT KC HRW Wheat (KW), which otherwise would be lower based on current open interest levels for these contracts.

b. Setting a Lower Single Month Position Limit Level for ICE Cotton No. 2 (CT)

The Commission is adopting a single month position limit level of 5,950 contracts, which is 50% of the proposed level of 11,900 contracts, which, in turn, was based on the modified 10/2.5% formula. This was in response to numerous comments from end-users suggesting that the Commission set the single month position limit level lower than the all-months-combined position limit level.[1423]

The Commission notes that there could be a benefit to setting the single month position limit level lower than the all-months-combined position limit level, because it could help diminish excessive speculation or prevent price distortions if traders hold unusually large positions in contracts outside of the spot month and those traders simultaneously exit those positions immediately before the spot month.

However, the Commission acknowledges that there could be a cost to adopting a single month limit that is half of the all-months-combined position limit levels. Specifically, it

*left-1490715761?mg=prod/com-wsj* (describing how ''Morgan Stanley sold its oil trading and storage business . . . and J.P. Morgan unloaded its physical commodities business . . . .''); Decambre, Mark, *Goldman Said to Plan Cuts to Commodity Trading Desk: WSJ* (Feb. 5, 2019), available at *https://www.marketwatch.com/story/goldman-said-to-plan-cuts-to-commodity-trading-desk-wsj-2019-02-05* (describing how Goldman Sachs ''plans on making cuts within its commodity trading platform . . . .'').

[1417] ISDA at 7.

[1418] *See supra* Sections II.A.1.x. (discussing pass-through swap provision), II.B.4.iii.a(1)(i) (discussing increases in open interest); *see also* NCFC at 7 (stating that NCFC is ''confident that the substantial increase in the overall speculative position limits and allowances for pass-through swaps will limit any potential loss of liquidity'' that might be associated with the elimination of the risk management exemption).

[1419] *See* Section II.B.4.iv.a(2)(iii).

[1420] AMCOT at 1–2; Moody Compress at 1; ACA at 2; Jess Smith at 2; McMeekin at 2; Memtex at 2; Mallory Alexander at 2; Walcot at 2; White Gold at 2; LDC at 2; Southern Cotton at 2–3; and Better Markets at 44–48.

[1421] IECA expressed similar concerns with respect to commodity index funds. IECA at 4 (stating that a June 2009 bipartisan report of the Senate Permanent Subcommittee for Investigation concluded that the ''activities of commodity index traders, in the aggregate, constituted 'excessive speculation,' '' and that index funds have caused an ''unwarranted burden on commerce.''). The Commission notes that one of the concerns that prompted the 2008 moratorium on granting risk management exemptions was a lack of convergence between futures and cash prices in wheat. Some at the time hypothesized that perhaps commodity index trading was a contributing factor to the lack of convergence, and, some have argued that this could harm price discovery since traders holding these positions may not react to market fundamentals, thereby exacerbating any problems with convergence. However, the Commission has determined for various reasons that risk management exemptions did not lead to the lack of convergence since the Commission understands that many commodity index traders vacate contracts before the spot month and therefore would not influence convergence between the spot and futures price at expiration of the contract. Further, the risk-management exemptions granted prior to 2008 remain in effect, yet the Commission is unaware of any significant convergence problems relating to commodity index traders at this time. Additionally, there did not appear to be any convergence problems between the period when Commission staff initially granted risk management exemptions and 2007. Instead, the Commission believes that the convergence issues that started to occur around 2007 were due to the contract specification underpricing the option to store wheat for the long futures holder making the expiring futures price more valuable than spot wheat.

[1422] The Commission notes that several commenters, including Better Markets, stated that exchanges may have financial incentives to increase trading volume, which could incentivize exchanges to set the highest possible exchange-set position limit levels. *See, e.g.,* Better Markets at 22–24, 46–47. While the Commission acknowledges that this is the case, the Commission also believes that such costs are sufficiently mitigated through exchange statutory and regulatory obligations, the Commission's oversight of the exchanges, and the exchanges' own financial incentives to maintain well-functioning markets. This is discussed more in depth in Sections II.B.2.iv.b and III.B.3.iii.b(3)(iii).

[1423] *E.g.,* LDC at 2; Moody Compress at 1; ACA at 2; Jess Smith at 2; McMeekin at 2; Memtex at 2; Mallory Alexander at 2; Walcot at 2; and White Gold at 1.

would restrict a speculative trader's ability to take opposite positions to bona fide hedgers by, for example, entering into calendar spread transactions that would normally provide liquidity to bona fide hedgers. Thus, by adopting the lower single month limit, liquidity in deferred month contracts would be reduced because the speculative trader would not be able to hold positions in excess of the single month limit. Nonetheless, the Commission believes that, based on the unanimous comments from the end-users of the ICE Cotton No. 2 (CT) contract requesting a lower single month position limit level, such costs may not materially negatively impact liquidity for bona fide hedgers.

c. Exceptions to the 10/2.5% Formula for CBOT Oats (O), MGEX Hard Red Spring Wheat (MWE), and CBOT Kansas City Hard Red Winter Wheat (KW)

Based on the Commission's experience since 2011 with Federal non-spot month position limit levels for the MGEX HRS Wheat (''MWE'') and CBOT KC HRW Wheat (''KW'') core referenced futures contracts, the Commission is maintaining the Federal non-spot month position limit levels for MWE and KW at the existing level of 12,000 contracts, rather than reducing them to the lower level that would result from applying the proposed updated 10/2.5% formula. Maintaining the status quo for the MWE and KW Federal non-spot month position limit levels results in partial wheat parity between those two wheat contracts, but not with CBOT Wheat (''W''), which increases to 19,300 contracts under the Final Rule.

The Commission believes that this benefits the MWE and KW markets since the two species of wheat are similar to one another; accordingly, decreasing the Federal non-spot month position limit levels for MWE could impose liquidity costs on the MWE market and harm bona fide hedgers, which could further harm liquidity for bona fide hedgers in the KW market. On the other hand, although commenters requested raising the Federal non-spot month position limit level for KW to match the level for W,[1424] the Commission has determined not to raise the Federal non-spot month position limit levels for KW and for MWE as well to the Federal non-spot month position limit level for W. This is because the limit level for W appears to be extraordinarily large in comparison to open interest in KW and MWE markets, and the limit levels for both the KW and the MWE contracts are already larger than the limit levels would be based on the 10/2.5% formula. While W is a potential substitute for KW and MWE, it is not similar to the same extent that MWE and KW are to one another, and so the Commission has determined that partial wheat parity outside of the spot month will maintain liquidity and price discovery while not unnecessarily inviting excessive speculation or potential market manipulation in the MWE and KW markets.

Likewise, based on the Commission's experience since 2011 with the Federal non-spot month speculative position limit for CBOT Oats (O), the Commission is maintaining the limit level at the current 2,000 contracts level, rather than reducing it to the lower level that would result from applying the updated 10/2.5% formula based on current open interest. The Commission has determined that there is no evidence of potential market manipulation or excessive speculation, and so there would be no perceived benefit to reducing the Federal non-spot month position limit for the CBOT Oats (O) contract, while reducing the level could impose liquidity costs.

iv. Subsequent Spot and Non-Spot Month Position Limit Levels

The Commission received several comments concerning updates to the Federal position limit levels, with commenters requesting that the Commission periodically review the levels and revise them if appropriate.[1425] One commenter was concerned that the Federal position limit levels could become too high over time,[1426] while the rest were concerned that the levels could become too low.[1427] In addition, CME Group also suggested that exchanges should update the EDS figures ''every two years [and] . . . DCMs should be provided the opportunity to submit data voluntarily to the Commission on a more frequent basis.'' [1428]

The Commission recognizes that there may be costs if Federal position limit levels become too high or low over time. For example, levels that become too high may permit excessive speculation; levels that become too low may negatively impact liquidity. However, the Commission believes that the Final Rule's position limits framework, which utilizes Federal position limit levels as ceilings and allows exchange-set position limits to operate under that ceiling, will mitigate such potential costs. Specifically, because the Federal position limits are utilized as ceilings, this framework will enable exchanges to respond to market conditions through a greater range of acceptable exchange-set position limit levels than if the Federal position limit levels did not operate as ceilings. Furthermore, because such exchange actions can be effectuated significantly faster than modifying Federal position limits, the Final Rule's position limits framework is able to quickly respond to rapidly evolving market conditions through exchange-action as well.[1429]

v. Phase-In of Federal Position Limit Levels

The Commission received comments requesting that the Commission ''consider phasing in these adjustments for agricultural commodities to assess the impacts of increasing limits on contract performance.'' [1430] CMC also noted that, ''[a] phased approach could provide market participants, exchanges, and the Commission a way to build in scheduled pauses to evaluate the effects of increased limits, thereby fostering confidence and trust in the markets.'' [1431]

[1424] SIFMA AMG at 3–4; ISDA at 12; PIMCO at 4–5; MFA/AIMA at 12; and Citadel at 6–7.

[1425] MFA/AIMA at 5 (stating that ''the Commission should direct exchanges to periodically monitor the proposed new position limit levels''); PIMCO at 6 (urging the CFTC ''to include . . . a mandatory requirement to regularly (and at least annually) review and update limits as markets grow and change''); SIFMA AMG at 10 (suggesting the Final Rule should require ''that the Commission regularly consult with exchanges and review and adjust position limits when it is necessary to do so based on relevant market factors''); ISDA at 10 (stating that ''the Commission must regularly convene and consult with exchanges on deliverable supply and, if appropriate, propose notice and comment rulemaking to adjust limit levels''); and IATP at 16–17 (proposing that the Commission should engage in ''an annual review of position limit levels to give [commercial hedgers] legal certainty over that period'' and also retain ''the authority to revise position limits . . . if data monitoring and analysis show that those annual limit levels are failing to prevent excessive speculation and/or various forms of market manipulation'').

[1426] IATP at 16–17.

[1427] MFA/AIMA at 5–6; PIMCO at 6; SIFMA AMG at 10; and ISDA at 10.

[1428] CME Group at 5.

[1429] Furthermore, the Commission notes that updating EDS figures and Federal position limit levels is a resource-intensive endeavor for both the Commission and the exchanges. Also, periodic, predetermined review intervals may not always align with market changes or other events resulting in material changes to deliverable supply that would warrant adjusting Federal spot month position limit levels. As a result, the Commission believes that it would be more efficient, timely, and effective to review the EDS figure and the Federal position limit level for a core referenced futures contract if warranted by market conditions, including changes in the underlying cash market, which the Commission and exchanges continually monitor.

[1430] AFIA at 2; CMC at 6.

[1431] CMC at 6. Although commenters did not provide specific details about what they meant by ''phase-in,'' the Commission understands these comments to mean that they are requesting a

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The Commission acknowledges that there could be some benefit in implementing a formal, gradual phase-in for the Federal position limit levels, because this could allow the Commission to more incrementally assess whether there are any issues with respect to the referenced contract markets.[1432] However, the Commission believes that the position limits framework that is implemented in the Final Rule effectively provides a similar, but more flexible result. Specifically, market participants will still be subject to the exchange-set spot month position limit levels even after the Final Rule's Federal spot month position limit levels go into effect. The existing exchange-set position limit levels are lower than the corresponding Federal levels as adopted in this Final Rule for most core referenced futures contracts [1433] and, unless and until exchanges affirmatively modify their exchange-set spot month position limit levels pursuant to part 40 of the Commission's regulations,[1434] the operative spot month position limit levels for market participants trading exchange-listed referenced contracts will be the exchange-set ones. So, if an exchange deems it appropriate to maintain its existing exchange-set position limit levels and does not choose to adopt the new applicable Federal speculative position limit level as the new exchange-set speculative limit for any relevant referenced contract listed on its exchange, then there will be no practical change from the status quo for market participants from a position limits perspective. If the exchange believes that it is appropriate to raise its exchange-set spot month position limit levels either up to the Federal position limit levels or lower levels as it deems appropriate, then the exchange may do so in a way that is tailored for each referenced contract (including through a phased-in approach) and that is informed by the exchange's knowledge of each market.

A further benefit to the Final Rule's position limits framework over a federally-mandated phase-in is that exchanges have greater flexibility (relative to the Commission) to quickly modify exchange-set levels, including modifying any phase-in levels, to respond to sudden and changing market conditions.

vi. Core Referenced Futures Contracts and Linked Referenced Contracts; Netting

The definitions of the terms ''core referenced futures contract'' and ''referenced contract'' set the scope of contracts to which Federal position limits apply. As discussed above, by applying the Federal position limits to ''referenced contracts,'' the Final Rule expands the Federal position limits beyond the 25 physically-settled ''core referenced futures contracts'' listed in final Appendix E to part 150 by also including any cash-settled and physically-settled ''referenced contracts'' linked thereto, as well as swaps that meet the ''economically equivalent swap'' definition in final § 150.1 and thus qualify as ''referenced contracts.'' [1435]

a. Referenced Contracts

The Commission has determined that including futures contracts and options thereon that are ''directly'' or ''indirectly linked'' to the core referenced futures contracts, including cash-settled contracts, under the definition of ''referenced contract'' in final § 150.1 helps prevent the evasion of Federal position limits—especially during the spot month—through the creation of a financially equivalent contract that references the price of a core referenced futures contract, or of the commodity underlying a core referenced futures contract. The Commission has determined that this benefits market integrity and potentially reduces costs to market participants that otherwise could result from market manipulation.

The Commission also recognizes that including cash-settled contracts within the final Federal position limits framework may impose additional compliance costs on market participants and exchanges. Further, the Federal position limits—especially outside the spot month—may not provide all of the benefits discussed above with respect to market integrity and manipulation because there is no physical delivery outside the spot month and therefore there is reduced concern for corners and squeezes. However, to the extent that there is manipulation or price distortion involving such non-spot, cash-settled contracts, the Commission's authority to regulate and oversee futures and related options on futures markets (other than through establishing Federal position limits) may also be effective in uncovering or preventing manipulation or distortion, especially in the non-spot cash markets, and may result in relatively lower compliance costs incurred by market participants. Similarly, the Commission acknowledges that exchange oversight could provide similar benefits to market oversight and prevention of market manipulation, but with lower costs imposed on market participants—given the exchanges' deep familiarity with their own markets and their ability to tailor a response to a particular market disruption—compared to Federal position limits.

The ''referenced contract'' definition in final § 150.1 also includes ''economically equivalent swap,'' and, for the reasons discussed below, includes a narrower set of swaps compared to the set of futures contracts and options thereon that would be, under the ''referenced contract'' definition, captured as either ''directly'' or ''indirectly linked'' to a core referenced futures contract.[1436]

b. List of Referenced Contracts [1437]

The Commission's publication of the Staff Workbook is intended to provide a non-exhaustive list of exchange-traded

gradual, step-up increase in Federal spot month and non-spot month position limit levels over time for agricultural core referenced futures contracts, instead of having the new Federal position limit levels apply all at once.

[1432] As a preliminary matter, the Commission believes that the referenced contract markets will be able to function in an orderly fashion when the final Federal position limit levels go into effect. This is because, among other things, the final Federal spot month position limit levels are supported by the updated EDS figures and are set at or below 25% of EDS, and the final Federal non-spot month position limit levels are supported by increased open interest and are generally set pursuant to the modified 10/2.5% formula. The three core referenced futures contracts that do not strictly follow the 10/2.5% formula in the non-spot month (*i.e.,* CBOT KC HRW Wheat (KW), MGEX HRS Wheat (MWE), and CBOT Oats (O)) do not require any phase-in period, because they remain at existing Federal and exchange-set non-spot month position limit levels.

[1433] Nineteen of the core referenced futures contracts will have Federal spot month position limit levels that are higher than current exchange-set spot month position limit levels. COMEX Copper (HG), CBOT Oats (O), NYMEX Platinum (PL), and NYMEX Palladium (PA) will have Federal spot month position limit levels that are equal to the current exchange-set spot month position limit levels. The last two steps of the Federal spot month step-down position limit levels for CME Live Cattle (LC) are equal to the corresponding last two steps of exchange-set spot month step-down position limit levels. Finally, although currently there is technically no exchange-set spot month position limit for ICE Sugar No. 16, this contract is subject to a single month position limit level of 1,000 contracts, which effectively serves as its spot month position limit level. As a result, the Federal spot month position limit level for ICE Sugar No. 16 will effectively be higher than its current exchange-set spot month position limit level.

[1434] 17 CFR part 40.

[1435] As discussed in the preamble, the position limits framework also applies to physically-settled swaps that qualify as economically equivalent swaps. However, the Commission believes that physically-settled economically equivalent swaps would be few in number.

[1436] *See infra* Section IV.A.3.vi.e. (discussing economically equivalent swaps).

[1437] Appendix C of the Final Rule provides staff guidance to assist market participants and exchanges in determining whether a particular contract qualifies as a referenced contract.

referenced contracts that are subject to Federal position limits. Although the Commission expects to timely update this list of contracts, the omission of a contract from the Staff Workbook does not mean that such contract is outside the definition of a referenced contract subject to Federal position limits.

Additionally, the Staff Workbook will provide a linkage between each referenced contract, and either the core referenced futures contract or referenced contract, as applicable to which it is linked, to aid in market participants' understanding of the Commission's determination.

Although some commenters believed that the Commission should require exchanges to publish and maintain a definitive list of referenced contracts (other than economically equivalent swaps) [1438] the Commission believes that the centralized publication of this Workbook creates efficiency by providing market participants a known access location, and minimizes costs by not requiring redundant publication.

The Commission's concurrent publication of the Staff Workbook provides a non-exhaustive list of exchange-traded referenced contracts, and will help market participants in determining categories of contracts that fit within the referenced contract definition. This effort is intended to provide clarity to market participants regarding which exchange-traded contracts are subject to Federal position limits.

c. Netting and Related Treatment of Cash-Settled Referenced Contracts

Under paragraph (1) of the final ''referenced contract'' definition, referenced contracts include a core referenced futures contract, and any cash-settled futures contracts and options on futures contacts that are directly or indirectly linked to a physically-settled core referenced futures contract.

PIMCO and SIFMA AMG contended that cash-settled referenced contracts should not be subject to Federal position limits at all because cash-settled contracts do not introduce the same risk of market manipulation. They argued that subjecting cash-settled referenced contracts to Federal position limits would increase transaction costs and reduce market liquidity and depth in these instruments.[1439]

ISDA argued that cash-settled contracts should not be included in an immediate Federal position limits rulemaking, and should instead be deferred until the Commission has adopted Federal limits with respect to physically-delivered spot month futures contracts, and after which the Commission should revisit Federal limits for cash-settled contracts.[1440]

FIA and ICE argued that limits for cash-settled referenced contracts should be higher relative to Federal position limits for physically-settled referenced contracts. They similarly argued that cash-settled referenced contracts are ''not subject to corners and squeezes'' and will '' 'ensure market liquidity for *bona fide* hedgers.' '' [1441]

In contrast, CME supported the Commission's approach for spot-month parity for physically-settled and cash-settled referenced contracts across all commodity markets. CME explained that absent such parity, one side of the market could be vulnerable to artificial distortions from manipulations on the other side of the market, regulatory arbitrage, and liquidity drain to the other side of the market.[1442]

The Commission believes that its parity approach, including parity with respect to the size of the Federal position limits for both cash-settled and physically-settled contracts, benefits market integrity, liquidity, and price discovery by not providing skewed incentives to a market participant to favor one group of contracts over the other, or providing avenues for manipulation that this rulemaking seeks to avoid.

The Commission is also generally adopting Federal position limits on an aggregated, instead of on a per-DCM basis.[1443] FIA and ICE suggested that Federal position limits for cash-settled referenced contracts should apply per DCM (rather than in the aggregate across DCMs).[1444] The Commission views DCM-based limits as restrictive and costly for the most innovative DCMs, as DCM-based limits would necessarily represent a smaller volume of contracts available than would an aggregated limit. By making the full aggregated Federal position limit available to the contract that is most responsive to the needs of the market, the Commission believes that this provides a market-wide benefit by promoting innovation and competition in the marketplace.

The Final Rule permits market participants to net positions outside the spot month in linked physically-settled and cash-settled referenced contracts, but during the spot month market participants may not net their positions in cash-settled referenced contracts against their positions in physically-settled referenced contracts. The Commission believes that final § 150.2(a) and (b) benefits liquidity formation and bona fide hedgers outside the spot months since the netting rules facilitate the management of risk on a portfolio basis for liquidity providers and market makers. In turn, improved liquidity may benefit bona fide hedgers and other end users by facilitating their hedging strategies and reducing related transaction costs (*e.g.,* improving execution timing and reducing bid-ask spreads). On the other hand, the Commission recognizes that allowing such netting could increase transaction costs and harm market integrity by allowing for a greater possibility of market manipulation since market participants and speculators can maintain larger gross positions outside the spot month. However, the Commission has determined that such potential costs may be mitigated since concerns about corners and squeezes generally are less acute outside the spot month given there is no physical delivery involved, and because there are tools other than Federal position limits for preventing and deterring other types of manipulation, including banging the close, such as exchange-set limits and accountability and surveillance both at the exchange and Federal level.

Moreover, prohibiting the netting of physical and cash positions during the spot month should benefit bona fide hedgers as well as price discovery of the underlying markets since market makers and speculators are not able to maintain a relatively large position in the physical markets by netting it against its positions in the cash markets.[1445] While

[1438] MFA/AIMA at 7; Citadel at 4–5; SIFMA AMG at 11–12.

[1439] PIMCO at 3; SIFMA AMG at 4–7. These entities did not specifically argue that cash-settled contracts should be excluded from the ''referenced contract'' definition; rather, they contended that in general such instruments should not be subject to Federal position limits. The Commission notes that this is technically a different argument since cash-settled instruments could be exempt from position limits but still qualify as ''referenced contracts.'' Nevertheless, the practical result is the same.

[1440] ISDA at 3–5.

[1441] ICE at 3, 15 (also arguing that cash-settled limits should apply per exchange, rather than across exchanges); FIA at 7–8.

[1442] CME Group at 6.

[1443] The Commission is permitting market participants to hold a position in cash-settled NYMEX NG referenced contracts up to the Federal spot month position limit on a per exchange basis. This is discussed more in depth in Section IV.A.3.ii.a.

[1444] FIA at 7–8; ICE at 13.

[1445] Otherwise, a market participant could maintain large, offsetting positions in excess of limits in both the physically-settled and cash-settled contract, which might harm market integrity and price discovery and undermine the Federal position limits framework. For example, absent such a restriction in the spot month, a trader could stand for over 100% of deliverable supply during

Continued

this may increase compliance and transaction costs for speculators, it may benefit some bona fide hedgers and end users. It may also impose costs on exchanges, including increased surveillance and compliance costs and lost fees related to the trading that such market makers or speculators otherwise might engage in absent Federal position limits or with the ability to net their physical and cash positions.

d. Exclusions From the ''Referenced Contract'' Definition

Although the ''referenced contract'' definition in final § 150.1 includes linked contracts, it explicitly excludes location basis contracts,[1446] commodity index contracts, swap guarantees, trade options that satisfy § 32.3 of the Commission's regulations,[1447] outright price reporting agency index contracts, and monthly average pricing contracts.

First, the ''referenced contract'' definition explicitly excludes location basis contracts, which are contracts that reflect the difference between two delivery locations or quality grades of the same commodity.[1448] The Commission believes that excluding location basis contracts from the ''referenced contract'' definition benefits market integrity by preventing a trader from obtaining an extraordinarily large speculative position in the commodity underlying the referenced contract. Absent this exclusion, a market participant could increase its exposure in the commodity underlying the referenced contract by using the location basis contract to net down against its position in a referenced contract, and then further increase its position in the referenced contract that would otherwise be restricted by position limits. Similarly, the Commission believes that the exclusion of location basis contracts reduces hedging costs for hedgers and commercial end-users, as they are able to more efficiently hedge the cost of commodities at their preferred location without the risk of possibly hitting a position limits ceiling or incurring compliance costs related to applying for a bona fide hedge recognition related to such position.[1449]

Excluding location basis contracts from the ''referenced contract'' definition also could impose costs for market participants that wish to trade location basis contracts since, as noted, such contracts are not subject to Federal position limits and thus could be more easily subject to manipulation by a market participant that obtained an excessively large position. However, the Commission believes such costs are mitigated because location basis contracts generally demonstrate less volatility and are less liquid than the core referenced futures contracts, meaning the Commission believes that it would be an inefficient method of manipulation (*i.e.,* too costly to implement and therefore, the Commission believes that the probability of manipulation is low). Further, excluding location basis contracts from the ''referenced contract'' definition is consistent with existing market practice since the market treats a contract on one grade or delivery location of a commodity as different from another grade or delivery location. Accordingly, to the extent that this exclusion is consistent with current market practice, any benefits or costs already may have been realized.

Second, the Commission has concluded that excluding commodity index contracts from the ''referenced contract'' definition benefits market integrity by preventing speculators from using a commodity index contract to net down an outright position in a referenced contract that is a component of the commodity index contract, which would allow the speculator to take on large outright positions in the referenced contracts and therefore result in increased speculation, undermining the Federal position limits framework.[1450] However, the Commission believes that this exclusion could impose costs on market participants that trade commodity index contracts since, as noted, such contracts are not subject to Federal position limits and thus could be more easily subject to manipulation by a market participant that obtained an excessively large position. The Commission believes such costs would be mitigated because the commodities comprising the index are themselves subject to limits, and because commodity index contracts generally tend to exhibit low volatility since they are diversified across many different commodities. Further, the Commission believes that it is possible that excluding commodity index contracts from the definition of ''referenced contract'' could result in some trading shifting to commodity index contracts, which may reduce liquidity in exchange-listed core referenced futures contracts, harm pre-trade transparency and the price discovery process in the futures markets, and depress open interest (as volumes shift to index positions, which would not count toward open interest calculations). However, the Commission believes that the probability of this occurring is low because the Commission believes that using commodity index contracts is an

the spot month by holding a large long position in the physical-delivery contract along with an offsetting short position in a cash-settled contract, which effectively would corner the market.

[1446] ICE further recommended that additional basis and spread contracts be excluded from the referenced contract definition. ICE at 10–11. The Commission has determined not to exclude these additional contracts from the referenced contract definition, as, among other reasons discussed further above, the Commission views the constraints on the liquidity and volatility associated with other excluded contracts as not present to an equal degree in basis and spread contracts proposed to be excluded by ICE.

[1447] 17 CFR 32.3.

[1448] The term ''location basis contract'' generally means a derivative that is cash-settled based on the difference in price, directly or indirectly, of (1) a core referenced futures contract; and (2) the same commodity underlying a particular core referenced futures contract at a different delivery location than that of the core referenced futures contract. *See* Appendix C to final part 150. For clarity, a core referenced futures contract may have specifications that include multiple delivery points or different grades (*i.e.,* the delivery price may be determined to be at par, a fixed discount to par, or a premium to par, depending on the grade or quality). The above discussion regarding location basis contracts is referring to delivery locations or quality grades other than those contemplated by the applicable core referenced futures contract.

[1449] AGA agrees that the exclusion of location basis contracts from the ''referenced contract'' definition creates certain netting benefits and may allow commercial end-users to more efficiently hedge the cost of commodities at a preferred location. AGA at 9. In general, AGA supported all of the proposed exclusions from the ''referenced contract'' definition in the 2020 NPRM, as it believes that market participants benefit from clear rules and definitions that help prevent ''potential disagreement leading to increased transaction costs, potential loss of liquidity, and compliance strategies that generally make the markets less efficient.'' *Id.*

[1450] Further, the Commission believes that prohibiting the netting of a commodity index position with a referenced contract is required by its interpretation of the Dodd-Frank Act's amendments to the CEA's definition of ''bona fide hedging transaction or position.'' The Commission interprets the amended CEA definition to eliminate the Commission's ability to recognize risk management positions as bona fide hedges or transactions. *See infra* Section IV.A.4, Exemptions from Federal Position Limits—Bona Fide Hedging Recognitions, Spread and Other Exemptions (Final §§ 150.1 and 150.3), for further discussion. In this regard, the Commission has observed that it is common for swap dealers to enter into commodity index contracts with participants for which the contract would not qualify as a bona fide hedging position (*e.g.,* with a pension fund). Failing to exclude commodity index contracts from the ''referenced contract'' definition could enable a swap dealer to use positions in commodity index contracts as a risk management hedge by netting down its offsetting outright futures positions in the components of the index. Permitting this type of risk management hedge would subvert the statutory pass-through swap language in CEA section 4a(c)(2)(B), which the Commission interprets as prohibiting the recognition of positions entered into for risk management purposes as bona fide hedges unless the swap dealer is entering into positions opposite a counterparty for which the swap position is a bona fide hedge.

inefficient means of obtaining exposure to a specific commodity.

Third, the Commission's determination to exclude trade options from the referenced contract definition is consistent with the historical practice of the Commission, in which it has exempted a number of trade options from Commission requirements. This exclusion benefits end-users who hedge their physical risk through these instruments, yet do not contribute to excessive speculation.

Fourth, the Commission's exclusion of swap guarantees from the referenced contract definition will help avoid any potential confusion regarding the application of position limits to guarantees of swaps. The Commission understands that swap guarantees generally serve as insurance, and, in many cases, swap guarantors guarantee the performance of an affiliate in order to entice a counterparty to enter into a swap with such guarantor's affiliate. As a result, the Commission believes that swap guarantees do not contribute to excessive speculation, market manipulation, squeezes, or corners. Furthermore, the Commission believes that swap guarantees were not contemplated when Congress articulated its policy goals in CEA section 4a(a).[1451]

Fifth, the Final Rule reaffirms the Commission's determination that an outright price reporting agency index contract does not qualify as a ''referenced contract.'' [1452] To provide market participants clarity regarding this determination, the Commission modified the regulatory text of the ''referenced contract'' definition in final § 150.1 to explicitly exclude the term ''outright price reporting agency index contracts.'' [1453] The exclusion of outright price reporting agency index contracts from the ''referenced contract'' definition benefits market participants through clarity and mitigation of costs, such as costs to monitor positions for aggregation and other compliance purposes. The Commission believes that this exclusion maintains market integrity as it would be costly to employ these contracts to circumvent position limits.

Finally, the Commission has concluded that excluding ''monthly average pricing contracts'' [1454] from the ''referenced contract'' definition benefits market integrity by ensuring sufficient market liquidity for bona fide hedgers due to: (1) The difficulty and expense of any entity artificially moving the price of the monthly average by manipulating one or more component prices within the contract; and (2) the widespread use of these contracts by, and their utility to, commercial entities in hedging their risk. As with the outright price reporting agency index contracts, this exclusion benefits market participants to the extent it mitigates costs to monitor positions for aggregation and other compliance purposes.

e. Economically Equivalent Swaps

The existing Federal position limits framework does not include Federal position limit levels on swaps. The Dodd-Frank Act added CEA section 4a(a)(5), which requires that when the Commission imposes Federal position limits on futures contracts and options on futures contracts pursuant to CEA section 4a(a)(2), the Commission also establish limits simultaneously for ''economically equivalent'' swaps ''as appropriate.'' [1455] As the statute does not define the term ''economically equivalent,'' the Commission is applying its expertise in construing such term consistent with the policy goals articulated by Congress, including in CEA sections 4a(a)(2)(C) and 4a(a)(3) as discussed below.

Specifically, under the Commission's definition of ''economically equivalent swap'' set forth in final § 150.1, a swap generally qualifies as economically equivalent with respect to a particular referenced contract so long as the swap shares ''identical material'' contract specifications, terms, and conditions with the referenced contract. Further, any differences between the swap and referenced contract with respect to the following are disregarded for purposes of determining whether the swap qualifies as economically equivalent: (i) Lot size or notional amount; (ii) for a natural gas swap and a referenced contract that are both physically-settled, delivery dates diverging by less than two calendar days, and for any other swap and referenced contract that are both physically-settled, delivery dates diverging by less than one calendar day; [1456] and (iii) post-trade risk-management arrangements.[1457]

As discussed in turn below, the Commission believes that the Final Rule's definition of ''economically equivalent swaps'' benefits (1) market integrity by protecting against excessive speculation and potential manipulation and (2) market liquidity by not favoring OTC or foreign markets over domestic markets. Additionally, (3) the Commission will discuss the costs and benefits related to the Final Rule's economically equivalent swap definition's treatment of natural gas swaps; and (4) the Commission will address the several proposed alternative definitions included in commenter letters.

As discussed further below, with respect to exchange-set position limits on swaps, the Commission proposed to delay compliance with DCM Core Principle 5 and SEF Core Principle 6, as compliance would otherwise be impracticable, and, in some cases, impossible, at this time. In the 2020 NPRM, the Commission explained that this delay was based largely on the fact that exchanges cannot view positions in OTC swaps across the various places they are trading, including on competitor exchanges. The Commission is maintaining this approach to permit exchanges to delay compliance with respect to exchange-set position limits on swaps, although the Commission emphasizes, for the avoidance of doubt, that it will monitor and enforce swaps for compliance with Federal position limits subject to the compliance dates

[1451] To the extent that swap guarantees may lower costs for uncleared OTC swaps in particular by incentivizing a counterparty to enter into a swap with the guarantor's affiliate, excluding swap guarantees may benefit market liquidity, which is consistent with the CEA's statutory goals in CEA section 4a(a)(3)(B) to ensure sufficient liquidity for bona fide hedgers when establishing its position limit framework.

[1452] As explained in the preamble to the Final Rule, the Commission has concluded that an ''outright price reporting agency index contract,'' which is based on an index published by a price reporting agency that surveys cash-market transaction prices (even if the cash-market practice is to price at a differential to a futures contract), is not directly or indirectly linked to the corresponding referenced contract. *See supra* Section II.A.16.iii.b(4)(v) (discussing new exclusions from the ''referenced contract'' definition).

[1453] The Commission does not believe this technical change to the regulatory text represents a change in policy. *See supra* Section II.A.16.

[1454] The definition of the new term ''monthly average pricing contracts'' in Appendix C of this Final Rule is intended to cover the types of contracts generally referred to in the industry as calendar-month average, trade-month average, and balance-of-the-month contracts. *See supra* Section II.A.16.iii.b(4)(v) (discussing new exclusions from the ''referenced contract'' definition).

[1455] CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5). In addition, CEA section 4a(a)(4) separately authorizes, but does not require, the Commission to impose Federal position limits on swaps that meet certain statutory criteria qualifying them as ''significant price discovery function'' swaps. 7 U.S.C. 6a(a)(4). The Commission reiterates, for the avoidance of doubt, that the definitions of ''economically equivalent'' in CEA section 4a(a)(5) and ''significant price discovery function'' in CEA section 4a(a)(4) are separate concepts and that contracts can be economically equivalent without serving a significant price discovery function.

[1456] As discussed below, the definition of ''economically equivalent swap'' with respect to natural gas referenced contracts contains the same terms, except that it includes delivery dates diverging by less than two calendar days.

[1457] *See supra* Section II.A.4. (further discussing the Commission's definition of ''economically equivalent swap'').

discussed above.[1458] However, the Commission notes that in two years, the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms to implement DCM Core Principle 5 and SEF Core Principle 6 with respect to swaps.

(1) Benefits and Costs Related to Market Integrity

The Commission believes that the final economically equivalent swap definition benefits market integrity in two ways. First, the final definition protects against excessive speculation and potential market manipulation by limiting the ability of speculators to obtain excessive positions through netting. As explained above, under the Final Rule, market participants may net positions across linked referenced contracts, including positions across linked referenced contracts in economically equivalent swaps and futures.[1459] Accordingly, a more inclusive ''economically equivalent'' definition that would encompass additional swaps (*e.g.,* swaps that may differ in their ''material'' terms or physically-settled swaps with delivery dates that diverge by one day or more) could make it easier for market participants to inappropriately net down against their referenced futures contracts by allowing market participants to structure swaps that do not necessarily offer identical risk or economic exposure or sensitivity as the linked futures contract, but which could still be netted under the Final Rules. In such a hypothetical case, a market participant could enter into an OTC swap with a maturity that differs by days or even weeks in order to net down a position in a referenced contract, enabling the market participant to hold an even greater position in the referenced contract.

Similarly, applying Federal position limits to swaps that share identical ''material'' terms with their corresponding referenced contracts benefits market integrity by preventing market participants from escaping the position limits framework merely by altering non-material terms, such as holiday conventions. On the other hand, the Commission recognizes that such a narrow ''economically equivalent swap'' definition could impose costs on the marketplace by possibly permitting excessive speculation since market participants would not be subject to Federal position limits if they were to enter into swaps that may have different material terms (*e.g.,* penultimate swaps to the extent a penultimate futures contract or options contract does not exist to which a penultimate swap could possibly be deemed to be ''economically equivalent'' and therefore subject to the applicable Federal position limits)[1460] but may nonetheless be sufficiently correlated to their corresponding referenced contract. In this case, it is possible that there may be potential for excessive speculation, market manipulation, or it is possible that market participants could leave the futures markets for the swaps markets, which could introduce new costs to commercial market participants due to reduced market liquidity or disruptions to the price discovery function.[1461] Nonetheless, to the extent that swaps currently are not subject to Federal position limit levels, such potential costs would remain unchanged compared to the status quo.

Second, the relatively narrow final definition benefits market integrity, and reduces associated compliance and implementation costs, by permitting exchanges, market participants, and the Commission to focus resources on those swaps that pose the greatest threat for facilitating corners and squeezes—that is, those swaps with substantially identical delivery dates and identical material economic terms to futures and options on futures subject to Federal position limits. While swaps that have different material terms than their corresponding referenced contracts, including different delivery dates, may potentially be used for engaging in market manipulation, the final definition benefits market integrity by allowing exchanges and the Commission to focus on the most sensitive period of the spot month, including with respect to the Commission's and exchanges' various surveillance and enforcement functions. To the extent market participants would be able to use swaps that fall outside the scope of the final definition to effect market manipulation, such potential costs would remain unchanged from the status quo since no swaps are currently covered by existing Federal position limits. The Commission however acknowledges that its narrow economically equivalent swap definition may introduce possible burdens to market integrity—as the form of an opportunity cost—since fewer swaps are covered under the Federal position limits compared to the alternative in which the Commission adopted a broader definition.

Further, the Final Rule's delayed compliance with respect to the establishment and enforcement of exchange-set limits on swaps benefits exchanges by facilitating exchanges' ability to establish surveillance and compliance systems. As noted above, exchanges currently lack sufficient data regarding individual market participants' open swap positions since exchanges cannot view positions in OTC swaps across the various places they are trading, including competitor exchanges, which means that requiring exchanges to establish oversight over market participants' positions currently could impose substantial costs and also may be impractical to achieve.[1462]

As a result, the Commission has determined that allowing exchanges delayed compliance with respect to swaps reduces unnecessary costs. Nonetheless, the Commission's determination to permit exchanges to delay implementing Federal position limits on swaps could incentivize market participants to leave the futures markets and instead transact in economically-equivalent swaps, which could reduce liquidity in the futures and related options markets. However, the Commission emphasizes that the Commission will oversee and enforce compliance with Federal position limits for economically equivalent swaps, which should mitigate the concern related to incentivizing futures contracts and related options on futures contracts to move trading and related liquidity to

[1458] For discussion of the relevant compliance dates for the Final Rule, *see supra* Section I.D.

[1459] *See supra* Section II.B.10. (discussing netting).

[1460] Or, in the case of natural gas referenced contracts, which would potentially include penultimate swaps as economically equivalent swaps, a swap with a maturity of less than one day away from the penultimate swap. *See supra* Sections II.A.4.iii.f. and II.B.3.vi. (discussing natural gas swaps).

[1461] The Commission acknowledges that liquidity could shift to penultimate swaps, which would impose costs on price discovery and market efficiency in the futures markets, in cases where there are no corresponding penultimate futures contracts or options contracts (and therefore the swap would not be deemed to be an economically equivalent swap), but the Commission believes that this concern is mitigated for two reasons. First, basis risk may exist between the penultimate swap and the referenced contract, and so the Commission believes that a market participant is less likely to hold a penultimate swap the greater the economic difference compared to the corresponding referenced contract. Second, the absence of penultimate futures contracts or options contracts may indicate lack of appropriate penultimate liquidity to hedge or offset one's penultimate swap position and therefore may militate against entering into penultimate swaps.

[1462] SIFMA AMG agrees with the Commission's assessment, stating that ''[s]ince the exchanges do not have visibility into OTC swaps markets, market participants and the CFTC would be responsible for implementing position limits on swaps without the benefit of the exchanges' extensive experience in monitoring and applying position limits for exchange-listed contracts.'' SIFMA AMG at 10.

the OTC swaps markets. With respect to exchange-set position limits on swaps, the Commission notes that in two years, the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms to implement position limits for economically equivalent swaps at the exchange level.[1463]

Additionally, while futures contracts and options thereon are subject to clearing and exchange oversight, economically equivalent swaps may be transacted bilaterally off-exchange (*i.e.,* OTC swaps). As a result, it is relatively easy to create customized OTC swaps that may be highly correlated to its corresponding futures (or options) contract, which would allow the market participant to create an exposure in the underlying commodity similar to the referenced contract's exposure. Due to the relatively narrow ''economically equivalent swap'' definition, the Commission believes that it may be possible for market participants to attempt to avoid Federal position limits by entering into such OTC swaps.[1464] While such swaps may not be perfectly correlated to their corresponding referenced contracts, market participants may find this risk acceptable in order to avoid Federal position limits. An increase in OTC swaps at the expense of futures contracts and options on futures contracts may impose costs on market integrity due to lack of exchange oversight. If liquidity were to move from futures exchanges to the OTC swaps markets, non-dealer commercial entities may face increased transaction costs and widening spreads, as swap dealers gain market power in the OTC market relative to centralized exchange trading. The Commission is unable to quantify the costs of these potential harms. However, while the Commission acknowledges these potential costs, such costs to those contracts that already have limits (including Federal and/or exchange-set position limits) on them already may have been realized in the marketplace because swaps are not subject to Federal position limits under the status quo.

Lastly, under the Final Rule, market participants are able to determine whether a particular swap satisfies the definition of ''economically equivalent swap,'' as long as market participants make a reasonable, good faith effort in reaching their determination and are able to provide sufficient evidence, if requested, to support a reasonable, good faith effort.[1465] The Commission anticipates that this flexibility will benefit market integrity by providing a greater level of certainty to market participants, in contrast to the alternative in which market participants would be required to first submit swaps to the Commission staff and wait for feedback or approval. On the other hand, the Commission also recognizes that not having the Commission explicitly opine on whether a swap would qualify as economically equivalent could cause market participants to avoid entering into such swaps.[1466] In turn, this could lead to less efficient hedging strategies if the market participant is forced to turn to the futures markets (*e.g.,* a market participant may choose to transact in the OTC swaps markets for various reasons, including liquidity, margin requirements, or simply better familiarity with ISDA and swap processes over exchange-traded futures). However, as noted below, the Commission reserves the right to declare whether a swap or class of swaps is or is not economically equivalent, and a market participant could petition, or request informally, that the Commission make such a determination, although the Commission acknowledges that there could be costs associated with this, including delayed timing and monetary costs.

Further, the Commission recognizes that requiring market participants to conduct reasonable due diligence and maintain related records also could impose new compliance costs. Additionally, the Commission recognizes that certain market participants could assert that an OTC swap is (or is not) ''economically equivalent'' depending upon whether such determination benefits the market participant. In such a case, market participants could theoretically subvert the intent of the Federal position limits framework, although the Commission believes that such potential costs would be mitigated due to the Commission's surveillance functions and authority to declare that a particular swap or class of swaps either does or does not qualify as economically equivalent.

(2) The Final Definition Could Increase Benefits or Costs Related to Market Liquidity and Price Discovery

First, the final economically equivalent swap definition could benefit market liquidity by being, in general, less disruptive to the swaps markets, which in turn may reduce the potential for disruption for the price discovery function compared to a possible alternative, broader definition. For example, if the Commission were to adopt an alternative to its final ''economically equivalent swap'' definition that encompassed a broader range of swaps by including, for example, delivery dates that diverge by one or more calendar days—perhaps by several days or weeks—a market participant (including speculators) with a large portfolio of swaps could more easily bump up against the applicable position limits and therefore would have an incentive either to reduce its

[1463] In response to the 2020 NPRM's proposal to permit exchanges to delay oversight and enforcement of exchanges' position limit rules on economically equivalent swaps, IATP stated that ''[d]elaying compliance with position limit requirement [sic] to avoid imposing costs on market participants makes it appear that the Commission is serving as a swap dealer booster, although swap dealers are amply resourced to provide the necessary data to the exchanges and to the Commission. The Commission is bending over backward to avoid requiring swaps market participants from paying the costs of exchange trading.'' However, the Commission emphasizes that the Commission will still implement, oversee, and enforce Federal position limits on swaps. As a result, the proposed delayed enforcement of exchange-set position limits is designed to reduce costs imposed on *exchanges* rather than swap dealers, which will be subject to Federal position limits under the Final Rule.

[1464] In contrast, since futures contracts and options on futures contracts are created by exchanges and submitted to the Commission for either self-certification or approval under part 40 of the Commission's regulations, a market participant would not be able to customize an exchange-traded futures contract or option on futures contract.

[1465] *See supra* Section II.A.4.g (discussing market participants' discretion in determining whether a swap is economically equivalent). Regarding the obligations of swap dealers to monitor position limits, ISDA commented that the requirements imposed by § 23.601 are burdensome and requested additional guidance regarding same. ISDA at 10. The Commission believes it is unnecessary to provide further detail with respect to § 23.601 because, as discussed above and in the preamble, the Commission will defer to a market participant's determination as long as the market participant is able to provide sufficient support to show that it made a reasonable, good faith effort in applying its discretion. Furthermore, the Commission is not adopting any amendments to § 23.601, so the baseline status quo in connection with § 23.601 is unchanged under the Final Rule. *See supra* Section II.A.4.g.

[1466] For example, NRECA believes that a standardized reference source to confirm whether a particular swap is subject to Federal position limits would benefit market participants: ''Because the Commission has determined not to codify its interpretations and other guidance, or to establish a single reference source for assistance in confirming 'swap/not-a-swap' distinction, the two counterparties to a bilateral off-facility energy transaction must make the 'swap/not-a-swap' determination without the benefit of standardized rules or product definitions. Although the terms of many off-facility, bilateral energy commodity transactions are highly-customized, other such transactions may be many iterations closer to futures contract 'look-alikes,' that is, to referenced contracts. If such a transaction is (or may be) a 'swap,' such a swap would then also need to be evaluated to determine whether it was 'economically equivalent' under the Speculative Position Limits Rules.'' NRECA at 18; *see also* CEWG at 30–31.

swaps activity or move its swaps activity to foreign jurisdictions. If there were many similarly situated market participants, the market for such swaps could become less liquid, which in turn could harm liquidity for bona fide hedgers as large liquidity providers could move to other markets.

Second, the final definition could benefit market liquidity by being sufficiently narrow to reduce incentives for liquidity providers to move to foreign jurisdictions, such as the European Union (''EU'').[1467] Additionally, the Commission believes that proposing a definition similar to that used by the EU will benefit international comity.[1468] Further, market participants trading in both U.S. and EU markets would find the final definition to be familiar, which may help reduce compliance costs for those market participants that already have systems and personnel in place to identify and monitor such swaps. As discussed by SIFMA AMG, ''[m]any market participants are active in markets and products that are regulated by the CFTC and EU authorities. Having different definitions would be costly for firms, since they would have to build out different compliance functions, and inefficient for markets.'' [1469] As noted above, any differences between the Final Rule's ''economically equivalent swap'' and the EU's corresponding definition by the addition of the ''material'' qualifier should lead to the benefits identified in the above discussion, along with the corresponding costs.

(3) The Final Definition Could Create Costs or Benefits Related to Market Liquidity for the Natural Gas Market

SIFMA AMG commented that ''financially-settled penultimate day expiry products in natural gas should be excluded from limits to the same extent as penultimate day expiry contracts for each of the other 24 core referenced futures contracts. To introduce a change from existing exchange practice (under which these financially-settled penultimate day contracts are out of scope) could introduce an otherwise avoidable disruption to trading during the closing days of the natural gas contract month, with no corresponding benefits to market oversight or integrity.'' [1470]

As discussed in greater detail in the preamble, the Commission recognizes that the market dynamics in natural gas are unique in several respects, including the fact that unlike with respect to other core referenced futures contracts, for natural gas, relatively liquid spot-month and penultimate cash-settled futures exist.[1471] However, in contrast to SIFMA AMG's comment, the Commission has determined that creating an exception to the proposed ''economically equivalent swap'' definition for natural gas benefits market liquidity by not unnecessarily favoring existing natural gas penultimate contracts over spot contracts. The Commission is especially sensitive to potential market manipulation in the natural gas markets since market participants—to a significantly greater extent compared to the other core referenced futures contracts that are included in the Final Rule—regularly trade in both the physically-settled core referenced futures contract and the cash-settled look-alike referenced contracts that are penultimate contracts. Accordingly, the Commission has concluded that a slightly broader definition of ''economically equivalent swap'' to encompass penultimate natural gas swaps uniquely benefits the natural gas markets by helping to deter and prevent manipulation of a physically-settled contract to benefit a related cash-settled contract, including penultimate positions.

(4) Alternatives to the ''Economically Equivalent Swap'' Definition

Several commenters provided alternative approaches to the 2020 NPRM's proposed ''economically equivalent swap'' definition.

First, SIFMA AMG argued that the Commission should not impose Federal position limits on swaps at all, and that the proposed Federal position limits were ''unnecessary and would in fact impose cost burdens . . . that are not commensurate with any of the suggested benefits . . . .'' [1472] Similarly, CHS stated that ''[t]here is little doubt, from CHS's perspective, that including economically equivalent swaps as 'referenced contracts' for position limit purposes will result in a material burden for (a) commercial end-users and (b) small to mid-sized FCMs that focus on the needs of grain and energy hedgers, which are referred to as '*Commodity-Focused FCMs*'. The costs of compliance on such participants will likely be large and time-consuming, and possibly entail some risk of operational error arising out of the implementation process.'' [1473]

[1467] In this regard, the final definition is similar in certain ways to the EU definition for OTC contracts that are ''economically equivalent'' to commodity derivatives traded on an EU trading venue. The applicable European regulations define an OTC derivative to be ''economically equivalent'' when it has ''identical contractual specifications, terms and conditions, excluding different lot size specifications, delivery dates diverging by less than one calendar day and different post trade risk management arrangements.'' While the Commission's final definition is similar, the Commission's final definition requires ''identical *material*'' terms rather than simply ''identical'' terms. Further, the Commission's final definition excludes different ''lot size specifications or *notional amounts*'' rather than referencing only ''lot size'' since swaps terminology usually refers to ''notional amounts'' rather than to ''lot sizes.'' *See* EU Commission Delegated Regulation (EU) 2017/591, 2017 O.J. (L 87).

[1468] Both the Commission's definition and the applicable EU regulation are intended to prevent harmful netting. *See* European Securities and Markets Authority, *Draft Regulatory Technical Standards on Methodology for Calculation and the Application of Position Limits for Commodity Derivatives Traded on Trading Venues and Economically Equivalent OTC Contracts,* ESMA/2016/668 at 10 (May 2, 2016), available at *https://www.esma.europa.eu/sites/default/files/library/2016-668_opinion_on_draft_rts_21.pdf* (''[D]rafting the [economically equivalent OTC swap] definition in too wide a fashion carries an even higher risk of enabling circumvention of position limits by creating an ability to net off positions taken in on-venue contracts against only roughly similar OTC positions.'')

The applicable EU regulator, the European Securities and Markets Authority (''ESMA''), recently released a ''consultation paper'' discussing the status of the existing EU position limits regime and specific comments received from market participants. According to ESMA, no commenter, with one exception, supported changing the definition of an economically equivalent swap (referred to as an ''economically equivalent OTC contract'' or ''EEOTC''). ESMA further noted that for some respondents, ''the mere fact that very few EEOTC contracts have been identified is no evidence that the regime is overly restrictive.'' *See* European Securities and Markets Authority, *Consultation Paper MiFID Review Report on Position Limits and Position Management Draft Technical Advice on Weekly Position Reports,* ESMA70–156–1484 at 46, Question 15 (Nov. 5, 2019), available at *https://www.esma.europa.eu/document/* consultation-paper-position-limits.

[1469] SIFMA AMG at 6–7.

[1470] SIFMA AMG at 11. For the purpose of this comment, even though SIFMA AMG refers generally to ''financially-settled penultimate'' contracts in natural gas, the Commission assumes it is referring to penultimate cash-settled economically equivalent swaps since penultimate futures contracts and options on futures contracts are included under the ''referenced contract'' definition.

[1471] *See supra* Section II.A.4.iii.f. (discussing economically equivalent natural gas swaps).

[1472] SIFMA AMG at 6–7. Additional commenters similarly argued that subjecting swaps to position limits is unnecessary and would increase costs without commensurate benefits. *E.g.,* CHS at 5; NCFC at 5; and ISDA at 5.

[1473] CHS at 4. *See also* NCFC at 5 (similarly stating that ''[t]he costs of compliance on such participants will likely be large and time-consuming, and possibly entail some risk of operational error arising out of the implementation process.''). CHS further stated, ''[w]ith respect to commercial end-users, absent additional Commission guidance CHS believes that the burdens will take the form of (a) determining which types of swaps will be deemed to be economically equivalent swaps, (b) making significant and costly modifications to systems to identify and track transactions for reporting purposes, (c) developing tools for swaps aggregation purposes (or manually conducting such tasks if such a tool is not readily available to be interpolated into existing systems)

However, as discussed above, the Dodd-Frank Act added CEA section 4a(a)(5), which explicitly requires that the Commission impose Federal position limits on swaps that are ''economically equivalent'' to the futures contracts and options on futures contracts subject to Federal position limits, and that the Commission establish limits simultaneously for ''economically equivalent'' swaps. Accordingly, from the perspective of this cost-benefit discussion, the question is not whether the Final Rule should encompass swaps at all, but only the extent to which swaps should be incorporated as ''economically equivalent'' pursuant to CEA section 4a(a)(5). Nonetheless, the Commission recognizes that subjecting economically equivalent swaps to Federal position limits could impose the compliance costs referenced above by CHS and others. However, to the extent that the Final Rule adopts a narrow ''economically equivalent swap'' definition, the Commission anticipates these costs should be mitigated compared to alternative definitions, while simultaneously satisfying the statutory requirement under CEA section 4a(a)(5).

Second, CME and Better Markets both suggested that the general ''referenced contract'' definition that applies to futures contracts and options on futures contracts should also apply to swaps, rather than the narrower ''economically equivalent swap'' definition. Similarly, NEFI argued that the narrower ''economically equivalent swap'' definition could allow for easy avoidance of Federal position limits.[1474] The Commission discusses the possible costs and benefits of the Final Rule's narrow definition versus this proposed alternative of a broader definition throughout this cost-benefit discussion of economically equivalent swaps, and the reasons discussed by the Commission throughout this section similarly apply in response to CME's, Better Markets', and NEFI's proposed alternative to establish a broader ''economically equivalent swap'' definition.

Third, SIFMA AMG argued that while it opposed including swaps within the Final Rule, to the extent the Commission determines to include swaps within the Final Rule, that, in the alternative, at least cash-settled swaps should be excluded from the economically equivalent swap definition since these types of swaps ''have not historically been the source of manipulative corners, squeezes, or other disruptions related to physical commodity prices, and SIFMA AMG does not believe limits on these products would be necessary to further deter and prevent this type of trading activity.'' [1475]

However, the Commission believes that SIFMA AMG's proposed alternative to exclude all cash-settled swaps *ex ante* would impose liquidity costs for bona fide hedgers since excluding all cash-settled swaps could incentivize liquidity to move from corresponding cash-settled referenced contracts to cash-settled OTC swaps, potentially harming the liquidity in the futures markets, including liquidity for bona fide hedgers. This could also harm price discovery if significant liquidity and trading migrates from the exchange-traded futures markets to the more opaque OTC swaps markets. For example, as noted above, if liquidity were to move from futures exchanges to the OTC swaps markets, non-dealer commercial entities may face increased transaction costs and widening spreads, as swap dealers gain market power in the OTC market relative to centralized exchange trading. The Commission is unable to quantify the costs of these potential harms.[1476]

Furthermore, the Commission notes that CEA section 4a(a)(3) does not merely refer to corners and squeezes, but also refers to ''manipulation'' generally. Accordingly, the Commission believes that the Final Rule will better benefit market integrity to the extent that cash-settled swaps would be subject to the Final Rule by helping to prevent other forms of manipulation, such as ''banging'' or ''marking'' the close.

Fourth, in contrast to the alternative posited by SIFMA AMG immediately above in which the Commission would exclude all cash-settled swaps, Better Markets believed that the Final Rule's exclusion of certain cash-settled swaps could actually impose costs on liquidity formation. Better Markets thus proposed an alternative where settlement type (*i.e.,* cash-settled versus physically-settled) was not considered to be a ''material'' difference and therefore cash-settled swaps could be deemed to be ''economically equivalent'' to core referenced futures contracts, which are all physically-settled. Better Markets argued that the 2020 NPRM's economically equivalent definition ''essentially excludes'' cash-settled swaps from Federal position limits because cash-settled swaps would not be able to qualify as economically equivalent to a physically-settled core referenced futures contract.[1477] As Better Markets commented, distinguishing between cash-settled and physically-settled swaps and futures contracts by deeming settlement type (*i.e.,* cash-settled vs. physically-settled settlement) to be a material term would ''incentivize[ ] speculative liquidity formation away from more liquid, more transparent, and more restrictive futures exchanges and to the swaps markets.'' [1478]

However, the Commission does not believe that the treatment of cash-settled swaps under the Final Rule imposes such costs, at least to the extent assumed by Better Markets. The

and (d) determining intra-day positions when addressing economically equivalent swaps, which will require real-time system reporting and real–time exception alerts, among other things . . . . In these respects, CHS asks the Commission to be mindful and more fully address the costs and benefits applicable to commercial end-users and Commodity-Focused FCMs, and to provide more clarity regarding the scope of referenced contracts. As a guide, CHS urges the Commission to maintain as narrow a definition of 'referenced contract' as possible. CHS also urges the Commission, both in the context of market participants generally and commercial end-users and Commodity-Focused FCMs particularly, to address CHS's recommendations in the following section.'' *Id.* at 4–5. NCFC similarly stated that ''NCFC believes any Federal speculative position limits rule should not unduly burden commercial end-users who utilize derivatives markets for economically appropriate risk management activities.'' NCFC at 7.

[1474] NEFI at 3.

[1475] SIFMA AMG at 7. SIFMA AMG further argued that ''imposing spot month limits only on physically-settled futures contracts would avoid such confusion, and more importantly, would adequately address the products of greatest concern and would serve to reduce compliance costs and related burdens (*i.e.,* technology builds, personnel allocation, training, etc.) for the Commission and market participants by allowing the Commission to observe the impact of limits for physically-settled futures prior to evaluating whether to extend limits to a broader scope of derivatives products.'' SIFMA AMG at 5–6.

PIMCO and ISDA similarly argue that neither cash-settled swaps nor futures contracts should be subject to position limits. PIMCO at 3; ISDA at 5 (arguing that position limits on cash-settled referenced contracts, whether futures contracts or swaps, ''impose a level of cost and complexity in implementation that does not correspond to any identified regulatory or policy benefit of such limits.'') AQR similarly argued that the ''opportunity or ability to use a swap to squeeze or corner an underlying physical commodity is extremely remote and thus extension of position limits to swaps would likely not be merited based on an analysis of the costs and benefits of such action.'' AQR at 10.

[1476] However, while the Commission acknowledges these potential costs, such costs to the nine legacy agricultural contracts may already have been realized because their corresponding swaps are not subject to Federal position limits under the status quo. Nonetheless, the Commission also recognizes that certain of the 16 non-legacy core referenced futures contracts that would be subject to Federal position limits for the first time under the Final Rule may have larger, more liquid swaps markets than the nine legacy agricultural contracts, and therefore potentially larger concomitant benefits and/or costs.

[1477] Better Markets at 32.

[1478] *Id.*

Commission believes Better Markets' concern is mitigated since under the Final Rule cash-settled swaps are subject to Federal position limits only if there is a corresponding (*i.e.,* ''economically equivalent'') cash-settled futures contract or option on a futures contract.[1479] That is, cash-settled swaps are free from Federal position limits if there are no corresponding cash-settled futures contracts or options on futures contracts. In these situations, if no corresponding futures contract or option thereon exists, then there is no liquidity formation in cash-settled futures contracts and options on futures contracts with which a cash-settled swap would be competing for liquidity in the first place.[1480]

Fifth, FIA proposed an alternative in which cash-settled economically equivalent swaps would be subject to a separate (higher) Federal spot-month position limit levels compared to their corresponding referenced contracts, and FIA argued that its proposed alternative would benefit innovation and competition between exchanges.[1481] However, the Commission believes that establishing separate (or higher) position limits for economically equivalent swaps could impose liquidity costs and burden market integrity and price discovery.

In particular, separate position limits for cash-settled swaps would make it easier for potential manipulators to engage in market manipulation, such as ''banging'' or ''marking'' the close, by effectively permitting higher Federal position limits in cash-settled referenced contracts. For example, a market participant would be able to double its cash-settled positions by maintaining positions in both cash-settled futures and cash-settled economically equivalent swaps since under FIA's proposed alternative positions in each contract type, that is futures contracts (including options thereon) and swaps, would be subject to their own separate position limits for purposes of Federal position limits.

Furthermore, imposing position limits separately on economically equivalent swaps and futures contracts (and options thereon) as requested under FIA's proposed alternative would mean that market participants would not be able to net their economically equivalent swaps with their futures positions. In contrast, the absence of separate Federal position limits for economically equivalent swaps means that market participants are able to net economically equivalent swaps with other referenced contracts, *i.e.,* futures contracts against swaps. The Commission also recognizes that netting could permit larger speculative positions in futures markets for market participants who did not previously have bona fide hedge exemptions, but who have positions in swaps in the same commodity that could be netted against futures contracts in the same commodity. This observation might seem to be at cross-purposes with the relatively narrow ''economically equivalent swap'' definition. However, the Commission is concerned that separate position limits for swaps could impair liquidity in futures contracts or swaps, as the case may be. For example, a market participant (including a market maker or speculator) with a large portfolio of swaps (or futures contracts) near the applicable position limit would be assumed to have a strong preference for executing futures contracts (or swaps) transactions in order to maintain a swaps (or futures contracts) position below the applicable position limit. If there were many similarly situated market participants, the market for such swaps (or futures contracts) could become less liquid, which could burden market efficiency and impose higher trading costs for bona fide hedgers. The absence of separate position limits for swaps should decrease the possibility of illiquid markets for referenced contracts subject to Federal position limits. Because economically equivalent swaps and the corresponding futures contracts and options on futures contracts are close substitutes for each other, the absence of separate position limits should allow greater integration between the economically equivalent swaps and corresponding futures and options markets for referenced contracts, which should benefit price discovery, and should also provide market participants with more flexibility whether hedging, providing liquidity or market making, or speculating, which should benefit market efficiency and price discovery.

Sixth, COPE alternatively requested that the Commission explicitly exclude physically-settled swaps, or at least provide specific examples of the contracts intended to be included.[1482] While the Commission provides greater clarity in the corresponding preamble discussion above,[1483] the Commission has determined that excluding all physically-settled swaps *ex ante* is inconsistent with the statutory goals in CEA section 4a(a)(3)(B), especially the requirements to deter corners and squeezes and to ensure sufficient market liquidity for bona fide hedgers enumerated in CEA section 4a(a)(3)(B)(ii) and (iii), respectively. For example, excluding physically-settled swaps could potentially incentivize liquidity to move from physically-settled core referenced futures contracts to physically-settled swaps, which could impose costs both on market liquidity for bona fide hedgers and also on market integrity by enabling potential manipulators to accumulate large directional positions in physically-settled contracts to effect a corner and squeeze more easily. This could additionally harm price discovery as liquidity and trading would move from the more transparent exchange-traded futures contracts and options thereon to the more opaque OTC swaps markets.

Seventh, NCFC stated that it ''appreciate[s] that CFTC proposed a narrow definition of an economically equivalent swap under a Federal position limits regime. Likewise, we do not object to an inclusion of such swaps in theory since our members use them for legitimate hedging purposes. However, NCFC continues to be concerned with the operational difficulties, burdens, and costs for commercial end users and small- to mid-sized FCMs that focus on the needs of agricultural hedgers of including swaps for position limit purposes. The costs of compliance on such participants will likely be large and time-consuming, and possibly entail some risk of operational error arising out of the implementation process.'' [1484] As a result, NCFC suggested, as an alternative to the 2020 NPRM's approach, that the Final Rule exclude from a commercial end-user's Federal position limits those agricultural commodity swaps that are transacted by invoking the ''End-User Exemption to Mandatory Clearing'' rule.[1485]

[1479] The Commission notes that a swap could be deemed to be ''economically equivalent'' to any referenced contract, including cash-settled look-alikes, and that the ''economically equivalent swap'' definition is not limited to core referenced futures contracts.

[1480] In contrast to Better Markets, AQR noted that any ''extension of position limits to swaps risks negatively impacting commercial hedgers by reducing market liquidity, increasing transaction costs, and increasing commodity market volatility. While the Commission cannot entirely avoid those risks if compelled to impose such limits, the proposed approach to economically equivalent swaps may mitigate them in ways that allow the Commission to fully discharge its statutory obligation without unnecessarily restricting market activity.'' AQR at 11.

[1481] FIA at 7–8. The Commission generally addresses FIA's argument about innovation and competition in the preamble above under Section II.B.10.v.

[1482] COPE at 4–5.

[1483] *See* Section II.A.4.iii.d(1).

[1484] NCFC at 5.

[1485] *Id.*

According to NCFC, those swap contracts already must meet the test ''to hedge or mitigate commercial risk,'' and are ''not used for a purpose that is in the nature of speculation, investing, or trading,'' as outlined in § 50.50 of the Commission's regulations, and therefore, by definition, these contracts should not be subject to end-user Federal speculative position limits.[1486]

The Commission understands NCFC's concern, but believes NCFC's alternative is unnecessary for two reasons. First, to the extent a swap described by NCFC would ''hedge or mitigate commercial risk,'' the Commission believes that the costs described by NCFC are mitigated since such swap likely would qualify for an enumerated bona fide hedge under the Final Rule and therefore would not contribute to a commercial end-user's net position for Federal position limits purposes.[1487] Second, the Commission believes the purported benefits related to NCFC's alternative are limited since physical commodity swaps are not required to be cleared under the Commission's existing regulations, so determining whether the end-user clearing exemption applies is not necessarily a helpful proxy in determining whether a swap is ''economically equivalent'' or not for purposes of CEA section 4a(a)(5).

vii. Pre-Existing Positions

Final § 150.2(g) imposes Federal position limits on ''pre-existing positions'' [1488]—other than pre-enactment swaps and transition period swaps—during both the spot month and non-spot month.

The Commission believes that final § 150.2(g) benefits market integrity since pre-existing positions (other than pre-enactment and transition period swaps) that exceed spot-month limits could result in market or price disruptions as positions are rolled into the spot month.[1489] The Commission recognizes some costs and benefits associated with final § 150.2(g)(2) may have already been realized given that the nine legacy agricultural contracts are already subject to the Federal non-spot month position limits. Therefore, exchanges and market participants should not incur any significant new costs to comply with § 150.2(g)(2), and will likely continue to benefit from market integrity as a result of the Final Rule.

In response to the 2020 NPRM, FIA and MGEX suggested that the Commission alternatively restructure the provision to include just two categories, ''pre-existing swaps'' and ''pre-existing futures,'' because the variability of exemptive relief could create operational challenges for market participants.'' [1490] Although the Commission did not adopt the terms ''pre-existing swaps'' and ''pre-existing futures'' for the Final Rule as FIA and MGEX suggested, the practical effect is that final § 150.2(g) creates two categories—(1) pre-existing futures contracts (including options thereon), which are subject to both the spot month and non-spot month Federal position limits; and (2) pre-existing swaps, which are not subject to such limits. Furthermore, to offset the operational challenges or other burdens associated with final § 150.2(g), the Commission is delaying the compliance date to January 1, 2022 in connection with the Federal position limits for the 16 non-legacy core referenced futures contracts, and further delaying the compliance date to January 1, 2023 for swaps that are subject to Federal position limits under the Final Rule.

viii. Anti-Evasion

Final § 150.2(i) provides that, if used to willfully circumvent or evade speculative position limits: (1) A commodity index contract, monthly average pricing contract, outright price reporting contract, and/or a location basis contract will be considered to be a referenced contract; (2) a bona fide hedging transaction or position recognition or spread exemption will no longer apply; and (3) a swap will considered to be an economically equivalent swap even if it does not meet the economically equivalent swap definition set forth in § 150.1. This provision serves to deter and prevent a number of potential methods of evading Federal position limits, the specifics of which the Commission may not be able to anticipate. Like the Federal position limits it supports, § 150.2(i) helps to protect market integrity by preventing excessive speculation and market manipulation. However, the Commission also recognizes possible costs to market participants due to uncertainty under the Final Rule's anti-evasion provision since it may be difficult for market participants to determine, as a bright-line matter, whether their positions and trading strategies represent legitimate avoidance of position limits or instead represent malfeasant evasive practices.[1491] As a result, the lack of a bright-line standard could potentially impose liquidity costs as market participants may instead choose to engage in less efficient trading strategies in order to err cautiously to avoid engaging in potentially ''evasive'' behavior.

As an alternative to the ''willfully'' standard, FIA recommended that the anti-evasion analysis be based on the presence of ''deceit, deception, or other unlawful or illegitimate activity.'' [1492] Because a position that does not involve fraud or deceit can still involve other indicia of evasive activity, the proposed alternative would be less effective in protecting market integrity to the extent it failed to capture evasive activity. Further, the incorporation of a standard other than ''willful'' would create confusion to market participants by resulting in divergent standards among Commission rulemakings concerning evasion.

4. Exemptions From Federal Position Limits—Bona Fide Hedging Recognitions, Spread and Other Exemptions (Final §§ 150.1 and 150.3)

i. Background

The Final Rule provides for several exemptions that, subject to certain conditions, permit a trader to exceed the applicable Federal position limit set forth in final § 150.2. Specifically, § 150.3 generally maintains but modifies, as discussed below, the two existing Federal exemptions that include (1) bona fide hedging positions and (2) spread positions. Final § 150.3 also includes new Federal exemptions

[1486] *Id.*

[1487] To the extent an FCM would not be able to qualify for a bona fide hedge, the Commission believes that excepting such swaps for purely financial firms would functionally have the same effect as maintaining the risk-management exemption, which Congress, through the Dodd-Frank Act's amendments to the CEA, has directed the Commission to eliminate. *See* Section II.A.4.iii. Nonetheless, to the extent that NCFC's comment is limited to small- and medium-sized FCMs, the Commission does not believe that such FCMs generally will violate the Federal position limit levels based on the Commission's understanding of existing market dynamics and positions held by market participants under the status quo, and therefore costs should be comparatively mitigated for small- and medium-sized FCMs.

[1488] Final § 150.1 defines ''pre-existing position'' to mean ''any position in a commodity derivative contract acquired in good faith prior to the effective date'' of any applicable position limit.

[1489] The Commission is particularly concerned about protecting the spot month in physical-delivery futures from corners and squeezes.

[1490] FIA at 8–9; MGEX at 4.

[1491] SIFMA AMG at 7, n.16 (noting that the anti-evasion provision makes the application of the proposed ''economically equivalent swap'' definition less clear because it incorporates a subjective measure of intent); *see also* FIA at 25 (questioning how a participant would distinguish a strategy that minimizes position size with an evasive strategy); Better Markets at 33 (describing the anti-evasion provision as a ''useful deterrent,'' but noting that the willful circumvention standard would be difficult to meet and partially turns on the Commission's consideration of the legitimate business purpose analysis).

[1492] FIA at 25–26.

for certain conditional spot month positions in natural gas, financial distress positions, and pre-enactment and transition period swaps. Final § 150.1 sets forth the definitions for which positions may qualify as a ''bona fide hedging transaction or position'' and for ''spread transaction.'' [1493]

ii. Bona Fide Hedging Definition; Enumerated Bona Fide Hedges; and Guidance on Spot Month Hedge Exemption Restrictions and Measuring Risk

The Commission is adopting several amendments to the bona fide hedge definition. First, the Commission is revising some of the general elements of the ''bona fide hedging transaction or position'' definition in final § 150.1 to conform the Commission's regulatory definition to the statutory bona fide hedge definition in CEA section 4a(c), as amended by Congress in the Dodd-Frank Act. As discussed in greater detail in the preamble, the Final Rule (1) revises the temporary substitute test, consistent with the Commission's understanding of the Dodd-Frank Act's amendments to section 4a of the CEA, to no longer recognize as bona fide hedges certain risk management positions; (2) revises the economically appropriate test to make explicit that the position must be economically appropriate to the reduction of ''price risk''; and (3) eliminates the incidental test and orderly trading requirement, which the Dodd-Frank Act did not include in section 4a of the CEA. The Commission believes that these amendments to the existing general elements of the regulatory definition include non-discretionary changes that are required by Congress's amendments to section 4a of the CEA, or in the case of the incorporation of ''price risk,'' do not represent a change from the status quo baseline. The Commission is also amending the bona fide hedge definition to conform to the CEA's statutory definition, by adding a provision for positions that qualify as pass-through swaps and pass-through swap offsets.[1494]

Second, the Commission is maintaining the distinction between enumerated and non-enumerated bona fide hedges but is (1) moving the location of the enumerated bona fide hedges, which will remain part of the regulatory text, from the existing definition of ''bona fide hedging transactions and positions'' currently found in Commission regulation § 1.3 to final Appendix A in part 150; [1495] and (2) expanding the list of enumerated hedges, which will continue to be self-effectuating for Federal position limit purposes, thereby not requiring prior Commission approval.

Third, the Commission is proposing guidance in Appendix B with respect to (i) whether an entity may measure risk on a net or gross basis for purposes of determining its bona fide hedge positions, and (ii) factors exchanges could consider when applying a restriction on an exemption against holding a position under a bona fide hedge or spread transaction exemption in excess of limits during the lesser of the last five days of trading or the time period for the spot month in a physically-delivered contract, or otherwise limit the size of such position.

The Commission expects that these modifications related to bona fide hedging will primarily benefit physical commodity commercial market participants, as well as their counterparties. CEA section 4a(c)(1) directs the Commission to exclude bona fide hedge positions from any Federal position limits framework. Further, the Commission believes that, generally, recognizing bona fide hedges supports all section 15(a) factors under this cost-benefit discussion. For example, recognizing bona fide hedges encourages participation in the futures markets by commercial market participants.[1496] Increasing participation from different types of market participants, including commercial market participants: (i) protects the legitimate commercial activity of cash-market participants,[1497] (ii) increases competitiveness, and (iii) supports the financial integrity of futures markets. Further, increased participation and competitiveness will benefit price discovery. Finally, an expanded list of enumerated bona fide hedges supports sound risk management practices by commercial market participants and their counterparties, which may result in indirect benefits to commodity end users or the public.[1498]

Recognizing an expanded list of enumerated bona fide hedges, which are self-effectuating and do not require prior approval from the Commission, will mitigate related compliance costs for those contract markets that will be newly subject to Federal position limits under the Final Rule. This is in comparison to an alternative scenario in which a narrow set of available enumerated hedges would have required market participants to obtain prior approval before availing themselves of an exemption for Federal position limit purposes.

The Commission notes that this section will discuss the substantive exemptions for Federal position limit purposes while the next section will discuss the process for the Commission or exchanges, as applicable, to grant exemptions and bona fide hedge recognitions.

a. Bona Fide Hedging Definition

(1) Elimination of Risk Management Exemptions; Addition of the Pass-Through Swap

Exemption

The Commission is eliminating the word ''normally'' from the bona fide hedge definition's temporary substitute test and, as a result, prohibiting recognition, as bona fide hedges, of risk management positions in physical commodity derivatives subject to Federal speculative position limits. This amendment conforms the regulatory bona fide hedging definition with the Commission's interpretation that the removal of the word ''normally'' from the CEA's section 4a(c)(2) statutory temporary substitute test by the Dodd-Frank Act signaled Congressional intent

[1493] The Commission currently defines this term in existing § 1.3 in the plural as ''bona fide hedging transactions or positions'' while the Final Rule defines it in the singular ''bona fide hedging transaction or position.'' *See supra* Section I.E. (discussing use of certain terminology). This discussion sometimes refers to the ''bona fide hedging transaction or position'' definition as ''bona fide hedges,'' ''bona fide hedging,'' or ''bona fide hedge positions.'' For the purpose of this discussion, the terms have the same meaning.

[1494] As discussed in Section II.A.—§ 150.1—Definitions of the preamble, the existing definition of ''bona fide hedging transactions and positions'' appears in existing § 1.3 of the Commission's regulations; the revised definition of this term, in singular form, now appears in § 150.1.

[1495] For the avoidance of doubt, Appendix A will still be incorporated as part of the Commission's regulations under the Final Rule. In contrast, the 2020 NPRM had proposed to make Appendix A Acceptable Practices.

[1496] NFPEA at 6 (stating that ''Congress intended the Commission to protect end-users' continued access to cost-effective commercial risk management tools, and did not intend to burden end-users with unnecessary regulatory compliance obligations'').

[1497] AGA expressed its support of an expanded list of enumerated hedges by stating that, ''consistent with the mandate of the CEA, any speculative position limits regime adopted by the CFTC must be established in a way that allows commercial end-users, such as natural gas utilities, to continue to enter into bona fide hedges to manage, hedge and mitigate the commercial risks of their natural gas distribution business in a non-burdensome and cost-effective manner on behalf of customers.'' AGA at 2.

[1498] In expressing overall support for the proposed definition of bona fide hedging transaction or position in the 2020 NPRM, CME Group noted that the Commission's recognition of a wider range of commercial hedging practices generally reflects Congress's intent not to unduly burden bona fide hedgers. CME Group at 9.

to cease recognizing ''risk management'' positions as bona fide hedges for physical commodities.

Additionally, in accordance with CEA section 4a(c)(2)(B), the Commission is, however, expanding the bona fide hedging definition to also include as a bona fide hedge any position that qualifies as a pass-through swap/swap offset, discussed further below.[1499] The Commission believes that including pass-through swaps and pass-through swap offsets within the definition of a bona fide hedge will mitigate some of the potential impact resulting from the rescission of the risk management exemption,[1500] and the Commission discusses the costs and benefits related to the pass-through swap provision further below.

As discussed below, the Final Rule's pass-through provisions should help address certain of the hedging needs of persons seeking to offset the risk from swap books, allowing for sufficient liquidity in the marketplace for both bona fide hedgers and their counterparties. Accordingly, under the Final Rule, market participants with positions that do not otherwise satisfy the bona fide hedging definition or qualify for another exemption are no longer able to rely on recognition of such risk-reducing techniques as bona fide hedges. Market participants who provide liquidity to commercial market participants and have obtained or requested a risk management exemption under the existing definition, and who do not qualify for a pass-through swap offset, may resort to other hedging strategies. These other hedging strategies may result in increased costs for these liquidity providers for those activities that are not eligible for the bona fide hedge treatment.

The Commission recognizes the possible liquidity costs as a result of eliminating risk management exemptions. Specifically, the Commission considered the risk that dealers who approach or exceed the Federal position limit may decide to pull back on providing liquidity, including to bona fide hedgers, due to the exclusion of risk management positions from the bona fide hedge definition. However, the Commission considered the risk of possible reduced liquidity against various factors and believes that the potential cost of reduced liquidity will be mitigated for several reasons.

First, the Final Rule extends the compliance date by which risk management exemption holders must reduce their positions to comply with Federal position limits under the Final Rule to January 1, 2023. This delay provides sufficient time for existing positions to roll off and/or be replaced with positions that conform with the Federal position limits adopted in this Final Rule.

Second, for the nine legacy agricultural contracts, the Final Rule generally sets Federal non-spot month position limit levels higher than existing non-spot limits, which may enable additional dealer activity described above.[1501] The remaining non-legacy 16 core referenced futures contracts will not be subject to non-spot month Federal position limits and will remain subject to existing exchange-set limits or accountability levels outside of the spot month, which does not represent a change from the status quo. The generally higher levels with respect to the nine legacy agricultural contracts, and the exchanges' flexible accountability regimes with respect to the new 16 core referenced futures contracts, should mitigate at least some potential costs related to the prohibition on recognizing risk management positions as bona fide hedges.

Third, the Final Rule may improve market competitiveness and reduce transaction costs. As noted above, existing holders of the risk management exemption, and the levels permitted thereunder, are currently confidential, and the Commission is no longer granting new risk management exemptions to potential new liquidity providers. Accordingly, by eliminating the risk management exemption, the Final Rule benefits the public and strengthens market integrity by improving market transparency since certain dealers are no longer able to maintain the grandfathered risk management exemption while other dealers lack this ability under the status quo. While the Commission believes that the risk management exemption may allow dealers to provide additional market making activities, which benefits market liquidity and may result in lower prices for end-users, as noted above, the potential costs resulting from removing the risk management exemption may be mitigated by the Final Rule's revised position limit levels that reflect current EDS for spot month levels and current open interest and trading volume for non-spot month levels. Therefore, the Commission believes that existing risk management exemption holders should be able to continue providing liquidity to bona fide hedgers, but acknowledges that some may not to the same degree as under the exemption. However, the Commission believes that any potential harm to liquidity should be mitigated.

Further, the spot month and non-spot month levels, which generally are higher than the status quo, together with the elimination of the risk management exemptions that benefit only certain dealers, may enable new liquidity providers to enter the markets on a level playing field with the existing risk management exemption holders. With the possibility of additional liquidity providers, the framework may strengthen market integrity by decreasing concentration risk potentially posed by too few market makers. However, the benefits to market liquidity the Commission described above may be muted since this analysis is predicated, in part, on the

[1499] *See infra* Section IV.A.4.ii.a(2). The existing bona fide hedging definition in § 1.3 requires that a position must ''normally'' represent a substitute for transactions or positions made at a later time in a physical marketing channel (*i.e.,* the ''temporary substitute test''). The Dodd-Frank Act amended the temporary substitute language that previously appeared in the statute by removing the word ''normally'' from the phrase normally ''represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel.'' 7 U.S.C. 6a(c)(2)(A)(i). The Commission interprets this change as reflecting Congressional direction that a bona fide hedging position in physical commodities must *always* (and not just ''normally'') be in connection with the production, sale, or use of a physical cash-market commodity.

Previously, the Commission stated that, among other things, the inclusion of the word ''normally'' in connection with the pre-Dodd-Frank-Act version of the temporary substitute language indicated that the bona fide hedging definition should not be construed to apply only to firms using futures to reduce their exposures to risks in the cash market, and that to qualify as a bona fide hedge, a transaction in the futures market did not need to be a temporary substitute for a later transaction in the cash market. *See* Clarification of Certain Aspects of the Hedging Definition, 52 FR at 27195, 27196 (Jul. 20, 1987). In other words, that 1987 interpretation took the view that a futures position could still qualify as a bona fide hedging position even if it was not in connection with the production, sale, or use of a physical commodity. Accordingly, based on the Commission's interpretation of the revised statutory definition of bona fide hedging in CEA section 4a(c)(2), risk-management hedges would not be recognized under the Commission's bona fide hedging definition in § 150.1.

[1500] *See, e.g.,* ICE at 5–6 (contending that eliminating risk management exemptions could make it less efficient and more expensive for commercial end-users to hedge risks and that pass-through exemption is an inadequate substitution); ISDA at 6–7 (arguing that the elimination of the risk management exemptions will result in increased costs for ''tailored over-the-counter financial products, . . . will cause some dealers to exit the business and will in any event lead to decreases in liquidity in the underlying futures markets, with a corresponding increase in volatility.''); *see also supra* Section II.A.1.iii.a(4) (discussing elimination of the risk management exemptions).

[1501] *See infra* Section II.B.4. (discussing non-spot month limit levels). Final § 150.2 generally increases position limits for non-spot months for contracts that currently are subject to the Federal position limits framework other than for CBOT Oats (O), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE), for which the Commission is maintaining existing levels.

understanding that dealers are the predominant large traders. Data in the Commission's Supplementary COT and its underlying data indicate that risk-management exemption holders are not the only large participants in these markets—large commercial firms also hold large positions in such commodities.

Fourth, although the Commission will no longer recognize risk management positions as bona fide hedges under this Final Rule, the Commission maintains other authorities, including the authority under CEA section 4a(a)(7), to exempt risk management positions from Federal position limits.

Fifth, consistent with existing industry practice, exchanges may continue to recognize risk management positions for contracts that are not subject to Federal position limits, including for excluded commodities.

Finally, as discussed immediately below, the Commission believes the recognition of pass-through swaps and pass-through swap offsets could mitigate, to some extent, the costs to the market in general, or to specific market participants, resulting from the risk management exemption's elimination.[1502]

(2) Pass-Through Swaps and Pass-Through Swap Offsets

The revised bona fide hedging definition, consistent with the Dodd-Frank Act's changes to CEA section 4a(c)(2), permits the recognition as bona fide hedges of futures and options on futures positions that offset pass-through swaps entered into by dealers and other liquidity providers (the ''pass-through swap counterparty'') [1503] opposite bona fide hedging swap counterparties (the ''bona fide hedge counterparty''), as long as: (1) The pass-through swap counterparty receives from the bona fide hedging swap counterparty a written representation that the pass-through swap qualifies as a bona fide hedge; and (2) the pass-through swap counterparty enters into a futures or option on a futures position or a swap position to offset and reduce the price risk attendant to the pass-through swap.[1504] Accordingly, a subset of risk management exemption holders and transactions they enter into could continue to benefit from an exemption, and potential counterparties could benefit from the liquidity they provide, as long as the position being offset qualifies as a bona fide hedge for the bona fide hedge counterparty.

The Commission has determined that any resulting costs or benefits related to the proposed pass-through swap exemption are a result of Congress's amendments to CEA section 4a(c) rather than the Commission's discretionary action. On the other hand, the Commission's discretionary action to require the pass-through swap counterparty to receive and maintain a written representation from the bona fide hedging swap counterparty that the pass-through swap qualifies as a bona fide hedging position causes the swap counterparty to incur marginal recordkeeping costs.[1505] The Commission considered comments requesting the elimination of the pass-through swap provision recordkeeping requirement in § 150.3(d) based on arguments that requiring this recordkeeping was not practical.[1506] The Commission is not persuaded by those arguments as the recordkeeping requirements assist the Commission in verifying that the pass-through swap provision is only being utilized to offset risks arising from bona fide hedges. Accordingly, the Commission is finalizing the proposed pass-through swap recordkeeping requirement in § 150.3(d), subject to certain conforming changes to reflect amendments to the pass-through swap paragraph of the bona fide hedging definition.

Since not all swaps entered into by a commercial entity may qualify as a bona fide hedge, the Commission declines commenters' requests that a pass-through swap counterparty may reasonably rely solely upon the fact that the counterparty is a commercial end user and, absent an agreement between the counterparties, that the swap appears to be consistent with hedges entered into by end users in the same line of business. The Commission, however, is amending the regulatory text to provide flexibility and avoid a prescriptive requirement that would otherwise cause additional costs or burdens.

Instead, the Final Rule provides that the pass-through swap counterparty (*i.e.,* the swap dealer) may rely in good faith on a written representation made by its bona fide hedging swap counterparty, unless the pass-through swap counterparty has information that would cause a reasonable person to question the accuracy of the representation. The Commission is adding the written representation requirement to enable the Commission to verify that only market participants with bona fide hedge exemptions are able to pass-through those exemptions to their swap dealer counterparties. To avoid a prescriptive requirement that would incur additional costs to market participants, the Final Rule does not prescribe the form or manner by which the pass-through swap counterparty obtains the written representation. The Commission recognizes that such flexibility would allow for the bona fide hedging counterparty to make such representations on a relationship basis through counterparty relationship documentation (*e.g.,* through ISDA documentation) or on a transaction basis (*e.g.,* through trade confirmations or in other forms as agreed upon by the parties), based on the most cost efficient manner for the market participants.

The Final Rule's pass-through swap provision, consistent with the Dodd-Frank Act's changes to CEA section 4a(c)(2), also addresses a situation where a participant who qualifies as a bona fide hedging swap counterparty (*i.e.,* a participant with a position in a previously-entered into swap that qualified, at the time the swap was entered into, as a bona fide hedging position under the revised definition) seeks, at some later time, to offset that swap position.[1507] Such step might be taken, for example, to respond to a change in the participant's risk exposure in the underlying commodity. As a result, a participant could use futures contracts or options on futures contracts in excess of Federal position limits to offset the price risk of a previously-entered into swap, which would allow the participant to exceed Federal position limits using either new futures or options on futures or swap positions that reduce the risk of the original swap.

The Commission expects the pass-through swap provision to facilitate

[1502] NCFC concurs that ''the substantial increase in the overall speculative position limits and allowances for pass-through swaps will limit any potential loss of liquidity'' that may result from the elimination of the risk management exemption. NCFC at 7.

[1503] Such pass-through swap counterparties are typically swap dealers providing liquidity to bona fide hedgers.

[1504] *See* paragraph (2)(i) of the proposed bona fide hedging definition. Of course, if the pass-through swap qualifies as an ''economically equivalent swap,'' then the pass-through swap counterparty does not need to rely on the pass-through swap provision since it may be able to offset its long (or short) position in the economically equivalent swap with the corresponding short (or long) position in the futures or option on futures position or on the opposite side of another economically equivalent swap.

[1505] To the extent that the pass-through swap counterparty is a swap dealer or major swap participant, it already may be subject to similar recordkeeping requirements under § 1.31 and part 23 of the Commission's regulations. As a result, such costs may already have been realized.

[1506] Cargill at 10; EEI/EPSA at 7–8; FIA at 11–12; CMC at 5; Shell at 6–7; ICE at 6–7; ISDA at 11–12.

[1507] *See* paragraph (2)(ii) of the ''bona fide hedging transaction or position'' definition in § 150.1.

dynamic hedging by market participants. The Commission recognizes that a significant number of market participants use dynamic hedging to more effectively manage their portfolio risks. Therefore, this provision may increase operational efficiency. In addition, by permitting dynamic hedging, a greater number of dealers should be better able to provide liquidity to the market, as these dealers will be able to more effectively manage their risks by entering into pass-through swaps with bona fide hedgers as counterparties. Moreover, market participants are not precluded from using swaps that are not ''economically equivalent swaps'' for such risk management purposes since swaps that are not deemed to be ''economically equivalent'' to a referenced contract are not subject to the Commission's position limits framework.

(3) Limiting ''Risk'' to ''Price'' Risk; Elimination of the Incidental Test and Orderly Trading Requirement

The bona fide hedging definition's ''economically appropriate test'' set out in final § 150.1 explicitly provides that only hedges that offset *price* risks can be recognized as bona fide hedging transactions or positions. The Commission does not believe that this particular change imposes any new costs or benefits, as it is consistent with both the existing bona fide hedging definition [1508] as well as the Commission's longstanding policy.[1509] Nonetheless, the Commission realizes that hedging occurs for more types of risks than price (*e.g.,* volumetric hedging) and hedging solely to protect against changes in value of non-price risks would fall outside the category of a bona fide hedge, which offsets the ''price risk'' of an underlying commodity cash position.

In response to commenters, the Commission clarifies in the preamble that price risk can be informed and impacted by various other types of risks.[1510] The Commission agrees with commenters who stated that market participants form independent economic assessments of how different risks (including, but not limited to, geopolitical, turmoil, weather, or counterparty) might create or impact the price risk of underlying commodities.[1511] The Commission recognizes these risks can create price risks and understands that firms may manage these potential risks to their businesses differently and in the manner most suitable for their business. By limiting the economically appropriate prong to price risk, the Commission is reiterating its historical practice (which has adequately applied to the legacy agricultural contracts for decades) to recognize hedges of price risk of an underlying commodity position as bona fide hedges while acknowledging that price risk may itself be impacted by non-price risks. Market participants may continue to manage non-price risks in a variety of ways, which may include participation in the futures markets or exposure to other financial products. In fact, market participants may decide to use futures contracts that are not subject to Federal position limits, if they determine such contracts will help them manage non-price risks faced by their businesses.

Alternatively, commenters suggested that the Commission permit market participants to use the non-enumerated hedge process to receive recognition of hedges of non-price risk on a case-by-case basis.[1512] The Commission is precluded from adopting this alternative in light of its view that price risk is required to satisfy the CEA's economically appropriate test. Further, the Commission is unaware of commercial market participants historically seeking non-enumerated bona fide hedge recognition for non-price risk in the spot month.

The Commission further implements Congress's Dodd-Frank Act amendments that did not include in the statutory bona fide hedge definition the incidental test and orderly trading requirement by eliminating those elements from to the Commission's regulatory definition. As discussed in the preamble, the Commission believes that these changes do not represent a change in policy or regulatory requirement. As a result, the Commission does not identify any costs or benefits related to these changes.

b. Enumerated Bona Fide Hedges

The Commission maintains, and incorporates in final § 150.3, a list of enumerated bona fide hedges in Appendix A to part 150 of the Commission's regulations that includes: (i) All of the existing enumerated hedges; and (ii) additional enumerated bona fide hedges. The Commission reinforces that hedging practices not otherwise listed may still be deemed, on a case-by-case basis, to comply with the proposed bona fide hedging definition (*i.e.,* non-enumerated bona fide hedges). As discussed further below, the enumerated bona fide hedges in Appendix A are ''self-effectuating'' for purposes of Federal position limit levels. This is expected to help in ensuring timely hedging and therefore reduce compliance costs associated with seeking an exemption.[1513]

(1) Treatment of Unfixed Price Transactions

As discussed in the preamble, the Commission has long recognized fixed-price commitments as the basis for a bona fide hedge.[1514] Under existing § 1.3, only one enumerated hedge explicitly mentions ''unfixed price,'' and its availability is limited to circumstances where a market participant has both an unfixed-price purchase *and* an unfixed-price sale on hand (precluding a market participant with only an unfixed-price purchase *or* an unfixed price sale from qualifying for this particular enumerated hedge).[1515] In 2012, Commission staff issued interpretive letter 12–07 (''Staff Letter 12–07''), which clarified that a commercial entity may qualify for the existing enumerated bona fide hedge for unfilled anticipated requirements even if the commercial entity has entered into long-term, unfixed-price supply or requirements contracts because, as staff explained, the unfixed-price purchase

[1508] The existing bona fide hedging definition in § 1.3 provides that ''no transactions or positions shall be classified as bona fide hedging unless their purpose is to offset *price* risks incidental to commercial cash or spot operations.'' (emphasis added). Accordingly, the definition in final § 150.1 merely moves this requirement to the definition's revised ''economically appropriate test'' requirement.

[1509] For example, in promulgating existing § 1.3, the Commission explained that a bona fide hedging position must, among other things, ''be economically appropriate to risk reduction, such risks must arise from operation of a commercial enterprise, and the price fluctuations of the futures contracts used in the transaction must be substantially related to fluctuations of the cash-market value of the assets, liabilities or services being hedged.'' Bona Fide Hedging Transactions or Positions, 42 FR at 14832, 14833 (Mar. 16, 1977). The Dodd-Frank Act added CEA section 4a(c)(2), which copied the ''economically appropriate test'' from the Commission's definition in § 1.3. *See also* 78 FR at 75702, 75703.

[1510] *See supra* Section II.A.1.iii.b (discussing economically appropriate test); Cargill at 3.

[1511] *See, e.g.,* CMC at 3.

[1512] MGEX at 2; FIA at 11.

[1513] For example, AGA expressed support for the Commission's proposal to recognize anticipatory merchandising as an enumerated hedge because it promotes liquidity. AGA at 8. AGA stated that ''[a]bsent such an enumerated hedge, there would be a piecemeal approach to permitting such hedges which could reduce liquidity, raise costs, and create undue risks for gas utilities, without any regulatory benefits toward the Commission's goal to reduce excessive speculative activities.'' *Id.*

[1514] *See supra* Section I.

[1515] *See, e.g.,* paragraphs (2)(i)(A) and 2(ii)(A) of existing § 1.3.

contract does not ''fill'' the commercial entity's anticipated requirements.[1516]

The Final Rule affirms and broadens the application of the interpretation provided in Staff Letter No. 12–07. As a result, commercial market participants with unfixed price transactions may qualify for bona fide hedge treatment under the enumerated bona fide hedges for anticipatory merchandising, anticipated unsold production, or anticipated unfilled requirements.[1517] The Commission clarifies that a commercial market participant that enters into an unfixed-price transaction will not be precluded from qualifying for one of these anticipatory enumerated bona fide hedges as long as the commercial entity otherwise satisfies all requirements for such anticipatory bona fide hedge, including demonstrating its anticipated need in the physical marketing channel related to either its unsold production, unfilled requirements, and/or merchandising, as applicable.[1518] As such, merely entering into an unfixed-price transaction is not alone sufficient to demonstrate compliance with one of the enumerated anticipatory bona fide hedges.

The same costs and benefits described above with respect to an expanded list of enumerated bona fide hedge recognitions also apply to such recognition based on unfixed-price transactions. The Commission's treatment of unfixed price transactions under the Final Rule will benefit physical commodity commercial market participants. As discussed previously, CEA section 4a(c)(1) directs the Commission to exclude bona fide hedge positions from any Federal position limits framework. In accordance with CEA section 4a(c)(1), the Commission's treatment of unfixed price transactions entered into by commercial market participants protects the legitimate commercial activity of cash-market participants,[1519] thereby encouraging participation in the futures markets by commercial market participants. Additionally, bona hedge treatment for qualified unfixed price transactions benefits the public by allowing commercial market participants to more effectively and predictably hedge their price risks, thus controlling costs that might be passed on to the public.[1520] However, to the extent the Commission currently allows exemptions related to unfixed-price transactions, the costs and benefits already may be realized by market participants and may not represent a change from the status quo baseline.

Alternatively, several commenters requested that the Commission create a new enumerated bona fide hedge for unfixed-price transactions or amend the existing enumerated bona fide hedge for offsetting unfixed purchase and sales.[1521] The Commission does not believe that this is necessary since, as described above, commercial market participants may continue to both qualify for anticipatory bona fide hedges while also entering into unfixed-price transactions. Further, the Commission believes that neither of these alternatives is suitable because there is an inherent difficulty in evaluating the propriety of a hedge of an unfixed price obligation with a fixed-price futures contract due to the basis risk that exists until the unfixed price obligation is fixed. Given differences among markets, creating a new enumerated bona fide hedge for any unfixed price transaction could, under certain circumstances, impose costs on market integrity, including by enabling potential market manipulation and/or allowing excessive speculation by potentially affording bona fide hedging treatment for speculative transactions. To the extent that a market participant does not qualify for an enumerated bona fide hedge in connection with an unfixed-price transaction, the Commission believes that any potential harms or costs to that market participant would be mitigated because the participant could still avail itself of the process under §§ 150.3 and 150.9 for non-enumerated bona fide hedges.[1522]

(2) Elimination of the Five-Day Rule

The Final Rule eliminates the existing restriction on holding certain enumerated bona fide hedges during the last five days of trading under existing § 1.3. Instead, under final § 150.5(a)(2)(ii)(H), the exchanges have discretion to determine, for purposes of their own exchange-granted exemptions (for contracts subject to Federal position limits), whether to apply a restriction against holding positions in excess of limits during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract (the ''Five-Day Rule''). Under final § 150.5(a)(2)(ii)(H), exchanges are able to establish their own Five-Day Rule, or otherwise limit the size of positions. The exchanges would thus have the ability and discretion, but not an obligation, to apply a five-day Rule or similar restriction to exemptions on any contracts subject to Federal position limits, regardless of whether such contracts have been subject to Federal position limits before.[1523] The Commission has determined that exchanges are well-informed with respect to their respective markets, and well-positioned to make a determination with respect to imposing the Five-Day Rule in connection with recognizing bona fide hedges for their respective commodity contracts.

In general, the Commission believes that, on the one hand, limiting a trader's ability to establish a position in this manner by requiring the Five-Day Rule could result in increased costs related to operational inefficiencies, as a trader may believe that holding a position late into the spot period is necessary for the bona fide hedge position. On the other hand, the Commission believes that price convergence may be particularly sensitive to potential market manipulation or excessive speculation during the spot period. Accordingly, the Commission believes that the

[1516] CFTC Staff Letter 12–07 at 1, issued August 16, 2012, *https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm*, title search ''12–07.''

[1517] *See supra* Section II.A.1.iv (discussing treatment of unfixed price transactions).

[1518] The specific requirements associated with each enumerated bona fide hedge, including each anticipatory bona fide hedge, are described in detail further below.

[1519] *See* Cargill at 6 (stating that the Commission should recognize unfixed price transactions as they are ''fundamental to price risk management and routinely used by firms to manage risk'').

[1520] CEWG at 18 (discussing storage hedges, stating that ''(''[n]ot allowing commercial energy firms to utilize these industry-standard hedges on an enumerated basis because they are ''anticipatory'' in nature or viewed as a form of ''merchandising''—or both—could result in storage assets being underutilized, which could increase volatility in physical and financial markets for energy commodities that ultimately could translate into higher costs for consumers'').

[1521] *See, e.g.,* Ecom at 1; ACA at 2; CEWG at 19–21; Chevron at 11; CME Group at 8–9; DECA at 2; East Cotton at 2; Gerald Marshall at 2; IFUS at 5–7; IMC at 2; Jess Smith at 2; LDC at 2; Mallory Alexander at 2; McMeekin at 2; Memtex at 2; Moody Compress 1; NCC at 1; NGFA at 7; Olam at 2; Omnicotton at 2; Canale Cotton at 2; Shell at 7; Southern Cotton at 2; Suncor at 7; SW Ag at 2; Toyo at 2; Texas Cotton at 2; Walcot at 2; White Gold at 2.

[1522] One commenter maintains that reliance on the non-enumerated bona fide hedge process for management of unpriced physical purchase or sale commitments ''will impose procedural hurdles, uncertainty, and additional costs on a critically important function of the supply chain in the U.S. economy.'' CEWG at 21. Another commenter stated that imposing a burden on commercial end users with unpriced physical purchase or sale commitments to rely on the non-enumerated hedge exemption process is contrary to the intent and language of the CEA. Cargill at 6. These concerns, however, are mitigated because, under the Final Rule, commercial market participants with unfixed price transactions may qualify for bona fide hedge treatment under the enumerated bona fide hedges for anticipatory merchandising, anticipated unsold production, or anticipated unfilled requirements.

[1523] The Commission is adopting Appendix B and Appendix G of this Final Rule to provide guidance for exchanges to consider when determining whether to impose the Five-Day Rule or similar requirements on bona fide hedge exemptions and spread exemptions, respectively.

determination to not impose the Five-Day Rule with respect to any of the enumerated bona fide hedges for Federal purposes, but to instead rely on exchanges' determinations with respect to exchange-granted exemptions, helps to better optimize these considerations. The Commission notes there is a potential cost to market integrity and price convergence since the Five-Day Rule is being eliminated as a blanket Federal requirement from some enumerated hedges while the exchanges will now have guidance from the Commission to consider when choosing whether to grant a position limits exemption subject to a five-day rule or similar restriction.[1524] Under this new framework, however, the Commission will continue to leverage its own market surveillance and oversight functions to ensure that exchanges continue to comply with their legal obligations, including with respect to Core Principles 2, 3, 4, and 5, among others.[1525] With an expanded list of contracts subject to Federal position limits, it is best to provide the exchanges additional discretion to protect their markets using tools other than a five-day rule, and to supplement that discretion with guidance highlighting the importance of the spot month to ensure price convergence and an orderly delivery process. Finally, the Commission believes a concern over oversight is also mitigated by the fact that the exchanges have an economic incentive to ensure that price convergence occurs with their respective contracts since commercial end-users would be less willing to use such contracts for hedging purposes if price convergence failed to occur in such contracts as they may generally desire to hedge cash-market prices with futures contracts.

The Commission is also adopting guidance in Appendix B to part 150 on factors for the exchanges to consider when granting an exemption subject to a restriction against holding physically delivered futures contracts into the spot month. In response to some commenters who stated that the proposed guidance was too prescriptive and would result in additional burdens,[1526] the Commission clarifies and reiterates the appendix is not intended to be used as a mandatory checklist. The Commission, however, has determined it is helpful to provide the exchanges with guidance highlighting the importance of the spot month to ensure price convergence and an orderly delivery process. Since price convergence and an orderly trading environment serve as a deterrent to mitigate certain types of market manipulation schemes such as corners and squeezes, the guidance is intended to include a non-exclusive list of considerations the Commission expects the exchanges to consider when determining whether to allow a position in excess of limits throughout the spot month. The Commission does not expect the guidance to impose additional burdens on the exchanges, as the exchanges currently have in place market surveillance practices or procedures to review the appropriateness of an exemption during the relevant referenced contract's spot period. The guidance is intended to supplement that existing process.

As discussed in the preamble, the guidance does not impose any additional reporting requirements on market participants, and the factors described in the guidance apply simply to the exchanges' evaluation of the specific contract market when considering whether an exemption shall be granted subject to any condition or limitation in the spot month. Finally, the Commission is making certain amendments to the guidance to ensure that the factors maintain a flexible approach, particularly where existing exchange application requirements already require market participants to provide relevant cash-market information.

c. Guidance for Measuring Risk

The Commission is issuing guidance in paragraph (a) of final Appendix B to part 150 on whether positions may be hedged on either a gross or net basis. Under the guidance, among other things, a trader may measure risk on a gross basis if that approach is consistent with the trader's historical practice and is not intended to evade applicable limits. The key cost associated with allowing gross hedging is that it may provide opportunity for hidden speculative trading or for cherry picking of positions in a manner that subverts positions limits.[1527]

Such risk is mitigated to a certain extent by the guidance's provisos that the trader does not switch between net hedging and gross hedging in order to evade limits and that the trader must demonstrate, upon request by the Commission or an exchange, the justifications for measuring risk on a gross basis.[1528] By focusing on consistency and historical practice with respect to the manner in which a person measures risk, the guidance enables market participants to measure risk on a gross basis when dictated by the nature of the exposure, but not simply when utilizing gross hedging will yield a larger exposure than net hedging, or will otherwise subvert Federal position limit or aggregation requirements. However, the Commission also recognizes that there are myriad ways in which organizations are structured and engage in commercial hedging practices, including the use of multi-line business strategies in certain industries that are subject to Federal position limits for the first time under this Final Rule and for which net hedging could impose significant costs or be operationally unfeasible.[1529]

[1524] Better Markets at 61 (discussing elimination of the Five-Day Rule and Appendix B guidance by stating that '' the CFTC proposes to abolish the rule for enumerated hedges, over-relying instead—and again—on the judgment of the exchanges to determine whether to apply the Five-Day Rule, or apply and grant fact specific waivers'').

[1525] Core Principle 4, 7 U.S.C. 7b–3(f)(4)(B); 7 U.S.C. 7b–3(f)(2); 7 U.S.C. 7b–3(f)(3); 7 U.S.C.7b–3(f)(5).

[1526] Cargill at 9; CME Group at 9 (stating that the ''CME Group believes the proposed guidance could be interpreted to cause unnecessary burden and costs to market participants. The guidance appears to create a formal process for firms to provide information outlined in the Appendix as part of their bona fide hedge exemption applications, but the Proposal does not seem to consider this additional burden in its cost analysis'').

[1527] For example, using gross hedging, a market participant could potentially point to a large long cash position as justification for a bona fide hedge, even though the participant, or an entity with which the participant is required to aggregate, has an equally large short cash position that would result in the participant having no net price risk to hedge as the participant had no price risk exposure to the commodity prior to establishing such derivative position. Instead, the participant created price risk exposure to the commodity by establishing the derivative position.

[1528] The proposed guidance on gross hedging positions in the 2020 NPRM provided that an exchange document the justifications for recognizing a gross position as a non-enumerated bona fide hedge pursuant to § 150.9. Several commenters alternatively requested elimination of that requirement as imposing unnecessary burdens directly on exchanges and indirectly on market participants. *See* CEWG at 4; FIA at 14; and MGEX at 3. Because the Commission and exchanges have other tools for accessing such information, the Commission eliminated that requirement from the guidance in Appendix B of this Final Rule. Under final § 150.3(b)(2) and (e) and final § 150.9(e)(5), and (g), the Commission has access to any information related to the applicable exemption request, and therefore concludes that eliminating this requirement does not result in any related costs and benefits.

[1529] FIA stated that ''the recommendation to implement specific policies and procedures governing gross and net hedging has the potential to create unnecessary, unintended and burdensome conflicts with other company policies, such as accounting policies, with little or no measurable benefit.'' FIA at 15. The Final Rule clarifies that the guidance does not require market participants to develop written policies or procedures setting forth when gross or net hedging is appropriate.

iii. Spread Exemptions

Under existing § 150.3, certain spread exemptions are self-effectuating. Specifically, existing § 150.3 allows for ''spread or arbitrage positions'' that are ''between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; provided, however, that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in § 150.2.'' [1530]

Final §§ 150.1 and 150.3 amend the existing spread position exemption for Federal position limits by (i) listing, in the spread transaction definition, specific types of spread exemptions that are self-effectuating for purposes of Federal limits and that may be granted by an exchange; (ii) creating a process that requires a person to apply for spread exemptions (that are not listed in the spread transaction definition) directly with the Commission pursuant to final § 150.3; [1531] and (iii) providing guidance on the types of spread positions that meet the spread transaction definition in a new Appendix G to part 150 under the Final Rule. In addition, final § 150.3 permits spread exemptions outside the same crop year and/or during the spot month.[1532]

In connection with the spread exemption provisions, the Commission is relaxing the prohibition for contracts during the same crop year and/or the spot month so that market participants may receive spread exemptions outside the same crop year and/or during the spot month. There may be benefits that result from permitting these types of spread exemptions. For example, the Commission believes that permitting spread exemptions in different crop years or during the spot month may potentially improve price discovery and provide market participants with the ability to use additional strategies involving spread positions, which may reduce hedging costs.

As in the inter-market wheat example discussed below, the spread relief, which is not limited to the same crop year, may better link prices between two markets (*e.g.,* the price of MGEX wheat futures and the price of CBOT wheat futures). Put another way, permitting spread exemptions outside the same crop year may enable pricing in two different but related markets for substitute goods to be more highly correlated, which benefits market participants with a price exposure to the underlying protein content in wheat generally, rather than that of a particular commodity.

However, the Commission also recognizes certain potential costs to permitting spread exemptions during the spot month, particularly to extend into the last five days of trading. This feature could raise the risk of allowing participants in the market at a time in the contract where only those interested in making or taking delivery should be present. When a contract goes into expiration, open interest and trading volume naturally decrease, as traders not interested in making or taking delivery roll their positions into deferred calendar months. The presence of large spread positions, normally tied to large liquidity providers so close to the expiration of a futures contract, could lead to disruptions in the price discovery function of the contract by disrupting the futures/cash price convergence. This could lead to increased transaction costs and harm the hedging utility for end-users of the futures contract, which could lead to higher costs passed on to consumers.

However, the Commission believes that these concerns are mitigated, as spread exemptions will not be self-effectuating for purposes of exchange-set position limits. Accordingly, exchanges will continue to apply their expertise in overseeing and maintaining the integrity of their markets. For example, an exchange could: Refuse to grant a spread exemption if the exchange determines that the exemption is inconsistent with the requirements of § 150.5(a) or harmful to its markets; require a market participant to reduce its positions; or implement a five-day rule for spread exemptions, as discussed above.[1533] The Commission has also provided guidance to exchanges in a new Appendix G to support exchange analysis of whether to grant a particular spread exemption and to remind exchanges of their oversight obligations when granting spread exemptions.

Generally, the Commission finds that, by allowing speculators to execute inter-market and intra-market spreads, speculators are able to hold a greater amount of open interest in underlying contract(s), and therefore, bona fide hedgers may benefit from any increase in market liquidity. Spread exemptions may also lead to better price continuity and price discovery if market participants who seek to provide liquidity (for example, through entry of resting orders for spread trades between different contracts) receive a spread exemption, and thus would not otherwise be constrained by a position limit.

For clarity, the Commission has identified the following two examples of spread positions that could benefit from the spread exemptions permitted by this Final Rule:

• Reverse crush spread in soybeans on the CBOT subject to an inter-market spread exemption. In the case where soybeans are processed into two different products, soybean meal and soybean oil, the crush spread is the difference between the combined value of the products and the value of soybeans. There are two actors in this scenario: The speculator and the soybean processor. The spread's value approximates the profit margin from actually crushing (or mashing) soybeans into meal and oil. The soybean processor may want to lock in the spread value as part of its hedging strategy, establishing a long position in soybean futures and short positions in soybean oil futures and soybean meal futures, as substitutes for the processor's expected cash-market transactions (the long position hedges the purchase of the anticipated inputs for processing and the short position hedges the sale of the anticipated soybean meal and oil products). On the other side of the processor's crush spread, a speculator takes a short position in soybean futures against long positions in soybean meal futures and soybean oil futures. The soybean processor may be able to lock in a higher crush spread because of liquidity provided by such a speculator who may need to rely upon a spread exemption. In this example, the speculator is accepting basis risk represented by the crush spread, and the speculator is providing liquidity to the soybean processor. The crush spread positions may result in greater correlation between the futures prices of

[1530] 17 CFR 150.3. CEA section 4a(a)(1) provides the Commission with authority to exempt from position limits transactions ''normally known to the trade'' as ''spreads'' or ''straddles'' or ''arbitrage'' or to fix limits for such transactions or positions different from limits fixed for other transactions or positions.

[1531] The ''spread transaction'' definition lists the most common types of spread positions: intra-market spread, inter-market spread, intra-commodity spread, or inter-commodity spread, including a calendar spread, quality differential spread, processing spread, product or by-product differential spread, or futures-option spread. Final § 150.3(b) also permits market participants to apply to the Commission for other spread transactions.

[1532] As discussed under final § 150.3, spread exemptions identified in the proposed ''spread transaction'' definition in final § 150.1 are self-effectuating, similar to the status quo, and do not represent a change to the status quo baseline. The related costs and benefits, particularly with respect to requesting exemptions with respect to spreads other than those identified in the proposed ''spread transaction'' definition, are discussed under the respective sections below.

[1533] *See supra* Section II.A.1.viii. (discussing the Five-Day Rule).

soybeans on the one hand and those of soybean oil and soybean meal on the other hand, which means that prices for all three products may move up or down together in a more correlated manner.

• Wheat spread subject to inter-market spread exemptions. There are two actors in this scenario: The speculator and the wheat farmer. In this example, a farmer growing hard wheat would like to reduce the price risk of her crop by shorting a MGEX wheat futures. There, however, may be no hedger, such as a mill, that is immediately available to trade at a desirable price for the farmer. There may be a speculator willing to offer liquidity to the hedger; however, the speculator may wish to reduce the risk of an outright long position in MGEX wheat futures through establishing a short position in CBOT wheat futures (soft wheat). Such a speculator, who otherwise would have been constrained by a position limit at MGEX and/or CBOT, may seek exemptions from MGEX and CBOT for an inter-market spread, that is, for a long position in MGEX wheat futures and a short position in CBOT wheat futures of the same maturity. As a result of the exchanges granting an inter-market spread exemption to such a speculator, who otherwise may be constrained by limits, the farmer might be able to transact at a higher price for hard wheat than might have existed absent the inter-market spread exemptions. Under this example, the speculator is accepting basis risk between hard wheat and soft wheat, reducing the risk of a position on one exchange by establishing a position on another exchange, and potentially providing liquidity to a hedger. Further, spread transactions may aid in price discovery regarding the relative protein content for each of the hard and soft wheat contracts.

iv. Conditional Spot Month Exemption Positions in Natural Gas

Final § 150.3(a)(4) provides a new Federal conditional spot month position limit exemption for cash-settled NYMEX NG referenced contracts. The conditional exemption permits traders to acquire positions up to 10,000 cash-settled NYMEX NG referenced contracts (the Federal spot month limit in final § 150.2 for cash-settled NYMEX NG is 2,000 cash-settled NYMEX NG referenced contracts per exchange and another 2,000 cash-settled NYMEX NG referenced contracts in the OTC swaps market) per exchange that lists a cash-settled NYMEX NG referenced contract, along with an additional position in cash-settled economically equivalent NYMEX NG OTC swaps that has a notional amount of up to 10,000 equivalent-sized contracts, as long as such person does not also hold positions in the physically-settled NYMEX NG referenced contract.[1534]

NYMEX, IFUS, and Nodal currently have rules in place establishing a conditional spot month limit exemption of up to 5,000 equivalent-sized cash-settled natural gas contracts per exchange, provided that the market participant does not hold any physically-settled natural gas contracts. Finalizing the conditional limit exemption for NYMEX NG enables the NYMEX NG referenced contract market to continue to operate as it has under the existing exchange-set conditional limit exemption framework, which the Commission notes has functioned well based on its observation over the past decade. Removing the conditional limit exemption will result in reduced liquidity, including for commercial hedgers seeking to offset price risks but not necessarily looking to make or take delivery, due to the significantly lower positions a market participant would be able to hold in the cash-settled NYMEX NG referenced contracts.

Several commenters suggested removing the NYMEX NG conditional limit exemption's requirement to divest all holdings in the physically-settled NYMEX NG referenced contract.[1535] The Commission believes that this could result in significant costs to the market by encouraging manipulation of the physically-settled NYMEX NG referenced contract to benefit a large position in the cash-settled NYMEX NG referenced contract available through the conditional limit exemption. Specifically, without this divestiture requirement, a trader could hold up to 40,000 cash-settled NYMEX NG referenced contracts and 2,000 physically-settled NYMEX NG referenced contracts. At these levels, it may not require much movement in the physically-settled markets to disproportionately benefit the cash-settled holdings. As a result, the requirement to exit the physically-settled contract is critical for reducing a market participant's incentive to manipulate the cash settlement price by, for example, banging-the-close or distorting physical delivery prices in the physically-settled contract to benefit leveraged cash-settled positions.

CME commented that the conditional limit exemption for NYMEX NG could ''incentivize the manipulation of a cash commodity price in order to benefit a position in a cash-settled contract.''[1536] The Commission notes that the conditional limit exemption does provide for a substantial increase in a trader's cash-settled position, but the core requirement that a trader must divest out of the physically-settled NYMEX NG referenced contract during the spot month period is intended to address and reduce the incentive for a trader to manipulate the physically-settled NYMEX NG core referenced futures contract to benefit a position in the cash-settled NYMEX NG referenced contracts. Furthermore, based on its experience in monitoring the NYMEX NG market since the conditional limit exemption was adopted, the Commission has not observed any market manipulations attributable to a trader utilizing the conditional limit exemption. That said, the Commission is aware of instances where traders violated the conditional exemption by holding or trading in the physically-settled NYMEX NG core referenced futures contracts. The exchanges also detected and took corrective action against those traders. The Commission will continue to closely monitor natural gas trader positions across exchanges and work with the exchanges to ensure the CME Group's concerns continue to be addressed to protect the market participants and the public and defend the financial integrity and price discovery function of the NYMEX NG core referenced futures contract.[1537]

Further, the Commission has heeded natural gas traders' concerns about disrupting market practices and harming liquidity in the cash-settled contract, which could increase the cost of hedging and possibly prevent convergence between the physical delivery futures and cash markets.[1538] While a trader with a position in the physically-settled NYMEX NG referenced contract may incur costs associated with liquidating that position in order to meet the conditions of the Federal exemption, such costs are incurred outside of the Final Rule, as the trader would have to do so as a condition of the exchange-level

[1534] The NYMEX NG contract is the only natural gas contract included as a core referenced futures contract under the Final Rule.

[1535] ISDA at 8; SIFMA AMG at 10–11; FIA at 7–8; NGSA at 12–14; Citadel at 7; CCI at 4; EEI/EPSA at 4.

[1536] CME Group at 6.

[1537] *See* IFUS Rule 6.20(c) and NYMEX Rule 559.F. *See, e.g.,* Nodal Rulebook Appendix C (equivalent rule of Nodal).

[1538] *See* 81 FR at 96862, 96863.

exemption under current exchange rules.[1539]

v. Financial Distress Exemption

Final § 150.3(a)(3) provides an exemption for certain financial distress circumstances, including the default of a customer, affiliate, or acquisition target of the requesting entity that may require the requesting entity to take on, in short order, the positions of another entity. In codifying the Commission's historical practice, the Final Rule accommodates transfers of positions from financially distressed firms to financially secure firms. The disorderly liquidation of a position threatens price impacts that may harm the efficiency and price discovery function of markets, and § 150.3(a)(3) makes it less likely that positions are prematurely or needlessly liquidated. The Commission has determined that costs related to filing and recordkeeping are negligible. The Commission cannot accurately estimate how often this exemption may be invoked because emergency or distressed market situations are unpredictable and dependent on a variety of firm and market-specific factors as well as general macroeconomic indicators.[1540] The Commission, nevertheless, believes that emergency or distressed market situations that might trigger the need for this exemption are infrequent, and that codifying this historical practice adds transparency to the Commission's oversight responsibilities.

vi. Pre-Enactment and Transition Period Swaps Exemption

Final § 150.3(a)(5) provides an exemption from position limits for positions acquired in good faith in any ''pre-enactment swap,'' or in any ''transition period swap,'' in either case as defined in final § 150.1. A person relying on this exemption may net such positions with post-effective date commodity derivative contracts for the purpose of complying with any non-spot month speculative positions limits, but may not net against spot month positions. This exemption is self-effectuating, and the Commission believes that § 150.3(a)(5) benefits both individual market participants by lessening the impact of the Federal position limits in final § 150.2, and market liquidity in general as liquidity providers initially will not be forced to reduce or exit their positions.

Final § 150.3(a)(5) benefits price discovery and convergence by prohibiting large traders seeking to roll their positions into the spot month from netting down positions in the spot-month against their pre-enactment swap or transition period swap. The Commission acknowledges that, on its face, including a ''good-faith'' requirement in final § 150.3(a)(5) could hypothetically diminish market integrity since determining whether a trader has acted in ''good faith'' is inherently subjective and could result in disparate treatment among traders, where certain traders may assert a more aggressive position in order to seek a competitive advantage over others. The Commission believes the risk of any such unscrupulous trader or exchange is mitigated since exchanges are still subject to Commission oversight and to DCM Core Principles 4 (''prevention of market disruption'') and 12 (''protection of markets and market participants''), among others. The Commission has determined that market participants who voluntarily employ this exemption also incur negligible recordkeeping costs.

5. Process for the Commission or Exchanges To Grant Exemptions and Bona Fide Hedge Recognitions for Purposes of Federal Position Limits (Final §§ 150.3 and 150.9) and Related Changes to Part 19 of the Commission's Regulations

Existing §§ 1.47 and 1.48 set forth the process for market participants to apply to the Commission for recognition of certain bona fide hedges for purposes of Federal position limits, and existing § 150.3 set forth the types of spread exemptions a person can rely on for purposes of Federal position limits. Under existing Commission practices, spread exemptions and certain enumerated bona fide hedges are generally self-effectuating and do not require market participants to apply to the Commission for purposes of Federal position limits. Market participants are currently, however, required to file Form 204 monthly reports[1541] to justify certain position limit overages.

Further, for those bona fide hedges for which market participants are required to apply to the Commission, existing regulations and market practice require market participants to apply both to the Commission for purposes of Federal position limits and also to the relevant exchanges for purposes of exchange-set limits. The Commission has determined that this dual application process creates inefficiencies for market participants.

Final §§ 150.3 and 150.9, taken together, make several changes to the process of acquiring bona fide hedge recognitions and spread exemptions for Federal position limits purposes. Final §§ 150.3 and 150.9 maintain certain elements of the status quo while also adopting certain changes to facilitate the exemption process.[1542]

First, with respect to the proposed enumerated bona fide hedges, final § 150.3 maintains the status quo by providing that those enumerated bona fide hedges that currently are self-effectuating for the nine legacy agricultural contracts will continue to remain self-effectuating for the nine legacy agricultural contracts for purposes of Federal position limits.[1543] Similarly, the enumerated bona fide hedges for the additional 16 contracts that are newly subject to Federal position limits (*i.e.,* those contracts other than the nine legacy agricultural contracts) also are self-effectuating for purposes of Federal position limits.

Second, for recognition of any non-enumerated bona fide hedge in connection with any referenced contract, market participants are required to apply either directly to the Commission under final § 150.3 or through an exchange that adheres to certain requirements under final § 150.9. The Commission notes that existing regulations require market participants to apply to the Commission for recognition of non-enumerated bona fide hedges, and so the Final Rule does not represent a change to the status quo in this respect for the nine legacy agricultural contracts.

Third, final § 150.3 maintains the status quo by providing that the most common spread exemptions for the nine legacy agricultural contracts remain self-effectuating. Similarly, these common spread exemptions also are self-effectuating for the additional 16 contracts that are newly subject to Federal position limits. These common spread exemptions are listed in the

[1539] *See* IFUS Rule 6.20(c) and NYMEX Rule 559.F. *See, e.g.,* Nodal Rulebook Appendix C (equivalent rules of Nodal).

[1540] *See* 81 FR at 96862, 96863.

[1541] In the case of cotton, market participants currently file the relevant portions of Form 304.

[1542] In this section the Commission discusses the costs and benefits related to the *application* process for these exemptions and bona fide hedge recognitions. For a discussion of the costs and benefits related to the scope of the exemptions and bona fide hedge recognitions, *see supra* Section IV.A.4.

[1543] Final § 150.3(a)(1)(i). Under the status quo, market participants must apply to the Commission for recognition of certain enumerated anticipatory bona fide hedges. The Final Rule also makes these enumerated anticipatory bona fide hedges self-effectuating for the nine legacy agricultural contracts.

''spread transaction'' definition under final § 150.1.[1544]

Fourth, for any spread exemption not listed in the ''spread transaction'' definition, market participants are required to apply directly to the Commission under final § 150.3. There is no exception for the nine legacy agricultural products, nor are market participants permitted to apply through an exchange under final § 150.9 for these types of spread exemptions.[1545]

The Commission anticipates that most—if not all—market participants will utilize the exchange-centric process set forth in final § 150.9 with respect to applying for recognition of non-enumerated bona fide hedges, rather than applying directly to the Commission under § 150.3. Market participants are likely already familiar with the processes set forth in § 150.9, which is intended to leverage the processes currently in place at the exchanges for addressing requests for bona fide hedge recognitions from exchange-set limits. In the sections below, the Commission will discuss the costs and benefits related to both processes.

i. Process for Requesting Exemptions and Bona Fide Hedge Recognitions Directly From the Commission (Final § 150.3)

Under existing §§ 1.47 and 1.48, and existing § 150.3, the processes for obtaining a recognition of a bona fide hedge or for relying on a spread exemption, are similar in some respects and different in other respects than the approach adopted in final § 150.3. Existing §§ 1.47 and 1.48 require market participants seeking recognition of non-enumerated bona fide hedges and enumerated anticipatory bona fide hedges, respectively, for purposes of Federal position limits to apply directly to the Commission for prior approval.

In contrast, existing non-anticipatory enumerated bona fide hedges and spread exemptions are self-effectuating, which means that market participants are not required to submit any information to the Commission for prior approval, although such market participants must subsequently file Form 204 or Form 304 each month in order to describe their cash-market positions and justify their bona fide hedge position. There currently is no codified Federal process related to financial distress exemptions or natural gas conditional spot month exemptions.

Final § 150.3 provides a process for market participants to apply directly to the Commission for recognition of non-enumerated bona fide hedges or spread exemptions not included in the ''spread transaction'' definition in final § 150.1, which in each case would not be self-effectuating under the Final Rule. Under final § 150.3, any person seeking Commission recognition of these types of bona fide hedges or spread exemptions (as opposed to applying for recognition of non-enumerated bona fide hedges using the exchange-centric process under proposed § 150.9 described below) are required to submit a request directly to the Commission and to provide information similar to what is currently required under existing §§ 1.47 and 1.48.[1546]

a. Existing Bona Fide Hedges That Currently Require Prior Submission to the Commission Under Existing §§ 1.47 and 1.48 for the Nine Legacy Agricultural Contracts

Under the Final Rule, the Commission maintains the distinction between enumerated bona fide hedges and non-enumerated bona fide hedges in final § 150.3: (1) Enumerated bona fide hedges continue to be self-effectuating; (2) enumerated anticipatory bona fide hedges are now self-effectuating, so market participants no longer need to apply to the Commission for recognition; and (3) non-enumerated bona fide hedges still require market participants to apply for recognition. Market participants that choose to apply directly to the Commission for a bona fide hedge recognition (*i.e.,* for non-enumerated bona fide hedges) are subject to an application process that generally is similar to what the Commission currently administers for the non-enumerated bona fide hedges and the enumerated anticipatory bona fide hedges.[1547]

With respect to enumerated anticipatory bona fide hedges for the nine legacy agricultural contracts, for which market participants currently are required to apply to the Commission for recognition for Federal position limit purposes, the Commission anticipates that the Final Rule will benefit market participants by making such hedges self-effectuating.[1548] As a result, market participants will no longer be required to spend time and resources applying to the Commission.

Further, for these enumerated anticipatory hedges, existing § 1.48 requires market participants to submit either an initial or supplemental application to the Commission 10 days prior to entering into the bona fide hedge that would cause the hedger to exceed Federal position limits.[1549] Under existing § 1.48, a market participant could proceed with its proposed bona fide hedge if the Commission does not notify a market participant otherwise within the specific 10-day period. Under the Final Rule, because bona fide hedgers can implement enumerated anticipatory bona fide hedges without filing an application with the Commission for approval and waiting the requisite 10 days, they may be able to implement their hedging strategy more efficiently with reduced cost and risk. The

[1544] Final § 150.1 defines ''spread transaction'' to include an intra-market spread, inter-market spread, intra-commodity spread, or inter-commodity spread, including a calendar spread, quality differential spread, processing spread, product or by-product differential spread, or futures-option spread.

[1545] As discussed below, the Final Rule also eliminates the Form 204 and the equivalent portions of the Form 304.

[1546] For bona fide hedges and spread exemptions, this information includes: (i) A description of the position in the commodity derivative contract (including the name of the underlying commodity and the derivative position size) or of the spread position for which the application is submitted; (ii) an explanation of the hedging strategy, including a statement that the position complies with the applicable requirements for, and the definition of, a bona fide hedging transaction or position, and information to demonstrate why the position satisfies such requirements and definition; (iii) a statement concerning the maximum size of all gross positions in commodity derivative contracts for which the application is submitted; (iv) for bona fide hedges, a description of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position for which the application is submitted, including information regarding the offsetting cash positions; and (v) any other information that may help the Commission determine whether the position meets the applicable requirements for a bona fide hedge position or spread transaction.

[1547] As noted above, under the existing framework, market participants are not required to apply for any type of bona fide hedge recognition or spread exemption from the Commission for any of the additional 16 contracts that are newly subject to Federal position limits (*i.e.,* those contracts other than the nine legacy agricultural contracts); rather, under the existing framework, such market participants must apply to the exchanges for bona fide hedge recognitions or exemptions for purposes of exchange-set position limits. Accordingly, to the extent that market participants do not need to apply to the Commission in connection with any of the additional 16 contracts, the Final Rule does not impose additional costs or benefits compared to the status quo.

[1548] As noted above, since market participants do not need to apply to the Commission for bona fide hedge recognition for any of the additional 16 contracts that are newly subject to Federal position limits, the Commission's proposal does not result in any additional costs or benefits to the extent such bona fide hedge recognitions are self-effectuating.

[1549] Under the Commission's existing regulations, non-anticipatory enumerated bona fide hedges are self-effectuating, and market participants do not have to file any applications for recognition under existing Commission regulations. However, existing Commission regulations require bona fide hedgers to file with the Commission monthly Form 204 (or Form 304 in connection with ICE Cotton No. 2 (CT)) reports discussing their underlying cash positions in order to substantiate their bona fide hedge positions.

Commission acknowledges that making such bona fide hedges more efficient to obtain could increase the possibility of excess speculation since anticipatory exemptions are theoretically more difficult to substantiate compared to the other existing enumerated bona fide hedges.

However, the Commission has gained significant experience over the years with bona fide hedging practices in general, and with enumerated anticipatory bona fide hedging practices in particular, and the Commission has determined that making such hedges self-effectuating should not increase the risk of excessive speculation or market manipulation compared to the status quo.

For non-enumerated bona fide hedges, existing § 1.47 requires market participants to submit (i) initial applications to the Commission 30 days prior to the date the market participant would exceed the applicable position limits and (ii) supplemental applications (*i.e.,* applications for a market participant that desires to exceed the bona fide hedge amount provided in the person's previous Commission filing) 10 days prior for Commission approval, and market participants can proceed with their proposed bona fide hedges if the Commission does not intervene within the specific time (*e.g.,* either 10 days or 30 days).

Final § 150.3 similarly requires market participants that elect to apply directly to the Commission (as opposed to applying through an exchange pursuant to final § 150.9) for a recognition of a non-enumerated bona fide hedge for any of the 25 core referenced futures contracts to apply to the Commission prior to exceeding Federal position limits. Final § 150.3 does not, however, prescribe a certain time period by which a bona fide hedger must apply or by which the Commission must respond. The Commission anticipates that the Final Rule benefits bona fide hedgers by enabling them, in many cases, to generally implement their hedging strategies sooner than the existing 30-day or 10-day waiting period, as applicants will have access to an expanded list of enumerated hedges (which don't require prior Commission approval), a new streamlined process for applying through exchanges for non-enumerated hedges, increased position limits, and, as discussed here, a more flexible approach for applying directly to the Commission for a non-enumerated hedge. Considering these factors, the Commission believes that, ultimately, hedging-related costs would likely decrease. However, the Commission believes that there could also be circumstances in which the overall process for applying directly to the Commission could take longer than the existing timelines under § 1.47, which could increase hedging-related costs if a bona fide hedger is compelled to wait longer, compared to existing Commission practices, before executing its hedging strategy.

On the other hand, the Commission also recognizes that there could be potential costs to bona fide hedgers if, under the Final Rule, they are forced either to enter into less effective bona fide hedges, or to wait to implement their hedging strategy, as a result of the potential uncertainty that could result from § 150.3 not requiring the Commission to respond within a certain amount of time. However, the Commission believes this concern is mitigated since market participants will likely also have the option to apply for a non-enumerated bona fide hedge under final § 150.9. As explained further below, final § 150.9(e)(3) is a streamlined process whereby a market participant in receipt of a notice of approval from the relevant exchange may elect, at its own risk, to exceed Federal position limits during the Commission's review period, which is limited to 10 (or 2) days under § 150.9.[1550]

This concern is also mitigated to the extent market participants utilize the § 150.3 process that permits a market participant that demonstrates a ''sudden or unforeseen'' increase in its bona fide hedging needs to enter into a bona fide hedge without first obtaining the Commission's prior approval, as long as the market participant submits a retroactive application to the Commission within five business days of exceeding the applicable position limit. The Commission believes this ''five-business day retroactive exemption'' benefits bona fide hedgers compared to existing §§ 1.47 and 1.48, which require Commission prior approval, since hedgers that qualify to exercise the five-business day retroactive exemption are also likely facing more acute hedging needs—with potentially commensurate costs if required to wait. This provision also leverages, for Federal position limit purposes, existing exchange practices for granting retroactive exemptions from exchange-set limits.

On the other hand, the proposed five-business day retroactive exemption could harm market liquidity and bona fide hedgers if the applicable exchange or the Commission were to not approve the retroactive request, and the Commission subsequently required liquidation of the position in question. As a result, such possibility could cause market participants to either enter into smaller bona fide hedge positions than they otherwise would, or cause the bona fide hedger to delay entering into its hedge, in either case potentially causing bona fide hedgers to incur increased hedging costs.

However, the Commission believes this concern is partially mitigated since proposed § 150.3 requires the purported bona fide hedger to exit its position in a ''commercially reasonable time,'' which the Commission believes should partially mitigate any costs incurred by the market participant compared to either an alternative that would require the bona fide hedger to exit its position immediately, or the status quo where the market participant either is unable to enter into a hedge at all without Commission prior approval.

b. Spread Exemptions and Non-Enumerated Bona Fide Hedges

Final § 150.3 imposes a new requirement for Federal position limit purposes for market participants to (1) apply either directly to the Commission pursuant to § 150.3 or indirectly through an exchange pursuant to final § 150.9 for any non-enumerated bona fide hedge; and (2) to apply directly to the Commission pursuant to § 150.3 for any spread exemptions not identified in the proposed ''spread transaction'' definition (the Commission notes that a market participant may not apply indirectly through an exchange for spread exemptions for Federal position limit purposes).[1551] As noted above, common spread exemptions (*i.e.,* those identified in the definition of ''spread transaction'' in final § 150.1) remain self-effectuating for the nine legacy agricultural products, and also are self-effectuating for the 16 additional core referenced futures contracts.[1552]

The baseline is the status quo under existing § 150.3(a)(3), which provides that certain spread exemptions are self-effectuating for purposes of Federal position limits. As noted above, § 150.3 is also the baseline for non-enumerated bona fide hedges. The final rule

[1550] *See supra* Section II.G.7. (discussing when a person may exceed Federal position limits).

[1551] As discussed below, for spread exemptions not identified in the proposed ''spread transaction'' definition in § 150.3, market participants are required to apply directly to the Commission under § 150.3 and are not able to apply under § 150.9.

[1552] Existing § 150.3(a)(2) does not specify a formal process for granting either spread exemptions or non-anticipatory enumerated bona fide hedges that are consistent with CEA section 4a(a)(1), so, in practice, spread exemptions and non-anticipatory enumerated bona fide hedges have been self-effectuating.

maintains the status quo with respect to spread exemptions that meet the ''spread transaction definition'' for the nine legacy agricultural contracts as such spread exemptions will continue to be self-effectuating. The final rule also maintains the status quo for any non-enumerated bona fide hedge in one of the nine legacy agricultural contracts by requiring an applicant to receive prior approval, and similarly requiring prior approval for such non-enumerated bona fide hedges for the additional 16 contracts that are newly subject to Federal position limits.[1553]

The Commission concludes that there is a change to the status quo baseline with respect to the 16 non-legacy core referenced futures contracts to the extent that they will be subject to Federal position limits for the first time under the Final Rule. However, since the most common spread exemptions will be ''self-effectuating'' for Federal purposes, market participants will not need to do anything new, compared to the status quo, under the Final Rule in connection with self-effectuating spread exemptions. Accordingly, as a practical matter, the Commission does not believe that the Final Rule will impose any new costs or benefits with respect to the 16 non-legacy core referenced futures products related to the Final Rule's treatment of these self-effectuating spread exemptions since market participants will not need to do anything differently compared to the status quo (*i.e.,* market participants will still need to obtain exchange approval of any spread exemption for purposes of exchange-set position limits, but will not be required to do anything for Federal purposes in connection with self-effectuating spread exemptions).

Alternatively, several commenters advocated for the Commission to expand the proposed § 150.9 process to also allow exchanges to grant ''non-enumerated'' spread exemptions for spread positions that do not meet the ''spread transaction'' definition.[1554] As more fully explained in the preamble, the Commission determined not to expand § 150.9 for two primary reasons.[1555] First, most of the more common spread exemptions used by market participants fall within the scope of the Final Rule's expanded ''spread transaction'' definition and are self-effectuating for purposes of Federal position limits. Spread exemption requests that fall outside of the ''spread transaction'' definition are likely to be novel exemption requests that require Commission review.

Second, bona fide hedge recognitions and spread transactions are subject to different legal standards under CEA section 4a(a). Because CEA section 4a(a)(c)(2) provides clear criteria to the Commission for determining what constitutes a bona fide hedging transaction or position, the Commission has defined in detail the term ''bona fide hedging transaction or position'' in § 150.1. As a result, the Commission is permitting exchanges to evaluate applications for non-enumerated bona fide hedges for purposes of exchange-set limits in accordance with the same clear criteria used by the Commission. In contrast, CEA section 4(a)(a)(1) does not include clear criteria to the Commission for the granting of spread exemptions and requires the Commission to use its judgment to conduct a fact-specific analysis of novel spread exemption requests. Because exchanges would lack clear standards for assessing whether a particular spread position satisfies the requirements of the CEA, the Commission currently is uncomfortable with leveraging an exchange's analysis and determination with respect to novel spread exemption requests and believes that such an alternative could impose costs on risk management practices due to possible inconsistent treatment of such exemption requests across exchanges as well as potential uncertainty due to lack of a clear statutory standard.

To the extent market participants are required to obtain prior approval for a non-enumerated bona fide hedge or spread exemption for any of the additional 16 contracts that are newly subject to Federal position limits, the Commission recognizes that § 150.3 imposes costs on market participants who are now required to spend time and resources submitting applications to the Commission or an exchange, or both, as applicable, for prior approval of exemptions for Federal position limit purposes.[1556] Further, compared to the status quo in which the proposed new 16 contracts are not subject to Federal position limits, the process in § 150.3 could increase uncertainty since market participants are required to seek prior approval and wait for an undetermined amount of time for a Commission response. As a result, such uncertainty could cause market participants to either enter into smaller spread or bona fide hedging positions or do so at a later time. In either case, this could cause market participants to incur additional costs and/or implement less efficient hedging strategies.

However, the Commission believes that final § 150.3's framework is familiar to market participants that currently apply to the Commission for bona fide exemptions for the nine legacy agricultural products, which should serve to reduce costs for some market participants associated with obtaining recognition of a bona fide hedge or spread exemption from the Commission for Federal position limits for those market participants.[1557]

The Commission believes that this analysis also applies to the nine legacy agricultural contracts for spread exemptions that are not listed in the proposed ''spread transaction'' definition and therefore also requires market participants to apply to the Commission for these types of spread exemptions for the first time for the nine legacy agricultural products. However, because the Commission has determined that most spread transactions are self-effectuating (especially for the nine legacy agricultural contracts based on the Commission's experience), the Commission believes that § 150.3 imposes only small costs with respect to spread exemptions for both the nine legacy agricultural contracts as well as the additional 16 contracts that are newly subject to Federal position limits.[1558]

[1553] The Commission discusses the costs and benefits related to the process for non-enumerated bona fide hedge recognitions with respect to the nine legacy agricultural products in the above section.

[1554] *See* MFA/AIMA at 10; FIA at 21; Citadel at 8–9; ISDA at 9; ICE at 7–8.

[1555] *See supra* Sections II.G.4., II.G.5.

[1556] The Commission's Paperwork Reduction Act analysis identifies some of these information collection burdens in greater specificity. *See infra* Section IV.B.3.ii.c. (discussing in greater detail the cost and benefits related to spread exemptions).

[1557] The Commission anticipates that the application process in § 150.3(b) could slightly reduce compliance-related costs, compared to the status quo application process to the Commission under existing §§ 1.47 and 1.48, because § 150.3 provides a single, standardized process for all bona fide hedge and spread exemption requests that is slightly less complex—and more clearly laid out in the proposed regulations—than the Commission's existing application processes. Nonetheless, since the Commission anticipates that most market participants would apply directly to exchanges for bona fide hedges when provided the option under § 150.9, the Commission believes that most market participants would incur the costs and benefits discussed thereunder.

[1558] ICE requested that market participants be able to apply for spread exemptions on a late or retroactive basis the same way they would be permitted to apply for bona fide hedge exemptions within five days of exceeding Federal position limits under proposed §§ 150.3 and 150.9. ICE at 8. The Commission has determined not to permit late retroactive applications for spread exemptions under § 150.3(a) because the Commission believes that the Final Rule provides sufficient flexibility to allow market participants to identify their exemption needs and submit timely applications. *See supra* Section II.C.4.iii. The Commission further believes that allowing retroactive spread exemptions (and other types of retroactive

Continued

While the Commission has years of experience granting and monitoring spread exemptions and enumerated and non-enumerated bona fide hedges for the nine legacy agricultural contracts, as well as overseeing exchange processes for administering exemptions from exchange-set limits on such commodities, the Commission does not have the same level of experience or comfort administering bona fide hedge recognitions and spread exemptions for the additional 16 contracts that are subject to the Federal position limits and the new exemption processes for the first time. Accordingly, the Commission recognizes that permitting enumerated bona fide hedges and spread exemptions identified in the ''spread transaction'' definition for these additional 16 contracts might not provide the purported benefits, or could result in increased costs, compared to the nine legacy agricultural products.

The Commission also believes that § 150.3 benefits market participants by providing them the option to choose the process for applying for a non-enumerated bona fide hedge (*i.e.,* either directly with the Commission or, alternatively, through the exchange-centric process discussed under § 150.9 below) for the additional 16 contracts that are newly subject to Federal position limits that are more efficient given the market participants' unique facts, circumstances, and experience.[1559] If a market participant chooses to apply through an exchange for Federal position limits pursuant to final § 150.9, the market participant receives the added benefit of not being required to also submit another application directly to the Commission. The Commission anticipates that most market participants would apply directly to exchanges for non-enumerated bona fide hedges, pursuant to the streamlined process § 150.9, as explained below, in which case the Commission believes that most market participants would incur the costs and benefits discussed thereunder. The Commission also believes that this analysis applies with respect to non-enumerated bona fide hedges for the nine legacy agricultural contracts.

c. Exemption-Related Recordkeeping

Final § 150.3(d) requires persons who avail themselves of any of the foregoing exemptions to maintain complete books and records concerning all details of each of their exemptions and any related position, and to make such records available to the Commission upon request under § 150.3(e).

Several commenters recommended that the Commission delete the pass-through swap recordkeeping requirements in proposed § 150.3(d)(2) based on concerns it would place all compliance burdens on the pass-through swap counterparty offering the swap rather than the bona fide hedging counterparty.[1560] Commenters further expressed concerns the proposed provision would be burdensome to the extent it would require the pass-through swap counterparty to maintain records of each representation made by the bona fide hedging counterparty on a trade-by-trade basis.[1561]

The Commission intended § 150.3(d)(2) to be an extension of market participants' existing obligations to maintain regulatory records under part 45 and § 1.31. As discussed above, the revised ''bona fide hedging transaction or position'' definition in final § 150.1 requires that a pass-through swap counterparty receive a written representation from its bona fide hedging swap counterparty in order for the pass-through swap to qualify as a bona fide hedge.[1562] In light of that, final § 150.3(d)(2) requires a person relying on the pass-through swap provision to maintain any records created for purposes of demonstrating a good faith reliance on that provision in accordance with § 150.1.

These recordkeeping requirements benefit market integrity by providing the Commission with the necessary information to monitor the use of exemptions from speculative position limits and help to ensure that any person who claims any exemption permitted by § 150.3 can demonstrate compliance with the applicable requirements. The Commission does not expect these requirements to impose significant new costs on market participants, as these requirements are in line with existing Commission and exchange-level recordkeeping obligations.

d. Exemption Renewals

Consistent with existing §§ 1.47 and 1.48, with respect to any Commission-recognized bona fide hedge or Commission-granted spread exemption pursuant to final § 150.3, the Commission does not require a market participant to reapply annually to the Commission.[1563] The Commission believes that this reduces burdens on market participants but also recognizes that not requiring market participants to annually reapply to the Commission ostensibly could harm market integrity since the Commission will not directly receive updated information with respect to particular bona fide hedgers or exemption holders prior to the trader exceeding the applicable Federal position limits.

However, the Commission believes that any potential harm is mitigated since the Commission, unlike exchanges, has access to aggregate market data, including positions held by individual market participants. Further, § 150.3 requires a market participant to submit a new application if any material information changes, or upon the Commission's request. In addition, the Commission will receive information about any annual renewals of such requests made to an exchange (for purposes of exchange-set limits) through the monthly exchange reports required under § 150.5(a)(4). On the other hand, market participants benefit by not being required to annually submit new applications, which the Commission believes reduces compliance costs.

e. Exemptions for Financial Distress and Conditional Natural Gas Positions

Final § 150.3 codifies the Commission's existing informal practice with respect to exemptions for financial distress and existing industry practice with respect to the conditional spot month limit exemption positions in natural gas. The same costs and benefits described above with respect to applications for bona fide hedge recognitions and spread exemptions also apply to these exemptions. However, to the extent the Commission currently allows exemptions related to financial distress, the Commission has determined that the costs and benefits with respect to the related application

exemptions) could potentially be harmful to the market, as these types of strategies may involve non-risk-reducing or speculative activity that should be evaluated prior to a person exceeding Federal position limits. *Id.*

[1559] As noted above, market participants seeking spread exemptions not listed in the proposed ''spread transaction'' definition in § 150.1 are required to apply directly with the Commission under § 150.3 and are not permitted to apply under § 150.9. The Commission recognizes that these types of spread exemptions are difficult to analyze compared to either the spread exemptions identified in § 150.1 or bona fide hedges in general. Accordingly, the Commission has determined to require market participants to apply directly to the Commission. Further, compared to the spread exemptions identified in final § 150.1, the Commission anticipates relatively few requests, and so does not believe the application requirement will impose a large aggregate burden across market participants.

[1560] Cargill at 6; Shell at 6.

[1561] *Id.*

[1562] *See supra* at Section II.A.1.x.

[1563] As discussed below, with respect to exchange-set limits under § 150.5 or the exchange process for Federal position limits under § 150.9, market participants are required to annually reapply to exchanges.

process already may be recognized by market participants.

ii. Process for Market Participants To Apply to an Exchange for Non-Enumerated Bona Fide Hedge Recognitions for Purposes of Federal Position Limits (Final § 150.9) and Related Changes to Part 19 of the Commission's Regulations

Final § 150.9 provides a framework whereby a market participant could avoid the existing dual application process described above and, instead, file one application with an exchange to receive a non-enumerated bona fide hedging recognition, which as discussed previously is not self-effectuating for purposes of Federal position limits. Under this process, a person is allowed to exceed the Federal position limit levels following an exchange's review and approval of an application for a bona fide hedge recognition, provided that the Commission during its review does not notify the exchange otherwise within a certain period of time thereafter. Market participants who do not elect to use the process in final § 150.9 for purposes of Federal position limits are required to request relief both directly from the Commission under § 150.3, as discussed above, and also apply to the relevant exchange, consistent with existing practices.[1564]

a. Final § 150.9—Establishment of General Exchange Process

Pursuant to final § 150.9, exchanges that elect to process these applications are required to file new rules or rule amendments with the Commission under § 40.5 of the Commission's regulations and obtain from applicants all information to enable the exchange and the Commission to determine that the facts and circumstances support a non-enumerated bona fide hedge recognition. Also, final § 150.9(e)(1) requires exchanges to provide real-time notification to the Commission of each initial determination to recognize a non-enumerated bona fide hedging transaction or position. The Commission believes that exchanges' existing practices generally are consistent with the requirements of § 150.9, and, therefore, exchanges will only incur marginal costs, if any, to modify their existing practices to comply. Similarly, the Commission anticipates that establishing uniform, standardized exemption processes across exchanges benefits market participants by reducing compliance costs. On the other hand, the Commission recognizes that exchanges that wish to participate in the processing of applications with the Commission under § 150.9 are required to expend resources to establish a process consistent with the Final Rule. However, to the extent exchanges have similar procedures, such benefits and costs may already have been realized by market participants and exchanges.

The Commission believes that there are significant benefits to the § 150.9 process that will be largely realized by market participants. The Commission has determined that the use of a single application to process both exchange and Federal position limits exemptions benefits market participants and exchanges by simplifying and streamlining the process. For applicants seeking recognition of a non-enumerated bona fide hedge, § 150.9 should reduce duplicative efforts, because applicants are saved the expense of applying in parallel to both an exchange and the Commission for relief from exchange-set position limits and Federal position limits, respectively. Because many exchanges already possess similar application processes with which market participants are likely accustomed, compliance costs should be decreased in the form of reduced application-production time by market participants and reduced response time by exchanges.[1565]

As discussed above, in connection with the recognition of bona fide hedges for Federal position limit purposes, current practices set forth in existing §§ 1.47 and 1.48 require market participants to differentiate between (i) enumerated non-anticipatory bona fide hedges that are self-effectuating, and (ii) enumerated anticipatory bona fide hedges and non-enumerated bona fide hedges for which market participants must apply to the Commission for prior approval. Under the Final Rule, the Commission's application processes no longer distinguish among different types of enumerated bona fide hedges (*e.g.,* anticipatory versus non-anticipatory enumerated bona fide hedges), and therefore, do not require exchanges to have separate processes for enumerated anticipatory positions under § 150.9. The Final Rule also eliminates the requirement for bona fide hedgers to file Form 204 or the relevant portions of Form 304, as applicable, with respect to any bona fide hedge, whether enumerated or non-enumerated.[1566] The Commission expects this to benefit market participants by providing a more efficient and less complex process that is consistent with existing practices at the exchange-level.[1567]

On the other hand, the Commission recognizes that § 150.9 imposes new costs related to non-enumerated bona fide hedges for the additional 16 contracts that are newly subject to Federal position limits. Under final § 150.9(c), market participants are now required to submit applications, including information to demonstrate why a particular position qualifies as bona fide hedge, as defined in § 150.1 and CEA section 4a(c)(2), to receive prior approval for Federal position limits purposes.[1568] However, since the Commission understands that exchanges already require market participants to submit applications and receive prior approval under exchange-set limits for all types of bona fide hedges, the Commission does not believe § 150.9 imposes any additional incremental costs on market participants beyond those already incurred under exchanges' existing processes.[1569] Accordingly, the

[1564] As noted above, the Commission anticipates that most, if not all, market participants will use § 150.9, rather than § 150.3, where permitted.

[1565] The Commission has previously estimated the combined annual burden hours for submitting applications under both §§ 1.47 and 1.48 to be 42 hours. *See infra* Section IV.B. (Paperwork Reduction Act) and 85 FR 11596, 11700 (Feb. 27, 2020).

[1566] *See supra* Section II.H.2. (discussing changes to part 19 eliminating Form 204 and portions of Form 304).

[1567] *See infra* Section IV.A.5.iii. for discussion related to changes to part 19 regarding the provision of information by market participants, noting that the elimination of Form 204 by the Final Rule reduces the burden hours estimates by 300 annual aggregate burden hours.

[1568] One commenter requested that the Commission provide additional factors that exchanges should consider when granting non-enumerated bona fide hedge recognitions. ISDA at 9. As discussed more fully in the preamble, the Commission believes that the final regulations strike a reasonable tradeoff by providing sufficient guidance to the exchanges for their review and determination in the context of exchange limits, while preserving the exchanges' discretionary authority to determine what types of additional information, if any, to collect. *See supra* Section II.G.5. (discussing final § 150.9(c)).

[1569] Under the 2020 NPRM, proposed § 150.9(c)(1)(ii) would have required exchanges to request a ''factual and legal'' analysis from applicants for non-enumerated bona fide hedge recognitions. 85 FR 11638. Two commenters expressed concern that the proposed requirement could be interpreted as requiring applications to engage legal counsel to complete their applications, which would result in additional costs to market participants. *See* CME Group at 10 and CMC at 11. The Commission did not intend for exchanges to require that applicants engage legal counsel to complete their applications for non-enumerated bona fide hedge recognitions. Final § 150.9(c)(1)(ii), instead of requiring a ''factual and legal analysis,'' requires an applicant to provide ''an explanation of the hedging strategy,'' including a statement that the position complies with the applicable requirements of the bona fide hedge definition, and information to demonstrate why the position satisfies the applicable requirements. *See supra* Section II.G.5. (discussing final § 150.9(c)).

Commission believes that any costs already may have been realized by market participants.

Further, the Commission believes that employing a concurrent process with exchanges that are self-regulatory organizations responsible for overseeing non-enumerated bona fide hedges executed on their platforms and that are not self-effectuating for Federal position limits purposes benefits market integrity by ensuring that market participants are appropriately relying on such bona fide hedges and not entering into such positions in order to attempt to manipulate the market or evade position limits. However, to the extent that exchange oversight, consistent with Commission standards and DCM core principles, already exists, such benefits may already be realized.

b. Final § 150.9—Exchange Expertise, Market Integrity, and Commission Oversight

For non-enumerated bona fide hedge recognitions that require the Commission's prior approval, the Final Rule provides a framework that utilizes existing exchange resources and expertise so that fair access and liquidity are promoted at the same time market manipulations, squeezes, corners, and other conduct that would disrupt markets are deterred and prevented.[1570] Final § 150.9 builds on existing exchange processes, which the Commission believes strengthens the ability of the Commission and exchanges to monitor markets and trading strategies while reducing burdens on both the exchanges, which administer the process, and market participants, who utilize the process. For example, exchanges are familiar with their market participants' commercial needs, practices, and trading strategies, and already evaluate hedging strategies in connection with setting and enforcing exchange-set position limits.[1571] Accordingly, exchanges should be able to readily identify bona fide hedges.

For these reasons, the Commission has determined that allowing market participants to apply through an exchange under § 150.9, rather than directly to the Commission as required under existing § 1.47, is likely to be more efficient than if the Commission itself initially had to review and approve all applications. The Commission considers the increased efficiency in processing applications under § 150.9 as a benefit to bona fide hedgers and liquidity providers. By having the availability of the exchange's analysis and view of the markets, the Commission is better informed in its review of the market participant and its application, which in turn may further benefit market participants in the form of administrative efficiency and regulatory consistency. However, the Commission recognizes additional costs for exchanges required to create and submit real-time notices under final § 150.9(e). In particular, commenters voiced concerns that the Commission's review of each non-enumerated bona fide hedge application could impose significant burdens on exchanges, market participants, and the Commission.[1572] To the extent exchanges already provide similar notice to the Commission or to market participants, or otherwise are required to notify the Commission under certain circumstances, such benefits and costs already may have been realized. In addition, the Commission expects that, due to the expanded list of enumerated hedges and other exemptions available to market participants as well as the higher Federal limits in the Final Rule, there will be a manageable amount of non-enumerated bona fide hedges that exchanges and the Commission will review through the new streamlined process. The Commission also reiterates that § 150.9 is an optional process that exchanges and market participants may elect to use in lieu of utilizing the traditional process of requesting non-enumerated bona fide hedges directly from the Commission under § 150.3.

On the other hand, to the extent exchanges become more involved with respect to review and oversight of market participants' bona fide hedges and spread exemptions, exchanges could incur additional costs. However, as noted, the Commission believes most of the costs have been realized by exchanges under current market practice.

At the same time, the Commission also recognizes that this aspect of the Final Rule could hypothetically harm market integrity. Absent other provisions, since exchanges profit from increased activity, an exchange could hypothetically seek a competitive advantage by offering excessively permissive exemptions, which could allow certain market participants to utilize non-enumerated bona fide hedge recognitions to engage in excessive speculation or to manipulate market prices. If an exchange engaged in such activity, other market participants would likely face greater costs through increased transaction fees, including forgoing trading opportunities resulting from market prices moving against market participants and/or preventing the market participant from executing at its desired prices, which may also further lead to inefficient hedging.

However, the Commission believes that these hypothetical costs are unfounded since under final § 150.9 the Commission reviews the applications submitted by market participants for bona fide hedge recognitions and spread exemptions for Federal position limits. The Commission emphasizes that § 150.9 is not providing exchanges with an ability to recognize a bona fide hedge or grant an exemption for Federal position limit purposes in lieu of a Commission review.[1573] Rather, § 150.9(e) and (f) require an exchange to provide the Commission with notice of the disposition of any application for purposes of exchange limits concurrently with the notice the exchange provides to the applicant, and the Commission will have 10 business days to make its determination for Federal position limits purposes (although, in connection with ''sudden or unforeseen increases'' in bona fide hedging needs, as discussed in connection with final § 150.3, § 150.9 requires the Commission to make its determination within two business days). Each non-enumerated bona fide hedge approved by an exchange for purposes of its own limits is separately and independently reviewed by the Commission for purposes of Federal position limits. Finally, under DCM Core Principle 5 and SEF Core Principle 6, exchanges are accountable for administering position limits in a manner that reduces the potential threat of market manipulation or congestion. The Commission believes that these

[1570] *See* CME Group at 7 (stating that the § 150.9 streamlined process would wisely leverage exchanges' long history of reviewing hedging approaches and applying those approaches to specific facts and circumstances, and would thereby advance the statutory goal of allowing commercial parties to ''hedge their legitimate anticipated business needs'' without imposing any undue burden in doing so).

[1571] For a discussion on the history of exemptions, *see* 78 FR at 75703–75706.

[1572] IFUS at 52 (stating that the ''exemption-by-exemption review of exchange decisions is a novel and significant departure from the longstanding process for the implementation of the position limits regime, imposes substantial burdens on the Commission and the exchanges, and decreases regulatory certainty for market participants regarding the status of an exemption''). *See also* ICE at 9 (questioning ''whether it is necessary for the Commission to routinely review each non-enumerated determination by the exchange'' and asserting that the § 150.9 10-day review process ''imposes unnecessary burdens and delays on market participants'').

[1573] *See supra* Section II.G. (discussing Commission determination of non-enumerated bona fide hedge applications submitted under § 150.9).

requirements, working in concert, provide sufficient protection against any potential harm to market integrity.

On the other hand, the Commission also recognizes that there could be potential costs to bona fide hedgers if, under the Final Rule, they wait up to 10 business days for the Commission to complete its review after the exchange's initial review—especially compared to the status quo for the 16 commodities that are subject to Federal position limits for the first time under the Final Rule and currently are not required to receive the Commission's prior approval. As a result, the Commission recognizes that a market participant could incur costs by waiting during the 10 business day period, or be required to enter into a less efficient hedge, which would harm liquidity.[1574] However, the Commission believes this concern is mitigated since, under final § 150.9(e)(3), a market participant in receipt of a notice of approval from the relevant exchange may elect, at its own risk, to exceed Federal position limits during the Commission's 10-day review period.[1575]

Further, final § 150.9(c)(2)(i), similar to final § 150.3, permits a market participant that demonstrates a ''sudden or unforeseen'' increase in its bona fide hedging needs to enter into a bona fide hedge without first obtaining the Commission's prior approval, as long as the market participant submits a retroactive application to the Commission within five business days of exceeding the applicable position limit.[1576] In turn, the Commission only has two business days (as opposed to the default 10 business days) to complete its review for Federal purposes. The Commission believes this retroactive application exemption benefits bona fide hedgers compared to existing § 1.47, which requires Commission prior approval, since hedgers that qualify to exercise the retroactive exemption are also likely facing more acute hedging needs—with potentially commensurate costs if required to wait. Absent the retroactive application exemption, market participants would be penalized and prevented from assuming appropriate hedges even though their hedging need arises from circumstances beyond their control. This provision also leverages, for Federal position limit purposes, existing exchange practices for granting retroactive exemptions from exchange-set limits.

On the other hand, the retroactive application exemption could harm market liquidity and bona fide hedgers since the Commission is able to require a market participant to exit its position if the exchange or the Commission does not approve of the retroactive request. Such uncertainty could cause market participants to either enter into smaller bona fide hedge positions than it otherwise would, or could cause the bona fide hedger to delay entering into its hedge, in either case potentially causing bona fide hedgers to incur increased hedging costs. However, the Commission believes this concern is partially mitigated since § 150.9 requires the purported bona fide hedger to exit its position in a ''commercially reasonable time,'' which the Commission believes should partially mitigate any costs incurred by the market participant compared to either an alternative that would require the bona fide hedger to exit its position immediately, or the status quo where the market participant is unable to enter into a hedge at all without Commission approval.

As discussed in the preamble, the Commission received and considered two comments recommending a broader retroactive application exemption: (1) CME recommended that the Commission allow retroactive applications regardless of the circumstances and impose a position limits violation on an applicant in the event the exchange denies its application; and (2) ICE recommended that the Commission permit retroactive exemptions for other types of exemptions, as well as for position limit overages that occur as a result of operational or incidental issues where the applicant did not intend to evade position limits.[1577] An expansion of this exception beyond bona fide hedge needs that arise due to sudden or unforeseen circumstances could disincentivize market participants from properly monitoring their hedging activities and filing applications in a timely manner. Because the Final Rule provides broad flexibility to market participants in the form of various exemptions, among other enhancements to the Federal position limits framework for bona fide hedges and other exemptions, the Commission determined not to expand the retroactive application provision in § 150.9(c)(2)(ii).[1578]

While existing § 1.47 does not require market participants to annually reapply for certain bona fide hedges, final § 150.9(c)(3) requires market participants to reapply at least annually with exchanges to maintain previously-approved non-enumerated bona fide hedge recognition for purposes of Federal position limits. Several commenters requested the Commission to clarify that an applicant is subject to the Commission's 10/2-day review process in § 150.9(e) only for initial applications for non-enumerated bona fide hedges, and is not subject to such review for annual renewal applications unless the facts and circumstances materially change from those presented in the initial application. As discussed in the preamble, market participants are only subject to the Commission's 10/2-day review process for their initial applications for non-enumerated bona fide hedges unless there are material changes to their initial application.

The Commission recognizes that requiring market participants to reapply annually could impose additional costs on those that are not currently required to do so. However, the Commission believes that this is consistent with industry practice with respect to exchange-set limits and that market participants are familiar with exchanges' exemption processes, which should reduce related costs.[1579] Further, the Commission believes that market integrity is strengthened by ensuring that exchanges receive updated trader information that may be relevant to the exchange's oversight.[1580] However, to the extent any of these benefits and costs reflects current market practice, they already may have been realized by exchanges and market participants.

The Commission anticipates additional costs for exchanges required to create and submit certain notifications and monthly reports. Final § 150.9(e)(1) requires exchanges to provide real-time notification to the Commission of each initial determination to recognize a bona fide hedging transaction or position.[1581]

[1574] *See* ICE at 9 (requesting that the Commission permit a ''market participant to engage in hedging up to the requested exemption limit while waiting for approval'').

[1575] *See supra* Sections II.G.7. (discussing when a person may exceed Federal position limits).

[1576] *Id.*

[1577] *See supra* Section II.G.5.iii.b. (citing CME Group at 9–10 and ICE at 10).

[1578] *See supra* Section II.G.5.ii. (discussing final § 150.9(c)(2)(i)).

[1579] *See infra* Section IV.A.6. (discussing final § 150.5).

[1580] In contrast, the Commission, unlike exchanges, has access to aggregate market data, including positions held by individual market participants, and so the Commission has determined that requiring market participants to apply annually under final § 150.3, absent any changes to their application, does not benefit market integrity to the same extent.

[1581] In addition to submitting a copy of any exchange-approved non-enumerated bona fide hedge application to the Commission under § 150.9(e), an exchange may, on a voluntary basis, send the Commission an advance courtesy copy of the non-enumerated bona fide hedge application

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Final § 150.5(a)(4) requires exchanges to provide monthly reports with necessary information in the form and manner required by the Commission. The exchange-to-Commission monthly report for contracts subject to Federal speculative position limits in final § 150.5(a)(4) further details the exchange's disposition of a market participant's application for recognition of a bona fide hedge position or spread exemption as well as the related position(s) in the underlying cash markets and swaps markets.[1582] The Commission believes that such reports provide greater transparency by facilitating the tracking of these positions by the Commission and further assist the Commission in ensuring that a market participant's activities conform to the exchange's rules and to the CEA. The combination of the ''real-time'' exchange notification and exchanges' provision of monthly reports to the Commission under final §§ 150.9(e)(1) and 150.5(a)(4), respectively, provides the Commission with enhanced surveillance tools on both a ''real-time'' and a monthly basis to ensure compliance with the requirements of the Final Rule. However, to the extent exchanges already provide similar notice to the Commission, or otherwise are required to notify the Commission under certain circumstances, such benefits and costs already may have been realized.

c. Final § 150.9(d)—Recordkeeping

Final § 150.9(d) requires exchanges to maintain complete books and records of all activities relating to the processing and disposition of any applications, including applicants' submission materials,[1583] and determination documents.[1584] The Commission believes that this benefits market integrity and Commission oversight by ensuring that pertinent records are readily accessible, as needed by the Commission. However, the Commission acknowledges that such requirements impose costs on exchanges. Nonetheless, to the extent that exchanges are already required to maintain similar records, such costs and benefits already may be realized.[1585]

d. Final § 150.9(f)—Commission Revocation of Previously Approved Applications

The Commission acknowledges that there may be costs to market participants if the Commission revokes a previously-approved non-enumerated hedge recognition for Federal purposes under final § 150.9(f). Specifically, market participants could incur costs to unwind trades or reduce positions if the Commission required the market participant to do so under final § 150.9(f)(2).

However, the potential cost to market participants is mitigated under final § 150.9(f) since the Commission provides a commercially reasonable time for a person to come back into compliance with the Federal position limits, which the Commission believes should mitigate transaction costs to exit the position and allow a market participant the opportunity to potentially execute other hedging strategies.

e. Final § 150.9—Commodity Indexes and Risk Management Exemptions

Final § 150.9(b) prohibits exchanges from recognizing as a bona fide hedge any positions that include commodity index contracts and one or more referenced contracts, including exemptions known as risk management exemptions. The Commission recognizes that this prohibition could alter trading strategies that currently use commodity index contracts as part of an entity's risk management program. Although there likely is a cost to change risk management strategies for entities that currently rely on a bona fide hedge recognition for positions in commodity index contracts, as discussed above, the Commission believes that such financial products are not substitutes for positions in a physical market and therefore do not satisfy the statutory requirement for a bona fide hedge under section 4a(c)(2) of the Act.[1586] In addition, the Commission further posits that this cost may be reduced or mitigated by the proposed increase in Federal position limit levels set forth in final § 150.2, or by the implementation of the pass-through swap provision of the bona fide hedge definition in final § 150.1.[1587]

iii. Related Changes to Part 19 of the Commission's Regulations Regarding the Provision of Information by Market Participants

Under existing regulations, the Commission relies on Form 204[1588] and Form 304,[1589] known collectively as the ''series '04'' reports, to monitor for compliance with Federal position limits. Prior to the amendments to part 19 in the Final Rule, market participants that held bona fide hedging positions in excess of Federal position limits for the nine legacy agricultural contracts had to justify such overages by filing the applicable report (Form 304 for cotton and Form 204 for the other eight legacy commodities) each month.[1590] The

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when the exchange first receives it from the applicant. For purposes of the cost-benefit considerations, we expect this to be a *de minimis* burden on an exchange that elects to provide the courtesy copy to the Commission. In addition, we expect that providing the courtesy copy could facilitate a more rapid Commission evaluation of applications submitted under § 150.9, help facilitate additional regulatory certainty for market participants, and aid the Commission in its review of applications processed under § 150.9.

[1582] In response to concerns from ICE that proposed § 150.5(a)(4) may be overly burdensome and redundant, the Commission clarified that the monthly report is required to capture only positions that are subject to Federal position limits (as opposed to other exchange-set non-enumerated exemptions), exchanges have discretion as to the best timing for submitting their reports so long as they are submitted on a monthly basis, and exchanges need not include factual and legal analysis in the monthly report. *See supra* Section II.D.3.iv. (discussing § 150.5(a)(4)).

[1583] One commenter requested that § 150.9 allow exchanges to maintain records of applicants' positions on an aggregate basis, as opposed to requiring an exchange to match applicants' bona fide hedge positions to their underlying cash positions on a one-to-one basis. NGSA at 9. In the preamble, the Commission noted that final § 150.9(d) does not prescribe the manner in which exchanges record application materials and information—it simply requires exchanges to keep a record of application materials and information collected. *See supra* Section II.G.6.iii.

[1584] Moreover, consistent with existing § 1.31, the Commission expects that these records will be readily accessible until the termination, maturity, or expiration date of the bona fide hedge recognition or exempt spread position and during the first two years of the subsequent five-year retention period.

[1585] The Commission believes that exchanges that process applications for recognition of bona fide hedging transactions or positions and/or spread exemptions currently maintain records of such applications as required pursuant to other existing Commission regulations, including existing § 1.31. The Commission, however, also believes that final § 150.9(d) may impose additional recordkeeping obligations on such exchanges. The Commission estimates that each exchange electing to administer the processes will likely spend five (5) hours annually to comply with the recordkeeping requirement of final § 150.9(d) and thus will incur minimal costs compared to the status quo. *See generally* Section IV.B. (discussing the Commission's PRA determinations).

[1586] *See supra* Section III.C.4. (discussing commodity indices); *see supra* Section IV.A.4.ii.a(1) (discussing elimination of the risk management exemption).

[1587] *See supra* Section IV.A.4.b.i(1) (discussing the pass-through swap exemption).

[1588] *CFTC Form 204: Statement of Cash Positions in Grains, Soybeans, Soybean Oil, and Soybean Meal,* available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@forms/documents/file/cftcform204.pdf* (existing Form 204).

[1589] *CFTC Form 304: Statement of Cash Positions in Cotton,* U.S. Commodity Futures Trading Commission website, available at *http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform304.pdf* (existing Form 204). Parts I and II of Form 304 address fixed-price cash positions used to justify cotton positions in excess of Federal position limits. As described below, Part III of Form 304 addresses unfixed price cotton ''on-call'' information, which is not used to justify cotton positions in excess of limits, but rather to allow the Commission to prepare its weekly cotton on-call report.

[1590] 17 CFR 19.01.

Commission has used these reports to determine whether a trader had sufficient cash positions to justify purported bona fide hedges positions using futures and options on futures positions above the applicable Federal position limits.

As discussed above, with respect to bona fide hedging positions, the Commission is adopting a streamlined approach, under final §§ 150.5 and 150.9, to cash-market reporting that reduces duplication between the Commission and the exchanges. Generally, the Commission is adopting amendments to part 19 and related provisions in part 15 that: (i) Eliminate Form 204; and (ii) amend the Form 304, in each case to remove any cash-market reporting requirements. Under the Final Rule, the Commission instead relies on cash-market reporting submitted directly to the exchanges, pursuant to final §§ 150.5 and 150.9,[1591] or requests cash-market information through a special call.[1592]

The cash-market and swap-market reporting elements of §§ 150.5 and 150.9 discussed above are largely consistent with current market practices with respect to exchange-set limits and thus should not result in any new costs.[1593] The Final Rule's elimination of Form 204 and the cash-market reporting segments of the Form 304 eliminate the reporting burden and associated costs.[1594] Market participants should realize significant benefits by being able to submit cash-market reporting to one entity—the exchanges—instead of having to comply with duplicative reporting requirements between the Commission and applicable exchange, or implement new Commission processes for reporting cash-market data for market participants who will be newly subject to position limits.[1595] Further, market participants are generally already familiar with exchange processes for reporting and recognizing bona fide hedging exemptions, which is an added benefit, especially for market participants that are newly subject to Federal position limits.

Further, these changes do not impact the Commission's existing provisions for gathering information through special calls relating to positions exceeding limits and/or to reportable positions. Accordingly, as discussed above, the Commission requires that all persons exceeding the Federal position limits set forth in final § 150.2, as well as all persons holding or controlling reportable positions pursuant to existing § 15.00(p)(1), must file any pertinent information as instructed in a special call.[1596] The Commission acknowledges that, on its face, not obtaining the cash-market position information in the form of a series '04 report could hypothetically result in some increase in speculation; however, as set out above, this risk is mitigated by the Commission's special call authority and by the requirements that the exchanges receive this information under §§ 150.5 and 150.9, as applicable. The Commission in turn would be able to receive this information from the applicable exchange. Final § 19.00(a)(3) is similar to existing § 19.00(a)(3), but requires any such person to file the information as instructed in the special call, rather than to file a series '04 report.[1597] The Commission believes that relying on its special call authority is less burdensome for market participants than the existing Forms 204 and 304 reporting costs, as special calls are discretionary requests for information whereas the series '04 reporting requirements are a monthly, recurring reporting burden for market participants. While collecting this data monthly would permit the Commission to analyze the bona fide hedges in a time series, which may be helpful in understanding trends in hedging techniques, the Commission will have access to this same data from the exchanges and could do the same analysis if required.

The Commission received one comment addressing the purported burdens that would accompany elimination of the cash-market reporting forms. Better Markets, for example, argued that eliminating these series '04 forms would impose additional reporting burdens on market participants by requiring participants to report cash-market information to multiple exchanges, and suggested that the Commission should instead ''ensure that all cash positions reporting is automated'' and ''amenable to aggregation'' in order to provide such information to the exchanges.[1598] The Commission disagrees with Better Markets' concerns about increased reporting burdens and criticism of the existing reporting infrastructure for the reasons discussed above.[1599] However, as noted above, eliminating the '04 forms will reduce burdens on market participants.[1600]

Separately, ACSA argued for the elimination of Form 304 in its entirety.[1601] ACSA asserted that Part III of Form 304, which is used to prepare the Commission's cotton on-call report, causes competitive harm to the U.S. cotton industry because the report divulges one market participant's proprietary information to another market participant and, according to ACSA, foreign mills believe that the report imposes risks and costs and are therefore more likely to purchase cotton from outside of the United States in order to avoid completing Part III of Form 304.[1602]

As discussed in detail above at Section II.H.5.iv, the Commission believes that the cotton on-call report contributes to efficient price discovery,[1603] and that continued publication of the cotton on-call report will not change the existing dynamics of the cotton market.

6. Exchange-Set Position Limits (Final § 150.5)

i. Introduction

Existing § 150.5 addresses exchange-set position limits on contracts not

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[1591] *See supra* Section II.G.ii.3. (discussing final § 150.9). As discussed above, leveraging existing exchange application processes should avoid duplicative Commission and exchange procedures and increase the speed by which position limit exemption applications are addressed. For purposes of Federal position limits, the cash-market reporting regime discussed in this section of the release only pertains to bona fide hedges, not to spread exemptions, because the Commission has not traditionally relied on cash-market information when reviewing requests for spread exemptions.

[1592] *See* final § 19.00(b).

[1593] *See, e.g.,* CME Rule 559 and ICE Rule 6.29.

[1594] Based on revised estimates of the current collections of information under existing part 19, the Commission estimates that the Final Rule reduces the collections of information in part 19 by 600 reports and by 300 annual aggregate burden hours since the Final Rule eliminates Form 204. *See infra* Section IV.B. (Paperwork Reduction Act) and 85 FR 11596, 11700 (Feb. 27, 2020).

[1595] The Commission has noted that certain commodity markets are subject to Federal position limits for the first time. In addition, the existing Form 204 would be inadequate for reporting of cash-market positions relating to certain energy contracts that are subject to Federal position limits for the first time under the Final Rule.

[1596] *See* final § 19.00(b).

[1597] 17 CFR 19.00(a)(3).

[1598] Better Markets at 59–60.

[1599] *See supra* Section H.2.iii.–iv. (discussing Better Markets' comments and the Commission's responses thereto).

[1600] *Id.*

[1601] ACSA at 9–11.

[1602] *See id.; see also* NCTO at 1–2 (arguing against publication of the cotton-on-call report and that textile mills are particularly harmed when speculators trade against the cash-market positions disclosed in the cotton on-call report because textile mills purchase the majority of their cotton on call).

[1603] *See, e.g.,* Glencore at 2. One commenter stated that it is difficult to see the benefit in limiting transparency in the cotton market and that cotton on-call report is useful and necessary because it allows market participants to identify market composition. Dunavant at 1. Similarly, another commenter stated that discontinuation of the cotton on-call report would widen the informational divide between large and small market participants while providing no benefits to the public or price discovery. Gerald Marshall at 3.

subject to Federal position limits under existing § 150.2, and sets forth different standards for DCMs to apply in setting limit levels depending on whether the DCM is establishing limit levels: (1) On an initial or subsequent basis; (2) for cash-settled or physically-settled contracts; and (3) during or outside the spot month.

In contrast, for physical commodity derivatives, final § 150.5(a) and (b): (1) Expands existing § 150.5's framework to also cover contracts subject to Federal position limits under final § 150.2; (2) simplifies the existing standards that DCMs apply when establishing exchange-set position limits; and (3) provides non-exclusive acceptable practices for compliance with those standards.[1604] Additionally, final § 150.5(d) requires DCMs to adopt aggregation rules that conform to existing § 150.4.[1605]

As a general matter, one factor (in addition to more specific factors discussed throughout this Final Rule's cost-benefit considerations) affecting the costs and benefits of the Federal position limits established by this Final Rule is the fact that exchanges, for many years, have had in place spot month position limits for all of the core referenced contracts and non-spot month limits for all of the nine legacy agricultural contracts.[1606] Under final § 150.5(a) and (b), exchanges will be required to adopt exchange-set position limits both (i) for contracts subject to Federal position limits and (ii) during the spot month for physical commodity contracts not subject to Federal position limits. Exchanges also will be required to adopt position limits or position accountability outside the spot month for those physical commodity contracts not subject to non-spot month Federal position limits, although the specifics may change with evolving market conditions and regulatory requirements.[1607] Exchange-set position limits, broadly speaking, have much the same effect as Federal position limits since both restrict the size of speculative positions market participants may hold.[1608] Moreover, there is significant interaction between Federal position limits and exchange-set position limits. In particular, CEA section 5(d)(5)(B) provides that, for contracts where the Commission has established a position limit, exchange-set position limits must be set at a level no higher than the Federal limit.[1609] In addition, where both the Commission and an exchange have position limits in place for a contract, final § 150.5(a)(2) puts constraints on exemptions from the exchange-set limit that are tied to the Commission's position limits in ways described in detail in Section II.D.3, above. As a result, the costs and benefits considered by the Commission, to a considerable extent, are jointly attributable to Federal and exchange-set position limits. The Commission does not have information that would permit a quantitative evaluation of the extent to which this is true. Qualitatively, where position limits overlap, a greater attribution of costs and benefits to the Federal limits appears appropriate to the extent that Federal limits trigger exchange-set limits pursuant to CEA section 5(d)(5)(B). However, this is less true if an exchange elects to impose position limits that are more stringent than the Federal limits for particular contracts.[1610]

Despite the overlap in the effects of Federal and exchange-set position limits, there are a number of distinctive features of Federal position limits. Most importantly, as noted above, for contracts where Federal position limits are established, they establish a ceiling on positions that can be held, both as a matter of law under CEA section 5(d)(5)(B) and as a matter of practicality since market participants must comply with Federal limits no matter what the level of exchange-set limits. In addition, while exchanges can share information to some extent, the Commission regulates trading on all exchanges and therefore is generally in a position to better monitor and enforce compliance with position limits across more than one exchange, for example in connection with positions in a core referenced futures contract in one exchange and a linked cash-settled look-alike referenced contract on another exchange.

There are other differences as well. Even where the Commission and an exchange set the same numerical position limit for a contract, final § 150.5(a)(2) allows for the possibility that there may be some differences in the exemptions allowed.[1611] And Federal position limits established pursuant to paragraph CEA section 4a(a)(2) are subject to a statutory requirement to achieve, to the maximum extent practicable, the multiple policy objectives set forth in subparagraph 4a(a)(3)(B) of the CEA. By contrast, exchanges have a narrower statutory mandate to adopt position limits or position accountability to ''reduce the potential threat of market manipulation or congestion.'' [1612] Finally, Federal position limits create compliance costs beyond those attributable to exchange-set position limits since market participants will need to establish systems to ensure compliance with Federal requirements. However, some compliance costs, for example keeping track of position levels, may be common to both forms of position limits.[1613]

Exchange-set position limits for contracts and commodities not subject to Federal position limits also affect the costs and benefits of Federal position limits, and, in particular, of the Commission's finding that position limits are necessary only for the 25 CRFCs and contracts linked to them.[1614]

[1604] *See* 17 CFR 150.2. Existing § 150.5 addresses only contracts *not* subject to Federal position limits under existing § 150.2 (aside from certain major foreign currency contracts). To avoid confusion created by the parallel Federal and exchange-set position limit frameworks, the Commission clarifies that final § 150.5 deals solely with exchange-set position limits and exemptions therefrom, whereas final § 150.9 deals solely with the process for purposes of Federal position limits.

[1605] *See* 17 CFR 150.4.

[1606] *See* Section II.D, *supra,* CME Group, Position Limits, *https://www.cmegroup.com/market-regulation/position-limits.html*; IFUS, Market Resources, Position Limits & Reporting, *https://www.theice.com/futures-us/market-resources*; CEA section 5(d)(5)(A) (requiring position limits or accountability); existing § 150.5; final § 150.5(a). This is generally true with the exception of ICE Sugar No. 16, which is only subject to exchange-set single month and all-months-combined position limits. However, the single month position limit effectively acts as the spot month position limits for this contract.

[1607] *See supra* Section II.D; *see also* CEA section 5(d)(5); final § 150.5(a).

[1608] *See* ICE Futures U.S. at 3 (''There is no apparent benefit provided by adding a Federal position limit and guidance'' to ICE's procedures for position limits and exemptions to such limits.)

[1609] *See also* final § 150.5(a)(1).

[1610] For example, exchanges sometimes reduce position limit levels in response to particular market conditions. *See, e.g.,* ICE Futures U.S. at 3, n.3 (describing a reduction in spot month position limit for cocoa in March of 2020 in response to potential impact of disruptions to normal business conditions on ability of market participants to submit cocoa for grading). In addition, an exchange could routinely set a lower position limit based on its judgment of what is necessary to prevent manipulation or other problems or based on the preferences of important participants in its market.

[1611] *See supra* Section II.D.

[1612] CEA section 5(d)(5)(A), 7 U.S.C. 7(d)(5)(A). However, the statutory policy objectives for Federal position limits may indirectly affect exchange-set limits where Federal limits set a ceiling for exchange-set limits pursuant to CEA section 5(d)(5)(B), 7 U.S.C. 7(d)(5)(B).

[1613] *See supra* Section III.B.2.c.ii; *see also* COPE at 3 (rule does not require market participants to create recordkeeping system to track data solely for purpose of filing forms with the Commission although some additions to existing tracking effort will be required).

[1614] For information on exchange-set position limits and position accountability for contracts and commodities not subject to Federal position limits, *see, e.g.,* CME Group, Position Limits, *https://www.cmegroup.com/market-regulation/position-limits.html*; IFUS, Market Resources, Position Limits & Reporting, *https://www.theice.com/futures-us/market-resources*; CEA section 5(d)(5)(A) (requiring position limits or accountability); existing § 150.5; final § 150.5(b).

The Commission also has concluded that the existence of exchange-set limits and position accountability (discussed further below) mitigates the effects of not establishing Federal position limits for other commodity derivatives contracts.[1615]

ii. Physical Commodity Derivative Contracts Subject to Federal Position Limits Under the Final Rule (Final § 150.5(a))

a. Exchange-Set Position Limits and Related Exemption Process

For contracts subject to Federal position limits under the Final Rule, final § 150.5(a)(1) requires DCMs to establish exchange-set limits no higher than the level set by the Commission. This is not a new requirement, and merely restates the applicable requirement in DCM Core Principle 5.[1616]

Final § 150.5(a)(2) authorizes DCMs to grant exemptions from such limits and is generally consistent with current industry practice. The Commission has determined that codifying such practice establishes important, minimum standards needed for DCMs to administer—and the Commission to oversee—an effective and efficient program for granting exemptions to exchange-set limits in a manner that does not undermine the Federal position limits framework.[1617]

In particular, § 150.5(a)(2) protects market integrity and prevents exchange-granted exemptions from undermining the Federal position limits framework by requiring DCMs to either conform their exemptions to the type the Commission would grant under final §§ 150.3 or 150.9, or to cap the exemption at the applicable Federal position limit level and to assess whether an exemption request would result in a position that is ''not in accord with sound commercial practices'' or would ''exceed an amount that may be established or liquidated in an orderly fashion in that market.''

Absent other factors, this element of the Final Rule could potentially increase compliance costs for traders since each DCM could establish different exemption-related rules and practices. However, to the extent that rules and procedures currently differ across exchanges, any compliance-related costs and benefits for traders may already be realized. Similarly, absent other provisions, a DCM could hypothetically seek a competitive advantage by offering excessively permissive exemptions, which could allow certain market participants to utilize exemptions in establishing sufficiently large positions to engage in excessive speculation and to manipulate market prices. However, final § 150.5(a)(2) mitigates these risks by requiring that exemptions that do not conform to the types the Commission may grant under final § 150.3 cannot exceed final § 150.2's applicable Federal position limit unless the Commission has first approved such exemption. Moreover, before a DCM could permit a new exemption category, final § 150.5(e) requires a DCM to submit rules to the Commission allowing for such exemptions, allowing the Commission to ensure that the proposed exemption type would be consistent with applicable requirements, including with the requirement that any resulting positions would be ''in accord with sound commercial practices'' and may be ''established and liquidated in an orderly fashion.''

Final § 150.5(a)(2) additionally requires traders to re-apply to the exchange at least annually for the exchange-level exemption. The Commission recognizes that requiring traders to re-apply annually could impose additional costs on traders that are not currently required to do so. However, the Commission believes this is industry practice among existing market participants, who are likely already familiar with DCMs' exemption processes.[1618] This familiarity should reduce related costs, and the Final Rule should strengthen market integrity by ensuring that DCMs receive updated information related to a particular exemption.

The Commission received various comments pertaining to § 150.5(a)(2). CMC requested that the Commission clarify that each exchange has discretion to determine what information is required of applicants when applying for a spread exemption from exchange-set limits.[1619] As noted in the 2020 NRPM, exchanges have discretion to determine what information is required of applicants applying for a spread exemption, or any other exemption from exchange-set limits, except for instances where the exchange is processing a non-enumerated bona fide hedge applications in accordance with the applications requirements of § 150.9.[1620] This flexibility permits exchanges to further mitigate costs and/or burdens associated with the exemption process by adopting protocols that leverage existing processes with which their participants are already familiar.

CMC also requested that the Commission clarify that an exchange is not responsible for monitoring the use of spread positions for purposes of Federal position limits.[1621] Exchanges are required to administer and monitor their position limits and any exemptions therefrom in accordance with DCM Core Principle 5 and SEF Core Principle 6, as applicable.[1622] For an inter-market spread exemption where part of the spread position is executed on another exchange or over the counter, exchanges are encouraged to request information from the spread exemption applicant about the entire composition of the spread position.[1623] Even though an exchange is not responsible for monitoring a trader's position on other exchanges, it is beneficial to the exchange to obtain this information so it is best informed about whether to grant the exemption. The Commission notes while an exchange may incur costs through requesting information from (or providing information to) another exchange, these costs already may have been realized by exchanges to the extent they reflect existing market practice. Similarly, such information sharing benefits market integrity, but such benefits likewise already may have been realized.

Final § 150.5(a)(4) requires a DCM to provide the Commission with certain monthly reports regarding the disposition of any exemption

[1615] *See infra* Section IV.A.6.

[1616] *See* Commission regulation § 38.300 (restating DCMs' statutory obligations under the CEA 5(d)(5), 7 U.S.C. 7(d)(5)). Accordingly, the Commission will not discuss any costs or benefits related to this proposed change since it merely reflects an existing regulatory and statutory obligation.

[1617] This standard is substantively consistent with current market practice. *See, e.g.,* CME Rule 559 (providing that CME will consider, among other things, the ''applicant's business needs and financial status, as well as whether the positions can be established and liquidated in an orderly manner . . .'') and ICE Rule 6.29 (requiring a statement that the applicant's ''positions will be initiated and liquidated in an orderly manner . . .''). This standard is also substantively similar to existing § 150.5's standard and is not intended to be materially different. *See* existing § 150.5(d)(1) (an exemption may be limited if it would not be ''in accord with sound commercial practices or exceed an amount which may be established and liquidated in orderly fashion.'') 17 CFR 150.5(d)(1).

[1618] As noted above, the Commission believes this requirement is consistent with current market practice. *See, e.g.,* CME Rule 559 and ICE Rule 6.29. While ICE Rule 6.29 merely requires a trader to ''submit to [ICE Exchange] a written request'' without specifying how often a trader must reapply, the Commission understands from informal discussions between Commission staff and ICE that traders must generally submit annual updates.

[1619] CMC at 7.

[1620] 85 FR 11644 (explaining that exchanges have flexibility to establish the application process as they see fit).

[1621] CMC at 7.

[1622] *See supra* Section II.D.3.ii.c.

[1623] *See id.*

application, including the recognition of any position as a bona fide hedge, the exemption of any spread transaction or other position, the revocation or modification or previously granted recognitions or exemptions, or the rejection of any application, as well as certain related information similar to the information that applicants must provide the Commission under final § 150.3 or an exchange under final § 150.9, including underlying cash-market and swap-market information related to bona fide hedge positions. The Commission generally recognizes that this monthly reporting requirement could impose additional costs on exchanges, although the Commission also has determined that this requirement would assist with the Commission's oversight functions and therefore benefit market integrity. The Commission discusses this proposed requirement in greater detail in its discussion of final § 150.9.[1624]

Further, while existing § 150.5(d) does not explicitly address whether traders should request an exemption prior to taking on its position, final § 150.5(a)(2), in contrast, explicitly authorizes (but does not require) DCMs to permit traders to file a retroactive exemption request due to ''demonstrated sudden or unforeseen increases in its bona fide hedging needs,'' but only within five business days after the trade and as long as the trader provides a supporting explanation.[1625] As noted above, these provisions are largely consistent with existing market practice, and to this extent, the benefits and costs already may have been realized by DCMs and market participants.

b. Pre-Existing Positions

Final § 150.5(a)(3) requires DCMs to impose exchange-set position limits on ''pre-existing positions,'' other than pre-enactment swaps and transition period swaps.[1626] The Commission believes that this approach benefits market integrity since pre-existing positions that exceed spot-month limits could result in market or price disruptions as positions are rolled into the spot month.[1627]

The Commission is alleviating the burden associated with final 150.5(a)(3) by delaying the compliance date to allow exchanges sufficient time to implement the Final Rule.

iii. Physical Commodity Derivative Contracts Not Subject to Federal Position Limits Under the Final Rule (Final § 150.5(b))

a. Spot Month Limits and Related Acceptable Practices

For cash-settled contracts during the spot month, existing § 150.5 sets forth the following qualitative standard: exchange-set limits should be ''no greater than necessary to minimize the potential for market manipulation or distortion of the contract's or underling commodity's price.'' However, for physically-settled contracts, existing § 150.5 provides a one-size-fits-all parameter that exchange limits must be no greater than 25% of EDS.

In contrast, the standard for setting spot month limit levels for physical commodity derivative contracts not subject to Federal position limits set forth in final § 150.5(b)(1) does not distinguish between cash-settled and physically-settled contracts, and instead requires DCMs to apply the existing § 150.5 qualitative standard to both.[1628] The Commission also provides a related, non-exclusive acceptable practice that deems exchange-set position limits for both cash-settled and physically-settled contracts subject to § 150.5(b) to be in compliance if the limits are no higher than 25% of the spot-month EDS.

Applying the existing § 150.5 qualitative standard and non-exclusive acceptable practice in final 150.5(b)(1), rather than a one-size-fits-all regulation, to both cash-settled and physically-settled contracts during the spot month is expected to enhance market integrity by permitting a DCM to establish a more tailored, product-specific approach by applying other parameters that may take into account the unique liquidity and other characteristics of the particular market and contract, which is not possible under the one-size-fits-all 25% of EDS parameter set forth in existing § 150.5. While the Commission recognizes that the existing 25% of EDS parameter has generally worked well, the Commission also recognizes that there may be circumstances where other parameters may be preferable and just as effective, if not more, including, for example, if the contract is cash-settled or does not have a reasonably accurate measurable deliverable supply, or if the DCM can demonstrate that a different parameter would better promote market integrity or efficiency for a particular contract or market.

On the other hand, the Commission recognizes that final § 150.5(b)(1) could adversely affect market integrity by theoretically allowing DCMs to establish excessively high position limits in order to gain a competitive advantage, which also could harm the integrity of other markets that offer similar products.[1629] However, the Commission believes these potential risks are mitigated since (i) final § 150.5(e) requires DCMs to submit proposed position limits to the Commission, which will review those rules for compliance with § 150.5(b), including to ensure that the proposed limits are ''in accord with sound commercial practices'' and that they may be ''established and liquidated in an orderly fashion''; and (ii) final § 150.5(b)(3) requires DCMs to adopt position limits for any new contract at a ''comparable'' level to existing contracts that are substantially similar (*i.e.,* ''look-alike contracts'') on other exchanges unless the exchange listing the new contracts demonstrates to the satisfaction of Commission staff, in their product filing with the Commission, how its levels comply with the requirements of § 150.5(b)(1) and (2). Moreover, this latter requirement also may reduce the amount of time and effort needed for the DCM and Commission staff to assess proposed limits for any new contract that competes with another DCM's existing contract.

[1624] *See supra* Section IV.A.5.b.ii. (discussing monthly exchange-to-Commission report in final § 150.5(a)).

[1625] Certain exchanges currently allow for the submission of exemption requests up to five business days after the trader established the position that exceeded a limit in certain circumstances. *See, e.g.,* CME Rule 559 and ICE's ''Guidance on Position Limits'' (Mar. 2018).

[1626] Final § 150.1 defines ''pre-existing position'' to mean ''any position in a commodity derivative contract acquired in good faith prior to the effective date'' of any applicable position limit.

[1627] The Commission is particularly concerned about protecting the spot month in physical-delivery futures from corners and squeezes.

[1628] Final § 150.5(b)(1) requires DCMs to establish position limits for spot-month contracts at a level that is ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' Existing § 150.5 also distinguishes between ''levels at designation'' and ''adjustments to levels,'' although each category similarly incorporates the qualitative standard for cash-settled contracts and the 25% metric for physically-settled contracts. Final § 150.5(b) eliminates this distinction. The Commission intends the final § 150.5(b)(1) standard to be substantively the same as the existing § 150.5 standard for cash-settled contracts, except that under final § 150.5(b)(1), the standard applies to physically-settled contracts.

[1629] Since the existing § 150.5 framework already applies the proposed qualitative standard to cash-settled spot-month contracts, any new risks resulting from the proposed standard would occur only with respect to physically-settled contracts, which are currently subject to the one-size-fits-all 25% EDS parameter under the existing framework.

b. Non-Spot Month Limits/Accountability Levels and Related Acceptable Practices

Existing § 150.5 provides one-size-fits-all levels for non-spot month contracts and allows for position accountability after a contract's initial listing only for those contracts that satisfy certain trading thresholds.[1630] In contrast, for contracts outside the spot-month, final § 150.5(b)(2) requires DCMs to establish either position limits or position accountability levels that satisfy the same proposed qualitative standard discussed above for spot-month contracts.[1631] For DCMs that establish position limits, final Appendix F to part 150 sets forth related acceptable practices that provide non-exclusive parameters that are generally consistent with existing § 150.5's parameters for non-spot month contracts.[1632] For DCMs that establish position accountability, § 150.1's definition of ''position accountability'' provides that a trader must reduce its position upon a DCM's request, which is generally consistent with existing § 150.5's framework, but does not distinguish between trading volume or contract type, like existing § 150.5. While DCMs are provided the ability to decide whether to use limit levels or accountability levels for any such contract, under either approach, the DCM has to set a level that is ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.''

One commenter alternatively recommended that § 150.5(b)(2) should require exchanges to set position limits *and* position accountability levels outside of the spot month at levels that reduce the potential threat of market manipulation or price distortion and the potential for sudden or unreasonable fluctuations or unwarranted changes.[1633] For the reasons more fully discussed below, the Commission believes that outside the spot-month, either exchange-set position limits or exchange-set accountability levels are sufficient for exchanges to reduce these potential threats.

Proposed § 150.5(b)(2) benefits market efficiency by authorizing DCMs to determine whether position limits or accountability is best-suited outside of the spot month based on the DCM's knowledge of its markets. For example, position accountability could improve liquidity compared to position limits since liquidity providers may be more willing or able to participate in markets that do not have hard limits. As discussed above, DCMs are well-positioned to understand their respective markets, and best practices in one market may differ in another market, including due to different market participants or liquidity characteristics of the underlying commodities. For DCMs that choose to establish position limits, the Commission believes that applying the final § 150.5 qualitative standard to contracts outside the spot-month benefits market integrity by permitting a DCM to establish a more tailored, product-specific approach by applying other tools that may take into account the unique liquidity and other characteristics of the particular market and contract, which is not possible under the existing § 150.5 specific parameters for non-spot month contracts. While the Commission recognizes that the existing parameters may have been well-suited to market dynamics when initially promulgated, the Commission also recognizes that open interest may have changed for certain contracts subject to final § 150.5(b), and open interest will likely continue to change in the future (*e.g.,* as new contracts may be introduced and as supply and/or demand may change for underlying commodities). In cases where open interest has not increased, the exchange may not need to change existing limit levels. But, for contracts where open interest has increased, the exchange is able to raise its limits to facilitate liquidity consistent with an orderly market. However, the Commission reiterates that the specific parameters in the acceptable practices set forth in final Appendix F to part 150 are merely non-exclusive examples, and an exchange is be able to establish higher (or lower) limits, provided the exchange submits its proposed limits to the Commission under final § 150.5(e) and explains how its proposed limits satisfy the qualitative standard and are otherwise consistent with all applicable requirements.

The Commission, however, recognizes that final § 150.5(b)(2) could adversely affect market integrity by potentially allowing DCMs to establish position accountability levels rather than position limits, regardless of whether the contract exceeds the volume-based thresholds provided in existing § 150.5. However, final § 150.5(e) requires DCMs to submit any proposed position accountability rules to the Commission for review, and the Commission will determine on a case-by-case basis whether such rules satisfy regulatory requirements, including the proposed qualitative standard. Similarly, in order to gain a competitive advantage, DCMs could theoretically set excessively high accountability (or position limit) levels, which also could potentially adversely affect markets with similar products. However, the Commission believes these risks are mitigated since (i) final § 150.5(e) requires DCMs to submit proposed position accountability (or limits) to the Commission, which will review those rules for compliance with § 150.5(b), including to ensure that the exchange's proposed accountability levels (or limits) are ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion'' of the contract or underlying commodity; and (ii) final § 150.5(b)(3) requires DCMs to adopt position limits for any new contract at a ''comparable'' level to existing contracts that are substantially similar on other exchanges unless the exchange listing the new

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[1630] As noted above, in establishing the specific metric, existing § 150.5 distinguishes between ''levels at designation'' and ''adjustments to [subsequent] levels.'' Final § 150.5(b)(2) eliminates this distinction and applies the qualitative standard for all non-spot month position limit and accountability levels.

[1631] DCM Core Principle 5 requires DCMs to establish either position limits or accountability for speculators. *See* Commission regulation § 38.300 (restating DCMs' statutory obligations under the CEA 5(d)(5)). Accordingly, inasmuch as final § 150.5(b)(2) requires DCMs to establish position limits or accountability, the Final Rule does not represent a change to the status quo baseline requirements.

[1632] Specifically, the acceptable practices in final Appendix F to part 150 provides that DCMs are deemed to comply with final § 150.5(b)(2)(i) qualitative standard if they establish non-spot limit levels no greater than any one of the following: (1) Based on the average of historical positions sizes held by speculative traders in the contract as a percentage of open interest in that contract; (2) the spot month limit level for that contract; (3) 5,000 contracts (scaled up proportionally to the ratio of the notional quantity per contract to the typical cash-market transaction if the notional quantity per contract is smaller than the typical cash-market transaction, or scaled down proportionally if the notional quantity per contract is larger than the typical cash-market transaction); or (4) 10% of open interest in that contract for the most recent calendar year up to 50,000 contracts, with a marginal increase of 2.5% of open interest thereafter.

These parameters have largely appeared in existing § 150.5 for many years in connection with non-spot month limits, either for levels at designation, or for subsequent levels, with certain revisions. For example, while existing § 150.5(b)(3) has provided a limit of 5,000 contracts for energy products, existing § 150.5(b)(2) provides a limit of 1,000 contracts for physical commodities other than energy products. The acceptable practice parameters in final Appendix F create a uniform standard of 5,000 contracts for all physical commodities. The Commission expects that the 5,000 contract acceptable practice, for example, is a useful rule of thumb for exchanges because it allows them to establish limits and demonstrate compliance with Commission regulations in a relatively efficient manner, particularly for new contracts that have yet to establish open interest. The spot month limit level under item (2) above is a new parameter for non-spot month contracts.

[1633] Better Markets at 47–48.

contracts demonstrates to the satisfaction of Commission staff, in their product filing with the Commission, how its levels comply with the requirements of § 150.5(b)(1) and (2).

c. Exchange-Set Limits on Economically Equivalent Swaps

As discussed above, swaps that qualify as ''economically equivalent swaps'' are subject to the Federal position limits framework. However, the Commission has determined to permit exchanges to delay enforcing their respective exchange-set position limits on economically equivalent swaps at this time. Specifically, with respect to exchange-set position limits on swaps, the Commission notes that in two years (which generally coincides with the compliance date for economically equivalent swaps), the Commission will reevaluate the ability of exchanges to establish and implement appropriate surveillance mechanisms to implement DCM Core Principle 5 and SEF Core Principle 6. However, after the swap compliance period (January 1, 2023), the Commission underscores that it will enforce Federal position limits in connection with OTC swaps.

Nonetheless, the Commission's determination to permit exchanges to delay implementing exchange-set position limits on swaps could incentivize market participants to leave the futures markets and instead transact in economically equivalent swaps, which could reduce liquidity in the futures and related options markets, which could also increase transaction and hedging costs. Delaying position limits on swaps therefore could harm market participants, especially end-users that do not transact in swaps, if many participants were to shift trading from the futures to the swaps markets. In turn, end-users could pass on some of these increased costs to the public at large.[1634] However, the Commission believes that these concerns are mitigated to the extent the Commission still oversees and enforces Federal position limits even if the exchanges are not be required to do so.

iv. Position Aggregation

Final § 150.5(d) requires all DCMs that list physical commodity derivative contracts to apply aggregation rules that conform to existing § 150.4, regardless of whether the contract is subject to Federal position limits under § 150.2.[1635] The Commission believes final § 150.5(d) benefits market integrity in several ways. First, a harmonized approach to aggregation across exchanges that list physical commodity derivative contracts prevents confusion that could result from divergent standards between Federal position limits under § 150.2 and exchange-set limits under § 150.5(b). As a result, final § 150.5(d) provides uniformity, consistency, and reduced administrative burdens for traders who are active on multiple trading venues and/or trade similar physical contracts, regardless of whether the contracts are subject to § 150.2's Federal position limits. Second, a harmonized aggregation policy eliminates the potential for DCMs to use excessively permissive aggregation policies as a competitive advantage, which would impair the effectiveness of the Commission's aggregation policy and position limits framework. Third, since, for contracts subject to Federal position limits, final § 150.5(a) requires DCMs to set position limits at a level not higher than that set by the Commission under final § 150.2, differing aggregation standards could effectively lead to an exchange-set limit that is higher than that set by the Commission. Accordingly, harmonizing aggregation standards reinforces the efficacy and intended purpose of final §§ 150.2 and 150.5 and existing § 150.4 by eliminating DCMs' ability to circumvent the applicable Federal aggregation and position limits rules.

To the extent a DCM currently is not applying the Federal aggregation rules in existing § 150.4, or similar exchange-based rules, final § 150.5(d) could impose costs with respect to market participants trading referenced contracts for the 16 new commodities that are subject to Federal position limits for the first time. Market participants are required to update their trading and compliance systems to ensure they comply with the new aggregation rules.

7. Section 15(a) Factors[1636]

i. Protection of Market Participants and the Public

A chief purpose of speculative position limits is to preserve the integrity of derivatives markets for the benefit of commercial interests, producers, and other end- users that use these markets to hedge risk and of consumers that consume the underlying commodities. As discussed above, the Commission believes that the final position limits regime operates to deter excessive speculation and manipulation, such as corners and squeezes, which might impair the contract's price discovery function and liquidity for bona fide hedgers—and ultimately, protects the integrity and utility of the commodity markets for the benefit of both producers and consumers.

The Commission is including 25 core referenced futures contracts, as well as any referenced contracts directly or indirectly linked thereto, within the final Federal position limits framework. In selecting the 25 core referenced futures contracts, the Commission analyzed (1) the importance of these contracts to the operation of the underlying cash commodity market, including that they require physical delivery; and (2) the importance of the underlying commodity to the economy as a whole. As discussed above, the Commission is of the view that evidence demonstrating one or both of these factors is sufficient to establish that position limits are necessary because each factor relates to the statutory objective identified in CEA section 4a(a)(1).[1637]

Of particular importance in the Commission's position limit regime are the limits on the spot month, because the Commission believes that deterring and preventing manipulative behaviors, such as corners and squeezes, is more urgent during this period. The spot month position limits are designed, among other things, to deter and prevent corners and squeezes, as spot months are more susceptible to such activities

[1634] On the other hand, the Commission has not seen any shifting of liquidity to the swaps markets—or general attempts at market manipulation or evasion of Federal position limits—with respect to the nine legacy core referenced futures contracts, even though swaps currently are not subject to Federal or exchange position limits.

[1635] The Commission adopted final aggregation rules in 2016 under existing § 150.4, which applies to contracts subject to Federal position limits under § 150.2. *See* Final Aggregation Rulemaking, 81 FR at 91454. Under the Final Aggregation Rulemaking, unless an exemption applies, a person's positions must be aggregated with positions for which the person controls trading or for which the person holds a 10% or greater ownership interest. The Division of Market Oversight has issued time-limited no-action relief from some of the aggregation requirements contained in that rulemaking. *See* CFTC Letter No. 19–19 (July 31, 2019), available at *https://www.cftc.gov/csl/19-19/download.* Commission regulation § 150.4(b) sets forth several permissible exemptions from aggregation. The Commission, outside the Final Rule, will separately consider comments related to the Final Aggregation Rulemaking and codification of NAL 19–19.

[1636] The discussion here covers the Final Rule amendments that the Commission has identified as being relevant to the areas set out in section 15(a) of the CEA: (i) Protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. For amendments that are not specifically addressed, the Commission has not identified any effects.

[1637] *See supra* Section III.C. (discussing the necessity findings as to the 25 core referenced futures contacts).

than non-spot months, as well as promote a more orderly liquidation process at expiration.[1638] By restricting derivatives positions to a proportion of the deliverable supply of the commodity, the spot month position limits reduce the possibility that a market participant can use derivatives to affect the price of the cash commodity (and vice versa).[1639] Limiting a speculative position based on a percentage of deliverable supply also restricts a speculative trader's ability to establish a leveraged position in cash-settled derivative contracts, diminishing that trader's incentive to manipulate the cash settlement price. As the Commission has determined in the preamble, excessive speculation or manipulation during the spot month may cause sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.[1640] In this way, the Commission believes that the limits in the Final Rule benefit market participants that seek to hedge the spot price of a commodity at expiration, and benefit consumers who are able to purchase underlying commodities for which prices are determined by fundamentals of supply and demand, rather than influenced by excessive speculation, manipulation, or other undue and unnecessary burdens on interstate commerce.

The Commission believes that the Final Rule's Commission and exchange-centric processes for granting exemptions from Federal position limits, including non-enumerated bona fide hedging recognitions, help ensure the hedging utility of the derivatives markets for commercial end-users.

First, the Final Rule allows exchanges to leverage existing processes and their knowledge of their own markets, including participant positions and activities, along with their knowledge of the underlying commodity cash market, which should allow for more timely review of exemption applications than if the Commission were to conduct such initial application reviews. This benefits the public by allowing producers and end-users of a commodity to more efficiently and predictably hedge their price risks, thus controlling costs that might be passed on to the public.

Second, exchanges may be better-suited than the Commission to leverage their knowledge of their own markets, including participant positions and activities, along with their knowledge of the underlying commodity cash market, in order to recognize whether an applicant qualifies for an exemption and what the level for that exemption should be. This benefits market participants and the public by helping assure that exemption levels are set in a manner that meets the risk management needs of the applicant without negatively impacting the derivative and cash market for that commodity.

Third, allowing for self-effectuating spread exemptions for purposes of Federal position limits could improve liquidity in all months for a listed contract or across commodities, benefitting hedgers by providing tighter bid-ask spreads for out-right trades. Furthermore, traders using spreads can arbitrage price discrepancies between calendar months within the same commodity contract or price discrepancies between commodities, helping ensure that futures prices more accurately reflect the underlying market fundamentals for a commodity.

Lastly, the Commission will review each application for bona fide hedge recognitions (other than those bona fide hedges that would be self-effectuating under the Final Rule), but the Final Rule allows the Commission to also leverage the exchange's knowledge and experience of its own markets and market participants discussed above for market participants that applies to the Commission by first submitting the application for a non-enumerated bona fide hedge exemption to the exchange for purposed of exchange-set limits under final § 150.9. Similarly, the Commission will review each application for a spread exemption that is not covered by the spread transaction definition and therefore is not self-effectuating for purposes of Federal position limits.

The Commission also understands that there are costs to market participants and the public to setting position limit levels that are too high or too low. If the levels are set too high, there's greater risk of excessive speculation, which may harm market participants and the public. Further, to the extent that the limits are set at such a level that even without these proposed exemptions, the probability of nearing or breaching such levels may be negligible for most market participants, benefits associated with such exemptions may be reduced.

Conversely, if the limits are set too low, transaction costs for market participants who are near or above the limit will rise as they transact in other instruments with higher transaction costs to obtain their desired level of speculative positions. Additionally, limits that are too low could incentivize speculators to leave the market and be unavailable to provide liquidity for hedgers, resulting in ''choppy'' prices. It is also possible for limits that are set too low to harm market efficiency because the views of some speculators might not be reflected fully in the price formation process.

In setting the final Federal position limit levels, the Commission considered these factors in order to implement to the maximum extent practicable, as it finds necessary in its discretion, to apply the position limits framework articulated in CEA section 4a(a) to set Federal position limits to protect market integrity and price discovery, thereby benefiting market participants and the public.

ii. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

Position limits help to prevent market manipulation or excessive speculation that may unduly influence prices at the expense of the efficiency and integrity of markets. The Final Rule's expansion of the Federal position limits regime to 25 core referenced futures contracts (*e.g.,* the existing nine legacy agricultural contracts and the 16 new contracts) enhances the buffer against excessive speculation historically afforded exclusively to the nine legacy agricultural contracts, improving the financial integrity of those markets. Moreover, the limits in final § 150.2 may promote market competitiveness by preventing a trader from gaining too much market power in the respective markets.

Also, in the absence of position limits, market participants may be deterred from participating in a particular market if the market participants perceive that there is a participant with an unusually large speculative position exerting what they believe is unreasonable market power. A lack of participation may harm liquidity, and consequently, may harm market efficiency.

On the other hand, traders who find position limits overly constraining may seek to trade in substitute instruments in order to meet their demand for speculative instruments. The substitute instruments could be futures contracts or swaps that are similar to or highly correlated with their corresponding core referenced futures contracts (but not otherwise deemed to be referenced contracts). They could also be trade options or other forward contracts. These traders may also decide to not trade beyond the Federal speculative position limit.

[1638] *See supra* Sections II.A.19 and II.B.3.iii.

[1639] *See supra* Section II.B.3.iii.

[1640] *See supra* Section III.C. (discussing the necessity finding).

Trading in substitute instruments may be less effective than trading in referenced contracts. For example, the trading of futures contracts has strong safeguards since futures contracts are by definition exchange-traded, which includes (1) the posting of initial and variation margin and (2) credit reviews and guarantees by futures commission merchants. These safeguards protect the integrity of futures markets but are generally not required for forward transactions, which are generally not traded on exchanges or centrally cleared. Forward contract nonperformance may result in dislocations in the physical marketing channel, which may lead to higher prices for consumers and end users and otherwise impose burdens on commerce. Further, with the use of substitute instruments, futures prices might not fully reflect all the speculative demand to hold the futures contract, because substitute instruments may not fully influence prices the same way that trading directly in the futures contract does. Thus, market efficiency and price discovery might be harmed, too.

The Commission believes that focusing on the 25 core referenced futures contracts (included any referenced contracts linked thereto), which generally have high levels of open interest and trading volume and/or have been subject to existing Federal position limits for many years, should, in general, be less disruptive for the respective derivatives markets, which in turn may reduce the potential for disruption for the price discovery function of the underlying commodity markets as compared to including less liquid contracts (only to the extent that the Commission is able to make the requisite necessity finding for such contracts).

Finally, the Commission believes that eliminating certain risk management positions as bona fide hedges, coupled with the increased non-spot month limit levels for most of the nine legacy agricultural contracts, will foster competition among swap dealers by subjecting all market participants, including all swap dealers, to the same non-spot month limit rather than limited staff-granted risk management exemptions. Accommodating risk management activity by additional entities with higher position limit levels may also help lessen the concentration risk potentially posed by a few commodity index traders holding exemptions that are not available to competing market participants.

iii. Price Discovery

As discussed above, market manipulation may result in artificial or distorted prices.[1641] Similarly, excessive speculation may result in ‘‘sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity.’’ [1642] Position limits may help to prevent the price discovery function of the underlying commodity markets from being disrupted.[1643] Also, in the absence of position limits, market participants might elect to trade less as a result of a perception that the market pricing does not reflect market forces, as a consequence of what they perceive is the exercise of too much market power by a concentration of several or one larger speculator. This reduced trading may result in a reduction in liquidity, which may have a negative impact on price discovery.

On the other hand, imposing position limits raises the concerns that liquidity and price discovery may be diminished, because certain market segments, *i.e.,* speculative traders, are restricted. For certain commodities, the Final Rule sets the levels of position limits at increased levels, to avoid harming liquidity that may be provided by speculators that would establish large positions, while restricting speculators from establishing extraordinarily large positions. The Commission further believes that the bona fide hedging recognition and exemption processes will foster liquidity and potentially improve price discovery by making it more efficient for market participants to apply for bona fide hedging recognitions and spread exemptions.

In addition, position limits may serve as a prophylactic measure that reduces market volatility due to a participant otherwise engaging in large quantity trades in a short time interval that induce price impacts that interfere with price discovery. In particular, spot month position limits make it more difficult to mark the close of a futures contract to possibly benefit other contracts that settle on the closing futures price. Marking the close harms markets by spoiling convergence between futures prices and spot prices at expiration and by damaging price discovery.

iv. Sound Risk Management Practices

The Final Rule promotes sound risk management practices by providing exemptions for bona fide hedgers to hedge their corresponding risk. In addition, the Commission crafted the Final Rule to ensure sufficient market liquidity for bona fide hedgers to the maximum extent practicable, *e.g.,* by: (1) Creating a bona fide hedging definition that is broad enough to accommodate common commercial hedging practices, including anticipatory hedging, for a variety of commodity types; (2) maintaining the status quo with respect to existing bona fide hedge recognitions and spread exemptions that will remain self-effectuating and make additional bona fide hedges and spreads self-effectuating (*i.e.,* certain anticipatory hedging); (3) providing additional ability for a streamlined process where market participants can make a single submission to an exchange in which the exchange and Commission will each review applications for non-enumerated bona fide hedge recognitions for purposes of Federal and exchange-set limits that are in line with commercial hedging practices; and (4) allowing for a conditional spot month limit exemption in natural gas.

To the extent that monitoring for position limits requires market participants to create internal risk limits and evaluate position size in relation to the market, position limits may also provide an incentive for market participants to engage in sound risk management practices. Further, sound risk management practices will be promoted by the Final Rule to allow for market participants to measure risk in the manner most suitable for their business (*i.e.,* net versus gross hedging practices), rather than having to conform their hedging programs to a one-size-fits-all standard that may not be suitable for their risk management needs. Finally, generally increasing non-spot month limit levels for the nine legacy agricultural contracts to levels that reflect observed levels of trading activity, based on recent data reviewed by the Commission, should allow swap dealers, liquidity providers, market makers, and others who have risk management needs, but who are not hedging a physical commercial, to soundly manage their risks.

v. Other Public Interest

The Commission has not identified any additional public interest considerations related to the costs and benefits of this Final Rule.

*B. Paperwork Reduction Act*

1. Overview

Certain provisions of the Final Rule amend or impose new ‘‘collection of information’’ requirements as that term

[1641] *See supra* Section II.A.16. (discussing the referenced contract definition).

[1642] *See supra* Section III.A. (discussing the necessity finding).

[1643] *Id.*

is defined under the Paperwork Reduction Act (''PRA'').[1644] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number from the Office of Management and Budget (''OMB''). The Final Rule modifies the following existing collections of information previously approved by OMB and for which the Commodity Futures Trading Commission (''Commission'') has received control numbers: (i) OMB control number 3038–0009 (Large Trader Reports), which generally covers Commission regulations in parts 15 through 21; (ii) OMB control number 3038–0013 (Aggregation of Positions), which covers Commission regulations in part 150;[1645] and (iii) OMB control number 3038–0093 (Provisions Common to Registered Entities), which covers Commission regulations in part 40.

The Commission requested that OMB approve and revise OMB control numbers 3038–0009, 3038–0013, and 3038–0093 in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.

2. Commission Reorganization of OMB Control Numbers 3038–0009 and 3038–0013

The Commission requested two non-substantive changes so that all collections of information related solely to the Commission's position limit requirements are consolidated under one OMB control number.[1646] First, the Commission is transferring collections of information under part 19 (Reports by Persons Holding Bona Fide Hedge Positions and By Merchants and Dealers in Cotton) related to position limit requirements from OMB control number 3038–0009 to OMB control number 3038–0013. Second, the modified OMB control number 3038–0013 is renamed as ''Position Limits.'' This renaming change is non-substantive and allows for all collections of information related to the Federal position limits requirements, including exemptions from speculative position limits and related large trader reporting, to be housed in one collection.

A single collection makes it easier for market participants to know where to find the relevant position limits PRA burdens. The remaining collections of information under OMB control number 3038–0009 cover reports by various entities under parts 15, 17, and 21[1647] of the Commission's regulations, while OMB control number 3038–0013 holds collections of information arising from parts 19 and 150.

As discussed in Section 3 below, this non-substantive reorganization results in: (i) A decreased burden estimate under control number 3038–0009 due to the transfer of the collection of information arising from obligations in part 19; and (ii) a corresponding increase of the amended part 19 burdens under control number 3038–0013. However, as discussed further below, the collection of information and burden hours arising from revised part 19 that is transferred to OMB control number 3038–0013 is less than the existing burden estimate under OMB control number 3038–0009 since the Final Rule amends existing part 19 by eliminating existing Form 204 and certain parts of Form 304 and the reporting burdens related thereto. As a result, market participants will see a net reduction of collections of information and burden hours under revised part 19.

3. Collections of Information

The Final Rule amends existing regulations, and creates new regulations, concerning speculative position limits. Among other amendments, the Final Rule includes: (1) New and amended Federal spot-month limits for the 25 core referenced futures contracts; (2) amended Federal non-spot limits for the nine legacy agricultural contracts subject to existing Federal position limits; (3) amended rules governing exchange-set limit levels and grants of exemptions therefrom; (4) an amended process for requesting certain spread exemptions and non-enumerated bona fide hedge recognitions for purposes of Federal position limits directly from the Commission; (5) a new streamlined process for recognizing non-enumerated bona fide hedge positions from Federal limit requirements; and (6) amendments to part 19 and related provisions that eliminate certain reporting obligations that require traders to submit a Form 204 and Parts I and II of Form 304.

Specifically, the Final Rule amends parts 15, 17, 19, 40, and 150 of the Commission's regulations to implement the revised Federal position limits framework. The Final Rule also transfers an amended version of the ''bona fide hedging transactions or positions'' definition from existing § 1.3 to final § 150.1, and removes §§ 1.47, 1.48, and 140.97. The Final Rule revises existing collections of information covered by OMB control number 3038–0009 by amending part 19,[1648] along with conforming changes to part 15, in order to narrow the scope of who is required to report under part 19.[1649]

Furthermore, the Final Rule's amendments to part 150 revise existing collections of information covered by OMB control number 3038–0013, including new reporting and recordkeeping requirements related to the application and request for relief from Federal position limit requirements submitted to exchanges. Finally, the Final Rule amends part 40 to incorporate a new reporting obligation into the definition of ''terms and conditions'' in § 40.1(j) and results in a revised existing collection of information covered by OMB control number 3038–0093.

i. OMB Control Number 3038–0009—Large Trader Reports; Part 19—Reports by Persons Holding Bona Fide Hedge Positions and by Merchants and Dealers in Cotton

Under OMB control number 3038–0009, the Commission currently estimates that the collections of information related to existing part 19, including Form 204 and Form 304, collectively known as the ''series '04'' reports, have a combined annual burden hours of 1,553 hours. Under existing part 19, market participants that hold *bona fide* hedging positions in excess of position limits for the nine legacy agricultural contracts subject to existing Federal position limits must file a monthly report on Form 204 (or Parts I and II of Form 304 for cotton). These reports show a snapshot of traders' cash

[1644] 44 U.S.C. 3501 *et seq.*

[1645] Currently, OMB control number 3038–0013 is titled ''Aggregation of Positions.'' The Commission is renaming the OMB control number ''Position Limits'' to better reflect the nature of the information collections covered by that OMB control number.

[1646] The Commission notes that certain collections of information under OMB control number 3038–0093 relate to several Commission regulations in addition to the Commission's final position limits framework. As a result, the collections of information discussed herein under this OMB control number 3038–0093 are not being consolidated under OMB control number 3038–0013.

[1647] As noted above, OMB control number 3038–0009 generally covers Commission regulations in parts 15 through 21. However, it does not cover §§ 16.02, 17.01, 18.04, or 18.05, which are under OMB control number 3038–0103. 78 FR at 69200 (transferring §§ 16.02, 17.01, 18.04, and 18.05 to OMB Control Number 3038–0103).

[1648] *See supra* Section IV.B.2 (discussing the transfer of information collection under part 19 from OMB control number 3038–0009 to 3038–0013).

[1649] As noted above, the Commission accomplishes this by eliminating existing Form 204 and Parts I and II of Form 304. Additionally, changes to part 17, covered by OMB control number 3038–0009, make conforming amendments to remove certain duplicative provisions and associated information collections related to aggregation of positions, which are in existing § 150.4. These conforming changes do not impact the burden estimates of OMB control number 3038–0009.

positions on one given day each month, and are used by the Commission to determine whether a trader has sufficient cash positions to justify futures and options on futures positions above the applicable Federal position limits in existing § 150.2.

The Final Rule amends part 19 to remove these reporting obligations associated with Form 204 and Parts I and II of Form 304. As discussed under final § 150.9 below, the Commission has determined to eliminate these forms because the Commission will still receive adequate information to carry out its market and financial surveillance programs since its amendments to §§ 150.5 and 150.9 enable the Commission to obtain the necessary information from the exchanges. To effect these changes to traders' reporting obligations, the Commission is eliminating (i) existing § 19.00(a)(1), which requires the applicable persons to file a Form 204; and (ii) existing § 19.01, which among other things, sets forth the cash-market information required to be submitted on Forms 204 and 304.[1650] The Commission is maintaining Part III of Form 304, which requests information on unfixed-price ''on call'' purchases and sales of cotton and which the Commission utilizes to prepare its weekly cotton on-call report.[1651] The Commission is also maintaining its existing special call authority under part 19.

The supporting statement for the current active information collection request for part 19 under OMB control number 3038–0009[1652] states that in 2014: (i) 135 reportable traders filed the series '04 reports (*i.e.,* Form 204 and Form 304 in the aggregate), (ii) totaling 3,105 series '04 reports, for a total of (iii) 1,553 burden hours.[1653] However, based on more current and recent 2019 submission data, the Commission has revised its existing estimates slightly higher for the series '04 reports under part 19:

F. *Form 204*: 50 monthly reports, for an annual total of 600 reports (50 monthly reports x 12 months = 600 total annual reports) and 300 annual burden hours (600 annual Form 204s submitted x 0.5 hours per report = 300 aggregate annual burden hours for all Form 204s).

G. *Form 304*: 55 weekly reports, for an annual total of 2,860 reports (55 weekly reports x 52 weeks = 2,860 total annual reports) and 1,430 annual burden hours (2,860 annual Form 304s submitted x 0.5 hours per report = 1,430 aggregate annual burden hours for all Form 304s).

Accordingly, based on the above revised estimates, the Commission is revising its estimate of the current collections of information under existing part 19 to reflect that approximately 105 reportable traders[1654] file a total of 3,460 responses annually[1655] resulting in an aggregate annual burden of 1,730 hours.[1656] [1657] The Final Rule reduces the current OMB control number 3038–0009 by these revised burden estimates under part 19 as they will be transferred to OMB control number 3038–0013.

With respect to the overall collections of information transferred to OMB control number 3038–0013 based on the Commission's revised part 19 estimate, the Commission estimates that the Final Rule reduces the collections of information in part 19 by 600 reports[1658] and by 300 annual aggregate burden hours since the Final Rule eliminates Form 204, as discussed above.[1659] The Commission does not expect a change in the number of reportable traders that are required to file Part III of Form 304.[1660] Thus, the Commission continues to expect approximately 55 weekly Form 304 reports, for an annual total of 2,860 reports[1661] for an aggregate total of 1,430 burden hours, which information collection burdens will be transferred to OMB control number 3038–0013.[1662]

In addition, the Commission is maintaining its authority to issue special calls for information to any person claiming an exemption from speculative Federal position limits. While the position limits framework expands to traders in the 25 core referenced futures contacts (an increase from the existing nine legacy agricultural products), the position limit levels themselves are also generally higher. The higher position limit levels result in a smaller universe of traders who may exceed the position limits and thus be subject to a special call for information on their large position(s). Taking into account the higher limits

[1650] As noted above, the amendments to part 19 affect certain provisions of part 15 and § 17.00. Based on the elimination of Form 204 and Parts I and II of Form 304, as discussed above, the Commission is adopting conforming technical changes to remove related reporting provisions from (i) the ''reportable position'' definition in § 15.00(p); (ii) the list of ''persons required to report'' in § 15.01; and (iii) the list of reporting forms in § 15.02. These conforming amendments to part 15 do not impact the existing burden estimates.

[1651] The Commission is adopting a conforming technical change to Part III of Form 304 to require traders to identify themselves on the Form 304 using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of the Form 304. However, the Commission has determined that this does not result in any change to its existing PRA estimates with respect to the collections of information related to Part III of Form 304.

[1652] *See* ICR Reference No: 201906–3038–008.

[1653] 3,105 Series '04 submissions × 0.5 hours per submission = 1,553 aggregate burden hours for all submissions. The Commission notes that it has estimated that it takes approximately 20 minutes to complete a Form 204 or 304. However, in order to err conservatively, the Commission now uses a figure of 30 minutes.

[1654] 55 Form 304 reports + 50 Form 204 reports = 105 reportable traders.

[1655] 2,860 Form 304s + 600 Form 204s = 3,460 total annual series '04 reports.

[1656] 3,460 series '04 reports × 0.5 hours per report = 1,730 annual aggregate burden hours.

[1657] These revised estimates result in an increased estimate under existing part 19 of 355 series '04 reports submitted by traders (3,460 estimated series '04 reports − 3,105 submissions from the Commission's previous estimate = an increase of 355 response difference); an increase of 177 aggregate burden hours across all respondents (1,730 aggregate burden hours − 1,553 aggregate burden hours from the Commission's previous estimate = an increase of 177 aggregate burden hours); and a decrease of 30 respondent traders (105 respondents − 135 respondents from the Commission's previous estimate = a decrease of 30 respondents).

[1658] 50 monthly Form 204 reports × 12 months = 600 total annual reports.

[1659] 600 Form 204 reports × 0.5 burden hours per report = 300 aggregate annual burden hours.

[1660] Since the Final Rule eliminates Parts I and II of Form 304, amended Form 304 only refers to existing Part III of that form.

[1661] 55 weekly Form 304 reports × 52 weeks = 2,860 total annual Form 304 reports.

[1662] 2,860 Form 304 reports × 0.5 burden hours per report = 1,430 aggregate annual burden hours.

and smaller universe of traders who will likely exceed the position limits, the Commission estimates that it is likely to issue a special call for information to four reportable traders. The Commission estimates that it will take approximately five hours to respond to a special call. The Commission therefore estimates that industry will incur a total of 20 aggregate annual burden hours.[1663]

ii. OMB Control Number 3038–0013—Aggregation of Positions (Renaming ''Position Limits'')

a. Introduction; Bona Fide Hedge Recognition and Exemption Process

The Final Rule amends the existing process for market participants to apply to obtain an exemption or recognition of a bona fide hedge position. Currently, the ''bona fide hedging transaction or position'' definition appears in existing § 1.3. Under existing §§ 1.47 and 1.48, a market participant must apply directly to the Commission to obtain a bona fide hedge recognition in accordance with § 1.3 for Federal position limit purposes.

Final §§ 150.3 and 150.9 establish an amended process for obtaining a bona fide hedge exemption or recognition, which includes: (i) A new bona fide hedging definition in § 150.1, (ii) a new process administered by the exchanges in final § 150.9 for recognizing non-enumerated bona fide hedging positions for Federal limit requirements, and (iii) an amended process to apply directly to the Commission for certain spread exemptions or for recognition of non-enumerated bona fide hedging positions in final § 150.3. Final § 150.3 also includes new exemption types not explicitly listed in existing § 150.3.

The Commission has previously estimated the combined annual burden hours for submitting applications under both §§ 1.47 and 1.48 to be 42 hours.[1664] The Final Rule largely maintains the existing process where market participants may apply directly to the Commission, although the Commission expects market participants to predominantly rely on the streamlined process to obtain recognition of their non-enumerated bona fide hedging positions for purposes of Federal position limit requirements. Enumerated bona fide hedge positions remain self-effectuating, which means that market participants do not need to apply to the Commission for purposes of Federal position limits, although market participants still need to apply to an exchange for recognition of bona fide hedge positions for purposes of exchange-set position limits. The Commission expects market participants to rely on the streamlined exchange process because all the contracts that are now subject to Federal position limits are already subject to exchange-set limits. Thus, most market participants are likely to already be familiar with an exchange-administered process, as adopted under § 150.9. Familiarity with an exchange-administered process will result in operational efficiencies, such as completing one application for non-enumerated bona fide hedge requests for both Federal and exchange-set limits and thus a reduced burden on market participants.

As previously discussed, the Final Rule moves the ''bona fide hedge transaction or position'' definition to final § 150.1. The Final Rule maintains the distinction between enumerated and non-enumerated bona fide hedges, and market participants are required to apply for recognition of non-enumerated bona fide hedge positions either directly from the Commission pursuant to § 150.3 or through an exchange-centric process under § 150.9.[1665] The Commission does not believe that this amendment has any PRA impacts since it is maintaining the status quo in which enumerated bona fide hedges are self-effectuating while requiring traders to apply to the Commission or an exchange for recognition of non-enumerated bona fide hedge positions.

b. § 150.2 Speculative Limits

Under final § 150.2(f), upon request from the Commission, DCMs listing a core referenced futures contract are required to supply to the Commission deliverable supply estimates for each core referenced futures contract listed at that DCM. DCMs are only required to submit estimates if requested to do so by the Commission on an as-needed basis. When submitting estimates, DCMs are required to provide a description of the methodology used to derive the estimate, as well as any statistical data supporting the estimate. Appendix C to part 38 sets forth guidance regarding estimating deliverable supply.

Submitting deliverable supply estimates upon demand from the Commission for contracts subject to Federal position limits is a new reporting obligation for DCMs. The Commission estimates that six DCMs will be required to submit initial deliverable supply estimates. The Commission estimates that it will request each DCM that lists a core referenced futures contract to file one initial report for each core reference futures contract it lists on its market. Such requests from the Commission will result in one initial submission for each of the 25 core referenced futures contracts. The Commission further estimates that it will take 20 hours to complete and file each report for a total annual burden of 500 hours for all respondents.[1666] Accordingly, the changes to § 150.2(f) result in an initial, one-time increase to the current burden estimates of OMB control number 3038–0013 of 25 submissions across six respondent DCMs for the initial number of submissions for the 25 core referenced futures contracts and an initial, one-time burden of 500 hours.

c. § 150.3 Exemptions From Federal Position Limit Requirements

Market participants may currently apply directly to the Commission for recognition of certain bona fide hedges under the process set forth in existing §§ 1.47 and 1.48. There is no existing process that is codified under the Commission's regulations for spread exemptions or other exemptions included under final § 150.3.

Final § 150.3(a) specifies the circumstances in which a trader could exceed Federal position limits.[1667] With respect to non-enumerated bona fide hedge recognitions and spread exemptions not identified in the proposed ''spread transaction'' definition in § 150.1, final § 150.3(b) provides a process for market participants to request such non-

[1663] Four possible reportable traders x 5 hours each = 20 aggregate annual burden hours.

[1664] The supporting statement for a previous information collection request, ICR Reference No: 201808–3038–003, for OMB control number 3038–0013, estimated that seven respondents would file the §§ 1.47 and 1.48 submissions, and that each respondent would file two submissions for a total of 14 annual submissions, requiring 3 hours per response, for a total of 42 burden hours for all respondents.

[1665] Currently, in order to determine whether a futures or an option on futures as a bona fide hedge, either (1) the position in question must qualify as an enumerated bona fide hedge, as defined in existing § 1.3, or (2) the trader must file a statement with the Commission, pursuant to existing § 1.47 (for non-enumerated bona fide hedges) and/or existing § 1.48 (for enumerated anticipatory bona fide hedges). The Commission does not expect this change to have any PRA impacts.

[1666] 20 initial hours × 25 core referenced futures contracts = 500 one-time, aggregate burden hours. While there is an initial annual submission, the Commission does not expect to require the exchanges to resubmit the supply estimates on an annual basis.

[1667] Final § 150.3(b) includes (1) recognitions of bona fide hedges under § 150.3(b); (2) spread exemptions under § 150.3(b); (3) financial distress positions a person could request from the Commission under § 140.99(a)(1); and (4) exemptions for certain natural gas positions held during the spot month. Final § 150.3(b) also exempts pre-enactment and transition period swaps. The enumerated bona fide hedge recognitions and spread exemptions identified in the proposed ''spread transaction'' definition in § 150.1 are self-effectuating.

enumerated bona fide hedge recognitions or spread exemptions directly from the Commission (as previously noted, both enumerated bona fide hedges and spread exemptions identified in the proposed ''spread transaction'' definition are self-effectuating and do not require a market participant to submit an exemption request to the Commission). Final § 150.3(b), (d), and (e) sets forth exemption-related reporting and recordkeeping requirements that impact the current burden estimates in OMB control number 3038–0013.[1668] The collection of information under final § 150.3(b), (d) and (e) is necessary for the Commission to determine whether to recognize a trader's position qualifies for one of the exemptions from Federal position limit requirements listed in § 150.3(a).

Final § 150.3(b) establishes application filing requirements and recordkeeping and reporting requirements that are similar to existing requirements for bona fide hedge recognitions under existing §§ 1.47 and 1.48. Although these requirements in final § 150.3 are new for market participants seeking spread exemptions (which are currently self-effectuating), the filing, recordkeeping, and reporting requirements in § 150.3(b) are otherwise familiar to market participants that have requested certain bona fide hedging recognitions from the Commission under existing regulations.

The Commission estimates that very few or no traders will request recognition of a non-enumerated bona fide hedge, and any traders that do would likely prefer the streamlined process in final § 150.9 (discussed further below) rather than applying directly to the Commission under final § 150.3(b). Similarly, the Commission estimates that very few or no traders will submit a request for a spread exemption since the Commission has determined that the most common spread exemptions are included in the ''spread transaction'' definition and therefore are self-effectuating and do not need Commission approval for purposes of Federal position limits. The Commission expects that traders are likely to rely on the § 150.3(b) process when dealing with a spread transaction or non-enumerated bona fide hedge position that poses a novel or complex question under the Commission's rules. Particularly when the exchanges have not recognized a particular hedging strategy as a non-enumerated bona fide hedge previously, the Commission expects market participants to seek more regulatory clarity under § 150.3(b). In the event a trader submits such request under § 150.3, the Commission estimates that traders would file one request per year for a total of one annual request for all respondents. The Commission further estimates that in such situation, it would take 20 hours to complete and file each report, for a total of 20 aggregate annual burden hours for all traders.

Final § 150.3(d) establishes recordkeeping requirements for persons who claim any exemptions or relief under § 150.3. Section 150.3(d) should help to ensure that if any person claims any exemption permitted under § 150.3 such exemption holder can demonstrate compliance with the applicable requirements as follows:

First, under § 150.3(d)(1), any person claiming an exemption is required to keep and maintain complete books and records concerning certain details.[1669] Section 150.3(d)(1) establishes recordkeeping requirements for any person relying on an exemption permitted under final § 150.3(a). Under § 150.3(d), the Commission estimates that 425 traders will create five records each, per year, for a total of 2,125 annual records for respondents. The Commission further estimates that it will take one hour to comply with the recordkeeping requirement of § 150.3(d)(1) for a total of five aggregate annual burden hours for each trader.

Second, under § 150.3(d)(2), a pass-through swap counterparty, as defined by § 150.1, that relies on a written representation received from a bona fide hedging swap counterparty that the swap qualifies in good faith as a ''bona fide hedging position or transaction,'' as defined under § 150.1, is required to: (i) Maintain the relevant books and records of any such written representation for at least two years following the expiration of the swap; and (ii) furnish any books and records of such written representation to the Commission upon request. Section 150.3(d)(2) creates a new recordkeeping obligation for certain persons relying on the pass-through swap representations, and the Commission estimates that 425 traders will be requested to maintain the required records. The Commission estimates that each trader will maintain at least five records per year for a total of 2,125 aggregate annual records for all respondents. The Commission further estimates that it will take one hour to comply with the recordkeeping requirement of § 150.3(d) for a total of five annual burden hours for each trader and 2,125 aggregate annual burden hours for all traders.

The Commission is moving existing § 150.3(b), which currently allows the Commission or certain Commission staff to make special calls to demand certain information regarding persons claiming exemptions, to final § 150.3(e), with some modifications to include swaps.[1670] Together with the recordkeeping provision of § 150.3(d), § 150.3(e) should enable the Commission to monitor the use of exemptions from speculative position limits and help to ensure that any person who claims any exemption permitted by § 150.3 can demonstrate compliance with the applicable requirements. The Commission's existing collection under existing § 150.3 estimated that the Commission issues two special calls per year for information related to exemptions, and that each response to a special call for information takes 3 burden hours to complete. This includes two burden hours to fulfill reporting requirements and one burden hour related to recordkeeping for an aggregate total for all respondents of six annual burden hours, broken down into four aggregate annual burden hours for reporting and two aggregate annual burden hours for recordkeeping.[1671]

The Commission estimates that § 150.3(e) imposes information collection burdens related to special calls by the Commission on approximately 18 additional respondents, for an estimated 20 special calls per year.[1672] The Commission

[1668] Final § 150.3(f) clarifies the implications on entities required to aggregate accounts under § 150.4, and § 150.3(g) provides for delegation of certain authorities to the Director of the Division of Market Oversight. The changes to §§ 150.3(f) and 150.3(g) do not impact the current estimates for these OMB control numbers. Also, the Final Rule reminds persons of the relief provisions in § 140.99, covered by OMB control number 3038–0049, which does not impact the burden estimates.

[1669] The requirement includes all details of related cash, forward, futures, options on futures, and swap positions and transactions (including anticipated requirements, production, merchandising activities, royalties, contracts for services, cash commodity products and by-products, cross-commodity hedges, and records of bona fide hedging swap counterparties).

[1670] Final § 150.3(e) refers to commodity derivative contracts, whereas existing § 150.3(b) refers to futures and options on futures. The change results in the inclusion of swaps.

[1671] The special call authority under part 19 and the special call authority discussed under § 150.3 are similar in nature; however, part 19 applies to special calls regarding bona fide hedge recognitions and related underlying cash-market positions while the special calls under § 150.3 applies to the other exemptions under § 150.3.

[1672] 2 respondents subject to special calls under existing § 150.3 + 18 additional respondents under final § 150.3 = 20 total respondents. The Commission estimates, at least during the initial implementation period, that it is likely to issue more special calls for information to monitor compliance with position limits, particularly in the estimates that these 20 market participants will provide one submission per year to respond to the special call for a total of 20 annual submissions for all respondents. The Commission estimates it will take a market participant approximately 10 hours to complete a response to a special call. Therefore, the Commission estimates responses to special calls for information will take an aggregate total of 200 burden hours for all traders.[1673] The Commission notes that it is also maintaining its special call authority for reporting requirements under part 19 discussed above.

d. § 150.5 Exchange-Set Limits and Exemptions

Amendments to § 150.5 refine the process, and establish non-exclusive methodologies, by which exchanges may set exchange-level limits and grant exemptions therefrom, including separate methodologies for setting limit levels for contracts subject to Federal position limits (§ 150.5(a)) and physical commodity derivatives not subject to Federal position limits (§ 150.5(b)).[1674] In compliance with part 40 of the Commission's regulations, exchanges currently have policies and procedures in place to address exemptions from exchange-set limits through their rulebooks. The Commission expects that the exchanges will accordingly update their rulebooks, both to conform to new requirements and to incorporate the additional contracts that are subject to Federal position limits for the first time into their process for setting exchange-level limits and exemptions therefrom.

The collections of information related to amended rulebooks under part 40 are covered by OMB control number 3038–0093. Separately, the collections of information related to applications for exemptions from exchange-set limits are covered by OMB control number 3038–0013.

Under final § 150.5(a)(1), for any contract subject to a Federal position limit, DCMs and, ultimately, SEFs, will be required to establish exchange-set position limits for such contracts. Under final § 150.5(a)(2), exchanges that wish to grant exemptions from exchange-set limits on commodity derivative contracts subject to Federal position limits must require traders to file an application that shows a request for a bona fide hedge recognition or exemption conforms to a type that may be granted under final § 150.3(a)(1)–(4). Exchanges must require that such exchange-set limit exemption applications be filed in advance of the date such position would be in excess of the limits, but exchanges have the discretion to adopt rules allowing traders to file bona fide hedging applications within five business days after a trader took on such position due to sudden or unforeseen increases in the trader's bona fide hedging needs. Final § 150.5(a)(2) also provides that exchanges must require that the trader reapply for the exemption at least annually. Final § 150.5(a)(4) requires each exchange to provide a monthly report showing the disposition of any exemption application, including the recognition of any position as a bona fide hedge, the exemption of any spread transaction, the renewal, revocation, or modification of a previously granted recognition or exemption, or the rejection of any application.[1675]

These collections of information related to exemptions from exchange-set limits are necessary to ensure that such exchange-set limits comply with Commission regulations, including that exchange limits are no higher than the applicable Federal level; to establish minimum standards needed for exchanges to administer the exchange's position limits framework; and to enable the Commission to oversee an exchange's exemptions process to ensure it does not undermine the Federal position limits framework. In addition, the Commission will use the information to confirm that exemptions are granted and renewed in accordance with the types of exemptions that may be granted under final § 150.3(a)(1)–(4).

The Commission estimates under final § 150.5(a) that 425 traders will submit applications to claim spread exemptions and bona fide hedge recognitions from exchange-set position limits on commodity derivatives contracts subject to Federal position limits set forth in § 150.2. The Commission estimates that each trader on average will submit five applications to an exchange each year for a total of 2,125 applications for all respondents. The Commission further estimates that it will take two hours to complete and file each application for a total of 10 annual burden hours for each trader and 4,250 aggregate burden hours for all traders.[1676]

The Commission estimates under final § 150.5(a)(4) that six exchanges will provide monthly reports for an annual total of 72 monthly reports for all exchanges.[1677] The Commission further estimates that it will take five hours to complete and file each monthly report for a total of 60 annual burden hours for each exchange and 360 annual burden hours for all exchanges.[1678]

Final § 150.5(b) requires exchanges, for physical commodity derivatives that are not subject to Federal position limits, to set limits during the spot month and to set either limits or accountability outside of the spot month. Under § 150.5(b)(3), where multiple exchanges list contracts that are substantially the same, including physically-settled contracts that have the same underlying commodity and delivery location, or cash-settled contracts that are directly or indirectly linked to a physically-settled contract, the exchange must either adopt ''comparable'' limits for such contracts, or demonstrate to the Commission how

commodity markets that will now be subject to Federal position limits for the first time.

[1673] 20 special calls × 10 burden hours per call = 200 total burden hours.

[1674] Final § 150.5 addresses exchange-set position limits and exemptions therefrom, whereas final § 150.9 addresses Federal position limits and a streamlined process for purposes of Federal position limits where an applicant may apply through an exchange to the Commission for recognition of an non-enumerated bona fide hedge for purposes of Federal position limits.

[1675] Additionally, each report should include the following details: (A) The date of disposition; (B) The effective date of the disposition; (C) The expiration date of any recognition or exemption; (D) Any unique identifier(s) the designated contract market or swap execution facility may assign to track the application, or the specific type of recognition or exemption; (E) If the application is for an enumerated bona fide hedging transaction or position, the name of the enumerated bona fide hedging transaction or position listed in Appendix A to this part; (F) If the application is for a spread transaction listed in the spread transaction definition in § 150.1, the name of the spread transaction as it is listed in § 150.1; (G) The identity of the applicant; (H) The listed commodity derivative contract or position(s) to which the application pertains; (I) The underlying cash commodity; (J) The maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a bona fide hedging transaction or position, specified by contract month and by the type of limit as spot month, single month, or all-months-combined, as applicable; (K) Any size limitations or conditions established for a spread exemption or other exemption; and (L) For a bona fide hedging transaction or position, a concise summary of the applicant's activity in the cash markets and swaps markets for the commodity underlying the commodity derivative position for which the application was submitted.

[1676] To increase efficiency and reduce duplicative efforts, the Final Rule permits an exchange to have a single process in place that allows market participants to request non-enumerated bona fide hedge recognitions from both Federal and exchange-set position limits at the same time. The Commission believes that under a single process, the estimated burdens under final § 150.5(a) discussed in this section for exemptions from exchange-set limits includes the burdens under the Federal limit exemption process for non-enumerated bona fide hedges under final § 150.9 discussed below.

[1677] 6 exchanges × 12 months = 72 total monthly reports per year.

[1678] 5 hours per monthly report × 12 months = 60 hours per year for each exchange. 60 annual hours × 6 exchanges = 360 aggregate annual hours for all exchanges.

the non-comparable levels comply with the standards set forth in § 150.5(b)(1) and (2). Such a determination also must address how the levels are necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index. Final § 150.5(b)(3) is intended to help ensure that position limits established on one exchange do not jeopardize market integrity or otherwise harm other markets. This provision may also improve the efficiency with which exchanges adopt limits on newly-listed contracts that compete with an existing contract listed on another exchange and help reduce the amount of time and effort needed for Commission staff to assess the new limit levels. Further, § 150.5(b)(3) is consistent with the Commission's determination to generally apply equivalent Federal position limits to linked contracts, including linked contracts listed on multiple exchanges.

The Commission estimates that under § 150.5(b)(3), six exchanges will make submissions to demonstrate to the Commission how the non-comparable levels comply with the standards set forth in § 150.5(b)(1) and (2). The Commission estimates that each exchange on average will make three submissions each year for a total of 18 submissions for all exchanges. The Commission further estimates that it will take 10 hours to complete and file each submission for a total of 18 annual burden hours for each exchange and 180 burden hours for all exchanges.[1679]

Final § 150.5(b)(4) permits exchanges to grant exemptions from any exchange limit established for physical commodity contracts not subject to Federal position limits. To grant such exemptions, exchanges must require traders to file an application to show whether the requested exemption from exchange-set limits is in accord with sound commercial practices in the relevant commodity derivative market and/or that may be established and liquidated in an orderly fashion in that market. This collection of information is necessary to confirm that any exemptions granted from exchange limits on physical commodity contracts not subject to Federal position limits do not pose a threat of market manipulation or congestion, and maintains orderly execution of transactions. The Commission estimates that 200 traders will submit one application each year and that each application will take approximately two hours to complete, for an aggregate total of 400 burden hours per year for all traders.

Final § 150.5(e) reflects that, consistent with the definition of "rule" in existing § 40.1, any exchange action establishing or modifying position limits or exemptions therefrom, or position accountability, in any case pursuant to § 150.5(a), (b), or (c), including related guidance in Appendices F or G, to part 150, qualifies as a "rule" and must be submitted to the Commission pursuant to part 40 of the Commission's regulations. Final § 150.5(e) further provides that exchanges are required to review regularly any position limit levels established under § 150.5 to ensure the level continues to comply with the requirements of those sections. The Commission estimates under § 150.5(e) that six exchanges will submit revised rulebooks to satisfy their compliance obligations under part 40. The Commission estimates that each exchange on average will make one initial revision of its rulebook to reflect the new position limit framework for a total of six applications for all exchanges. The Commission further estimates that it will take 30 hours to revise a rulebook for a total of 30 annual burden hours for each exchange and 180 burden hours for all exchanges.[1680]

This collection of information is necessary to ensure that the exchanges' rulebooks reflect the most up-to-date rules and requirements in compliance with the position limits framework. The information is used to confirm that exchanges are complying with their requirements to regularly review any position limit levels established under § 150.5.

e. § 150.9 Exchange Process for Bona Fide Hedge Recognitions From Federal Position Limits

Final § 150.9 establishes a new streamlined process in which a trader could apply through an exchange to request a non-enumerated bona fide hedging recognition for purposes of Federal position limits. As part of the process, final § 150.9 creates certain recordkeeping and reporting obligations on the market participant and the exchange, including: (i) An application to request non-enumerated bona fide hedge recognitions, which the trader submits to the exchange and which the exchange subsequently provides to the Commission if the exchange approves the application for purposes of exchange-set limits; (ii) a notification to the Commission and the applicant of the exchange's determination for purposes of exchange limits regarding the trader's request for recognition of a bona fide hedge or spread exemption; (iii) and a requirement to maintain full, complete and systematic records for Commission review of the exchange's decisions. The Commission believes that the exchanges that will elect to process applications for non-enumerated bona fide hedging exemptions under § 150.9(a) already have similar processes for the review and disposition of such exemption applications in place through their rulebooks for purposes of exchange-set position limits.

Accordingly, the estimated burden on an exchange to comply with final § 150.9 will be less burdensome because the exchanges may leverage their existing policies and procedures to comply with the Final Rule. The Commission estimates that six exchanges will elect to process applications for non-enumerated bona fide hedge recognitions that satisfy the Federal position limit requirements under final § 150.9, and will be required to file amended rulebooks pursuant to part 40 of the Commission's regulations. The Commission bases its estimate on the number of exchanges that have submitted similar rules to the Commission in the past.

Final § 150.9(c) requires a trader to submit an application with certain information to enable the exchange to determine whether it should recognize a position as a bona fide hedge for purposes of exchange-set position limits. Each applicant will need to reapply to the exchange for its non-enumerated bona fide hedge recognition at least on an annual basis by updating its original application. The Commission expects that traders will benefit from the streamlined framework established under final § 150.9 because traders may submit one application to obtain a non-enumerated bona fide hedge recognition for purposes of both exchange-set and Federal position limits, as opposed to submitting separate applications to the Commission for Federal position limit purposes and separate applications to an exchange for exchange limit purposes.[1681]

[1679] 18 estimated annual submissions × 10 burden hours per submission = 180 aggregate annual burden hours.

[1680] 6 initial applications × 30 burden hours = 180 initial aggregate burden hours.

[1681] The Commission believes the collections of information set forth above are necessary for the exchange to process requests for recognition of non-enumerated bona fide hedges for purposes of exchange-set position limits, and separately, if applicable, for the Commission to make its determination for purposes of Federal position limits. The information is used by the exchange to determine, and the Commission to review and determine, whether the facts and circumstances demonstrate it is appropriate to recognize a position

Accordingly, the estimated burden for traders requesting non-enumerated bona fide hedge recognitions from exchange-set limits under § 150.5(a) will subsume the burden estimates in connection with final § 150.9 for requesting non-enumerated bona fide hedge recognition's from Federal position limits since the Commission believes exchanges will combine the two processes (*i.e.,* any trader who applies through an exchange under final § 150.9 for a non-enumerated bona fide hedge for Federal position limits purposes also will be deemed to be applying at the same time under final § 150.5(a) for exchange position limits purposes and thus it would not be appropriate to distinguish between the two for PRA purposes). Accordingly, the Commission anticipates that six exchanges each will receive only one application for a non-enumerated bona fide hedge recognition under final § 150.9 for a total of six aggregate annual applications for all exchanges; however, as noted above, this amount is included in the Commission's estimate in connection with final § 150.5(a).[1682] Specifically, as discussed above in connection with final § 150.5(a), the Commission estimates under final §§ 150.5(a) and 150.9(a) that 425 traders will submit applications to claim exemptions and/or bona fide hedge recognitions for contracts subject to Federal position limits as set forth in § 150.2.[1683]

as a non-enumerated bona fide hedging transaction or position.

[1682] As discussed above, the process and estimated burdens under final § 150.9 do not apply to § 150.5(b) because final § 150.5(b) applies to those physical commodity contracts that are not subject to Federal position limits (as opposed to final § 150.5(a), which applies to those contracts subject to Federal position limits). As a result, a trader that would use the process established under § 150.5(b) for exchange-set limits will not need to apply under final § 150.9 since the traders would not need a bona fide hedge recognition or an exemption from Federal position limits.

[1683] As discussed in connection with final § 150.5(a) above, the Commission estimates that each trader on average will make five applications each year for a total of 2,125 applications across all exchanges. The Commission further estimates that, for final §§ 150.5(a) and 150.9(a), taken together, it will take two hours to complete and file each application for a total of 10 annual burden hours for each trader and 4,250 aggregate annual burden hours for all traders (2,125 total annual applications × two burden hours per application = 4,250 aggregate annual burden hours). The Commission anticipates that compared to final § 150.5(a), fewer traders will apply under final § 150.9 since final § 150.9 applies only to non-enumerated bona fide hedge recognitions for Federal purposes. In comparison, while final § 150.5 encompasses these same applications for non-enumerated bona fide hedge recognitions (but for the purpose of exchange-set limits), final § 150.5(a) also includes enumerated bona fide hedge applications along with spread exemption requests. The Commission's estimate of 4,250 aggregate annual burden hours encompasses all such requests from all traders. However, for the sake of clarity, the Commission anticipates that six exchanges each will receive one application per year for a non-enumerated bona fide hedge under final § 150.9 (for a total of six applications across all exchanges); as noted, this burden is included in the Commission's estimate of 425 respondents in connection with its estimate under final § 150.5(a).

Final § 150.9(d) requires exchanges to keep full, complete, and systematic records, including all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof. In addition, as provided for in final § 150.9(g) and existing § 1.31, the Commission may, in its discretion, at any time, review the exchange's records retained pursuant to final § 150.9(d) or request additional information pursuant to § 150.9(e)(5). The recordkeeping requirement is necessary for the Commission to review the exchanges' processes, retention of records, and compliance with requirements established and implemented under this section.

Final § 150.9(d) creates a new recordkeeping obligation consistent with the standards in existing § 1.31.[1684] The Commission estimates that six exchanges will each create one record in connection with final § 150.9 each year for a total of six annual records for all respondents. The Commission further estimates that it will take five hours to comply with the recordkeeping requirement of § 150.9(d) for a total of five annual burden hours for each exchange and 30 aggregate annual burden hours across all exchanges.

Final § 150.9(d) allows the Commission to inspect such books and records.[1685] In the event the Commission exercises its authority to inspect such books and records, it estimates that the Commission will conduct an inspection of two exchanges per year and each exchange will incur four hours to make its books and records available to the Commission for review for a total of eight aggregate annual burden hours for the two estimated respondent exchanges.[1686]

[1684] Consistent with existing § 1.31, the Commission expects that these records will be readily available during the first two years of the required five-year recordkeeping period for paper records, and readily accessible for the entire five-year recordkeeping period for electronic records. In addition, the Commission expects that records required to be maintained by an exchange pursuant to this section will be readily accessible during the pendency of any application, and for two years following any disposition that did not recognize a derivative position as a bona fide hedge.

[1685] Final § 150.9(d)(1) requires the exchange to keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof. This requirement working in concert with § 1.31 allows the Commission to inspect any such records. Separately, under § 150.9(e)(5), if the Commission determines additional information is required to conduct its review, then it would notify the exchange and the relevant market participant of any issues identified and provide them with an opportunity to provide supplemental information.

Under final § 150.9(e), an exchange needs to provide an applicant and the Commission with notice of any approved application of an exchange's determination to recognize bona fide hedges with respect to its own position limits for purposes of exceeding the Federal position limits. The notification requirement is necessary to inform the Commission of the details of the type of bona fide hedge recognitions being granted. The information is used to keep the Commission informed as to the manner in which an exchange administers its application procedures, and the exchange's rationale for permitting large positions.

The Commission estimates that under final § 150.9(e), six exchanges will submit notifications of approved application of an exchange's determination to recognize non-enumerated bona fide hedges for purposes of exceeding the Federal position limits. The Commission estimates that each exchange on average will make two notifications: One notification each to the applicant trader and to the Commission each year for a total of 12 notices for all exchanges. The Commission further estimates that it will take 0.5 hours to complete and file each notification for a total of one annual burden hour for each exchange and six burden hours for all exchanges.[1687]

In addition to submitting a copy of any exchange-approved non-enumerated bona fide hedge application to the Commission under § 150.9(e), the preamble clarifies that an exchange may, on a voluntary basis, send the Commission an advance courtesy copy of the non-enumerated bona fide hedge application when the exchange first receives it from the applicant. Although this advance courtesy copy would be a voluntary submission, it is still considered a new information collection under the PRA. However, the Commission believes there is no corresponding burden for this filing because the Commission considers this practice to be in the ordinary course of business as it is usual and customary for exchanges to provide the Commission with advance copies of various filings under other Commission

[1686] 2 exchanges per year subject to a Commission inspection × 4 hours per inspection request = 8 aggregate annual burden hours for all exchanges.

[1687] Twelve notices for all exchanges × 0.5 hours per notice = six total burden hours across all exchanges.

regulations.[1688] In the event that this practice is not considered usual and customary, the Commission estimates that the burden of such filing will be *de minimis* and take less than five minutes for an exchange to send an application to the Commission, if the exchange elects to do so (less than 30 total minutes in the aggregate across all exchanges: 6 exchanges × 1 advance copy × less than 5 minutes = less than 30 minutes).

iii. OMB Control Number 3038–0093—Provisions Common to Registered Entities

a. § 150.9(a)

Under final § 150.9(a), exchanges that would like for their market participants to be able to exceed Federal position limits based on a non-enumerated bona fide hedge recognition granted by the exchange with respect to its own limits must maintain rules that establish processes consistent with the provisions of final § 150.9 and must seek approval of such rules from the Commission pursuant to § 40.5 of the Commission's regulations. The collection of information is necessary to capture the new non-enumerated bona fide hedge process in the exchanges' rulebook, which is subject to Commission approval. The information is used to assess the process put in place by each exchange submitting amended rulebooks.

The Commission has previously estimated the combined annual burden hours for both §§ 40.5 and 40.6 to be 7,000 hours.[1689] Upon implementation of final § 150.9, the Commission estimates that six exchanges will each make one initial § 40.5 rule filing per year for a total of six one-time initial submissions for all exchanges. The Commission further estimates that the exchanges will employ a combination of in-house and outside legal and compliance counsel to update existing rulebooks and it will take 25 hours to complete and file each rule for a total 25 one-time burden hours for each exchange and 150 one-time burden hours for all exchanges.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[1690] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[1691] The requirements related to the Final Rule fall mainly on registered entities, exchanges, FCMs, swap dealers, clearing members, foreign brokers, and large traders. The Commission has previously determined that registered DCMs, FCMs, swap dealers, major swap participants, eligible contract participants, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA.[1692]

Further, while the requirements under this rulemaking may impact nonfinancial end users, the Commission notes that position limits levels apply only to large traders. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), that the actions taken herein will not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the 2013 Proposal,[1693] the 2016 Supplemental Proposal,[1694] the 2016 Reproposal,[1695] and the 2020 NPRM.[1696]

*D. Antitrust Considerations*

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.[1697] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. In the Proposal, the Commission requested comments on whether: (1) The proposed rules could be anticompetitive; (2) there are other less anticompetitive means of deterring and preventing price manipulation or any other disruptions to market integrity; and (3) requiring DCOs to impose initial margin surcharges in lieu of imposing position limits is feasible.

The Commission does not anticipate that the position limits regime that it is adopting today will result in anticompetitive behavior. To the contrary, the Commission believes that the relatively high position limit levels (coupled with the numerous exemptions from position limits adopted as part of this rulemaking) do not establish any barriers to entry or competitive restraints. As noted above, the Commission encouraged comments from the public on any aspect of the rulemaking that may have the potential to be inconsistent with the antitrust laws or be anticompetitive in nature. The Commission received two (2) comments asserting that the proposed rule may be anticompetitive.

ICE commented that it has concerns regarding the potential anticompetitive aspects of the Commission's approach to aggregation of contracts across all exchanges rather than on a per exchange basis.[1698] In particular, ICE asserted that the aggregation of referenced contracts across all exchanges by the Commission fails to comply with the requirements of Section 15(b) of the CEA that requires the Commission take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA.[1699] ICE noted that an aggregated Federal position limit, across all exchanges, may make it very difficult for an exchange to launch a new contract or that would be aggregated with an existing contract for position limit purposes. In addition, ICE also indicated that launching a new exchange may even be more difficult given the aggregate approach to position limits across exchanges. The underlying

[1688] For example, exchanges have frequently submitted advance courtesy copies of new rule filings and product filings to the Commission under the part 40 regulations.

[1689] The supporting statement for the current active information collection request, ICR Reference No: 201503–3038–002, for OMB control number 3038–0013, estimated that seven respondents would file the §§ 1.47 and 1.48 reports, and that each respondent would file two reports for a total of 14 annual responses, requiring three hours per response, for a total of 42 burden hours for all respondents.

[1690] 44 U.S.C. 601 *et seq.*

[1684] 5 U.S.C. 601(2), 603–05.

[1692] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618–19, (Apr. 30, 1982) (DCMs, FCMs, and large traders) (''RFA Small Entities Definitions''); Opting Out of Segregation, 66 FR 20740–20743, (Apr. 25, 2001) (eligible contract participants); Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680, (Nov. 18, 2011) (clearing members); Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548, (Jun. 4, 2013) (SEFs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, (Aug. 29, 2001) (DCOs); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, Jan. 19, 2012, (swap dealers and major swap participants); and Special Calls, 72 FR 50209, (Aug. 31, 2007) (foreign brokers).

[1693] *See* 2013 Proposal, 78 FR at 75784.

[1694] *See* 2016 Supplemental Proposal, 81 FR at 38499.

[1695] *See* 2016 Reproposal, 81 FR at 96894.

[1696] *See* 2020 NPRM, 85 FR at 11708.

[1697] 7 U.S.C. 19(b).

[1698] ICE at 12.

[1699] ICE believes that this is particularly true for cash-settled contracts and for other contracts outside of the delivery month.

basis for ICE's assertion is that aggregation may potentially reduce the ability of a new exchange or new contract to attract enough liquidity to become sustainable. ICE argued that a more flexible approach to aggregation of positions that allows each exchange to develop its own liquidity (and establish its own limits), even for similar or look-alike contracts, would better advance the goals of developing robust and liquid markets while providing adequate means to protect against excessive speculation.

Similarly, FIA commented that the Commission's aggregation of position limits across exchanges in connection with financially-settled reference contracts ''will reduce innovation and competition between exchanges because any new proposed financially-settled referenced futures contracts will have to share the same liquidity pool with existing financially-settled referenced futures contracts, including economically-equivalent swaps.'' [1700] Instead, FIA argued that position limits should be established per designated contract spot month limits for financially-settled referenced contracts and a separate spot month limit should be established for economically-equivalent swaps in order to enhance competition, innovation and liquidity for bona fide hedgers.

As an initial legal matter, the Commission interprets CEA section 4a(a)(6) to generally require aggregated Federal position limits across exchanges. CEA section 4a(a)(6) requires the Commission to ''establish limits . . . on the aggregate number or amount of positions . . . across—(A) contracts listed by designated contract markets . . . .'' Accordingly, even if the Commission were to grant ICE's claim *in arguendo* of possible anti-competitive affects, the requirement in CEA section 4a(a)(6) that Federal position limits should apply in the aggregate across exchanges is dispositive for the Commission's approach under the Final Rule.[1701]

As stated above in Section II.B.10 of the preamble, the Commission disagrees with comments by ICE and FIA asserting that generally the aggregation of cash-settled positions across exchanges would impair competition and provide a barrier to financial innovation. Both commenters essentially advocate for a disaggregated Federal position limit that applies on a per-exchange basis based on the notion that this will promote and attract greater liquidity to the markets regardless of the potential for manipulation and/or market disruption. In contrast to these commenters' concerns, the Commission submits that in general an aggregate position limit framework across exchanges should promote, not prohibit, competition and therefore enhance liquidity formation.[1702] The ability to apply the Federal position limits framework on a disaggregated basis would also significantly increase position limits so that the potential risk of excessive speculation and manipulation would become a much greater concern to the Commission based on the ability of market participants to hold larger positions in the aggregate across exchanges. Therefore, under the approach supported by ICE and FIA, the Commission would be required to re-adjust Federal position limits to a much lower level, potentially impacting liquidity and future financial innovation. The Commission also asserts that the application of the Federal position limit levels across exchanges promotes innovation and competition in the marketplace because the full aggregate position limit level is available for market participants regardless of the particular trading venue/exchange, which, by definition, promotes greater competition and significant price discovery.

As noted in the 2020 NPRM and the preamble of this adopting release,[1703] the Commission is aware that exchanges may also have conflicting and competing interests in connection with the adoption of exchange position limits and accountability levels. Additionally, the final rules with respect to exchange-set position limits require any new commodity derivative contract to establish limits at a ''comparable'' level to existing contracts that are substantially similar (*i.e.,* ''look-alike contracts'') on other exchanges unless the exchange listing the new contract demonstrates to the satisfaction of Commission staff, in its product filing with the Commission, how its levels comply with the requirements of § 150.5(b)(1) and (2). This requirement could potentially provide competitive advantages to the ''first mover'' exchange since such exchange could effectively establish the position limit for all other exchanges that seek to list and trade substantially similar contracts.

Although the Commission acknowledges these competitive concerns, the Commission believes that these concerns are mitigated because (i) an exchange is required to submit any proposed position limits to the Commission under part 40 of the Commission's regulations and (ii) an exchange is required pursuant to § 150.5(b) to set limits that are necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index. In addition, for those commodity derivative contracts that are subject to a Federal speculative position limit under § 150.2, the limit set by the exchange can be no higher than Federal speculative position limit specified in § 150.2. The Commission believes that exchanges have significant incentives to maintain well-functioning markets to remain competitive with other exchanges. Market participants may choose exchanges that are less susceptible to sudden or unreasonable fluctuations or unwarranted changes caused by excessive speculation or corners, squeezes, and manipulation, which could, among other things, harm the price discovery function of the commodity derivative contracts and negatively impact the delivery of the underlying commodity, bona fide hedging strategies, and market participants' general risk management.[1704] Furthermore, several academic studies, including one concerning futures exchanges and another concerning demutualized stock exchanges, support the conclusion that exchanges are able to both satisfy shareholder interests and meet their self-regulatory organization responsibilities.[1705]

[1700] FIA at p. 8.

[1701] As discussed in the preamble to this release, however, the Commission is making an exception under its exemptive authority for position limits in CEA section 4a(a)(7) for the NYMEX NG referenced contracts, which will be subject to a per-exchange position limit level, based on the unique liquidity characteristics of the natural gas markets.

[1702] The Commission believes that permitting Federal position limits to apply on a disaggregated, per-exchange basis also has the potential to further divide liquidity among several liquidity pools, which could make accessing liquidity for bona fide hedgers more difficult and reduce price discovery.

[1703] *See* 85 FR 11596, 11677 at fn. 576; *see also* Section II.G. (discussing the § 150.9 process and the role of the exchanges) and Section II.B.2 (discussing the role of exchanges in connection with non-spot month limits under § 150.2).

[1704] Kane, Stephen, *Exploring price impact liquidity for December 2016 NYMEX energy contracts,* n.33, available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_priceimpact.pdf.*

[1705] *See* David Reiffen and Michel A. Robe, *Demutualization and Customer Protection at Self-Regulatory Financial Exchanges,* Journal of Futures Markets, Vol. 31, 126–164, Feb. 2011 (in many circumstances, an exchange that maximizes shareholder (rather than member) income has a greater incentive to aggressively enforce regulations that protect participants from dishonest agents); and Kobana Abukari and Isaac Otchere, *Has Stock Exchange Demutualization Improved Market*

Continued

The Commission has determined that the position limit rules adopted today serve the regulatory purpose of the CEA ''to deter and prevent price manipulation or any other disruptions to market integrity.'' [1706] In addition, the Commission notes that the adopted position limit rules implement additional purposes and policies set forth in section 4a(a) of the CEA.[1707] The Commission has considered the rulemaking and related comments to determine whether it is anticompetitive, and continues to believe that the position limits rulemaking will not result in any unreasonable restraint of trade or impose any material anticompetitive burden on trading in the markets.

**Final Regulatory Text and Related Appendices**

**List of Subjects**

*17 CFR Part 1*

Agricultural commodity, Agriculture, Brokers, Committees, Commodity futures, Conflicts of interest, Consumer protection, Definitions, Designated contract markets, Directors, Major swap participants, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements, Swap dealers, Swaps.

*17 CFR Part 15*

Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

*17 CFR Part 17*

Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

*Quality? International Evidence,* Review of Quantitative Finance and Accounting, Dec 09, 2019, *https://doi.org/10.1007/s11156-019-00863-y* (demutualized exchanges have realized significant reductions in transaction costs in the post-demutualization period).

[1706] Section 3(b) of the CEA, 7 U.S.C. 5(b).

[1707] 7 U.S.C. 7a(a) (burdens on interstate commerce; trading or position limits).

*17 CFR Part 19*

Commodity futures, Cottons, Grains, Reporting and recordkeeping requirements, Swaps.

*17 CFR Part 40*

Commodity futures, Procedural rules, Reporting and recordkeeping requirements.

*17 CFR Part 140*

Authority delegations (Government agencies), Conflict of interests, Organizations and functions (Government agencies).

*17 CFR Part 150*

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

*17 CFR Part 151*

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

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

## PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

### § 1.3 [Amended]

■ 2. In § 1.3, remove the definition of the term ''bona fide hedging transactions and positions for excluded commodities''.

## PART 15—REPORTS—GENERAL PROVISIONS

■ 3. The authority citation for part 15 continues to read as follows:

**Authority:** 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 4. In § 15.00, revise paragraph (p)(1) to read as follows:

### § 15.00 Definitions of terms used in parts 15 to 19, and 21 of this chapter.

* * * * *

(p) * * *

(1) For reports specified in parts 17 and 18 and in § 19.00(a) and (b) of this chapter, any open contract position that at the close of the market on any business day equals or exceeds the quantity specified in § 15.03 in either:

(i) Any one futures of any commodity on any one reporting market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of the reporting market; or

(ii) Long or short put or call options that exercise into the same futures contract of any commodity, or other long or short put or call commodity options that have identical expirations and exercise into the same commodity, on any one reporting market.

* * * * *

■ 5. In § 15.01, revise paragraph (d) to read as follows:

### § 15.01 Persons required to report.

* * * * *

(d) Persons, as specified in part 19 of this chapter, who:

(1) Are merchants or dealers of cotton holding or controlling positions for future delivery in cotton that equal or exceed the amount set forth in § 15.03; or

(2) Are persons who have received a special call from the Commission or its designee under § 19.00(b) of this chapter.

* * * * *

■ 6. Revise § 15.02 to read as follows:

### § 15.02 Reporting forms.

Forms on which to report may be obtained from any office of the Commission or via *https://www.cftc.gov*. Listed below are the forms to be used for the filing of reports. To determine who shall file these forms, refer to the Commission rule listed in the column opposite the form number.

| Form No. | Title | Rule |
|---|---|---|
| 40 | Statement of Reporting Trader | 18.04 |
| 71 | Identification of Omnibus Accounts and Sub-accounts | 17.01 |
| 101 | Positions of Special Accounts | 17.00 |
| 102 | Identification of Special Accounts, Volume Threshold Accounts, and Consolidated Accounts | 17.01 |
| 304 | Statement of Cash Positions for Unfixed-Price Cotton "On Call" | 19.00 |

(Approved by the Office of Management and Budget under control numbers 3038-0007, 3038-0009, 3038-0013, and 3038-0103.)

## PART 17—REPORTS BY REPORTING MARKETS, FUTURES COMMISSION MERCHANTS, CLEARING MEMBERS, AND FOREIGN BROKERS

■ 7. The authority citation for part 17 continues to read as follows:

**Authority:** 7 U.S.C. 2, 6a, 6c, 6d, 6f, 6g, 6i, 6t, 7, 7a, and 12a.

■ 8. In § 17.00, revise paragraph (b) introductory text to read as follows:

### § 17.00 Information to be furnished by futures commission merchants, clearing members and foreign brokers.

* * * * *

(b) *Interest in or control of several accounts.* Except as otherwise instructed by the Commission or its designee and as specifically provided in § 150.4 of this chapter, if any person holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member, or foreign broker as a single account for the purpose of determining special account status and for reporting purposes.

* * * * *

■ 9. In § 17.03, add paragraph (i) to read as follows:

### § 17.03 Delegation of authority to the Director of the Office of Data and Technology or the Director of the Division of Market Oversight.

* * * * *

(i) Pursuant to § 17.00(b), and as specifically provided in § 150.4 of this chapter, the authority shall be designated to the Director of the Office of Data and Technology to instruct a futures commission merchant, clearing member, or foreign broker to consider otherwise than as a single account for the purpose of determining special account status and for reporting purposes all accounts one person holds or controls, or in which the person has a financial interest.

■ 10. Revise part 19 to read as follows:

## PART 19—REPORTS BY PERSONS HOLDING REPORTABLE POSITIONS IN EXCESS OF POSITION LIMITS, AND BY MERCHANTS AND DEALERS IN COTTON

Sec.

19.00 Who shall furnish information.
19.01 [Reserved]
19.02 Reports pertaining to cotton on call purchases and sales.
19.03 Delegation of authority to the Director of the Division of Enforcement.
19.04–19.10 [Reserved]
Appendix A to Part 19—Form 304

**Authority:** 7 U.S.C. 6g, 6c(b), 6i, and 12a(5).

### § 19.00 Who shall furnish information.

(a) *Persons filing cotton-on-call reports.* Merchants and dealers of cotton holding or controlling positions for future delivery in cotton that are reportable pursuant to § 15.00(p)(1)(i) of this chapter shall file CFTC Form 304.

(b) *Persons responding to a special call.* All persons: Exceeding speculative position limits under § 150.2 of this chapter; or holding or controlling positions for future delivery that are reportable pursuant to § 15.00(p)(1) of this chapter and who have received a special call from the Commission or its designee shall file any pertinent information as instructed in the special call. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. Such filing shall be transmitted using the format, coding structure, and electronic data submission procedures approved in writing by the Commission.

### § 19.01 [Reserved]

### § 19.02 Reports pertaining to cotton on call purchases and sales.

(a) *Information required.* Persons required to file CFTC Form 304 reports under § 19.00(a) shall file CFTC Form 304 reports showing the quantity of call cotton bought or sold on which the price has not been fixed, together with the respective futures on which the purchase or sale is based. As used herein, call cotton refers to spot cotton bought or sold, or contracted for purchase or sale at a price to be fixed later based upon a specified future.

(b) *Time and place of filing reports.* Each CFTC Form 304 report shall be made weekly, dated as of the close of business on Friday, and filed not later than 9 a.m. Eastern Time on the third business day following that Friday using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission.

**§ 19.03 Delegation of authority to the Director of the Division of Enforcement.**

(a) The Commission hereby delegates, until it orders otherwise, the authority in § 19.00(b) to issue special calls to the Director of the Division of Enforcement, or such other employee or employees as the Director may designate from time to time.

(b) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Enforcement, or such other employee or employees as the Director may designate from time to time, the authority in § 19.00(b) to provide instructions or to determine the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(c) The Director of the Division of Enforcement may submit to the Commission for its consideration any matter which has been delegated in this section.

(d) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

**§§ 19.04—19.10 [Reserved]**

## Appendix A to Part 19—Form 304

BILLING CODE 6351–01–P

## CFTC FORM 304

### Statement of Cash Positions for Unfixed-Price

### Cotton "On Call"

**NOTICE:** Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading, or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

### PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4i and 8 of the CEA and related regulations (*see, e.g.*, 17 CFR 19.02). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see, e.g.*, 7 U.S.C. 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is used by the Commission to prepare its cotton on-call report. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on *www.cftc.gov*.

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[1] 7 U.S.C. 1, *et seq*.

[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter I of title 17 of the Code of Federal Regulations; 17 CFR chapter I.

## BACKGROUND & INSTRUCTIONS

Applicable Regulations:

- 17 CFR 19.00(a) specifies who shall file Form 304.
- 17 CFR 19.02(a) specifies the information required on Form 304.
- 17 CFR 19.02(b) specifies the frequency (weekly), the report date (close of business on Friday), and the time (9 a.m. Eastern Time on the third business day following that Friday) and manner, for filing the Form 304.

Please follow the instructions below to generate and submit the required filing. Relevant regulations are cited in parentheses () for reference. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

**Complete Form 304 as follows:**

**The trader identification fields should be completed by all filers.** This Form 304 requires traders to identify themselves using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of the Form 304. This number is provided to traders who have previously filed Forms 40 or 102 with the Commission. Traders may contact the Commission to obtain this number if it is unknown. If a trader has a National Futures Association Identification Number ("NFA ID") and/or a Legal Entity Identifier ("LEI"), the trader should also identify itself using those numbers. Form 304 requires traders to identify the name of the reporting trader or firm and the contact information (including full name, address, phone number, and email address) for a natural person the Commission may contact regarding the submitted Form 304.

**Merchants and dealers of cotton shall report on Form 304.** Report in hundreds of 500-lb. bales unfixed-price cotton "on-call" pursuant to § 19.02(a) of the Commission's regulations.

Include under "Call Purchases" stocks on hand for which price has not yet been fixed. For each listed stock, report the delivery month, delivery year, quantity of call purchases, and quantity of call sales.

**The signature/authorization page shall be completed by all filers.** This page shall include the name and position of the natural person filing Form 304 as well as the name of the reporting trader represented by that person. The trader certifying this Form 304 on the signature/authorization page should note that filing a report that includes a false, misleading, or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

**Submitting Form 304:** Once completed, please submit this form to the Commission pursuant to the instructions on *www.cftc.gov* or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at *techsupport@cftc.gov* for further technical support.

Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

<table>
<tr><td colspan="5">Public Trader ID No. [provided by CFTC]</td><td>OMB No. 3038-0013</td></tr>
<tr><td rowspan="11">COMMODITY FUTURES TRADING COMMISSION<br>FORM 304<br>STATEMENT OF CASH POSITIONS FOR UNFIXED-PRICE<br>COTTON “ON-CALL”</td><td colspan="5">Identifying Information</td></tr>
<tr><td colspan="5">Identification Codes:</td></tr>
<tr><td colspan="2">NFA ID</td><td colspan="3">Legal Entity Identifier (LEI)</td></tr>
<tr><td colspan="2"></td><td colspan="3"></td></tr>
<tr><td colspan="5">Name of Reporting Trader or Firm:</td></tr>
<tr><td colspan="5"></td></tr>
<tr><td colspan="5">Name of Person to Contact Regarding This Form:</td></tr>
<tr><td>First Name</td><td>Middle Name</td><td colspan="2">Last Name</td><td>Suffix</td></tr>
<tr><td></td><td></td><td colspan="2"></td><td></td></tr>
<tr><td colspan="5">Contact Information:</td></tr>
<tr><td>Address</td><td>Phone Number</td><td colspan="3">Email Address</td></tr>
</table>

| | | | |
|---|---|---|---|
| | | | |
| NOTICE: Failure to file a report required by the Commodity Exchange Act (“CEA” or the “Act”) and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission (“CFTC” or “Commission”) that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number. | | | |
| Unfixed-price Cotton “on-call” pursuant to § 19.02(a); include under “Call Purchases” stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales). | | | |
| Delivery Month | Delivery Year | Call Purchases (’00 bales) | Call Sales (’00 bales) |
| | | | |
| | | | |

Please sign/authenticate the Form 304 prior to submitting.

Signature/ Electronic Authentication:

☐ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 304, and that to the best of my knowledge the information and representations made herein are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission: ____________________

CFTC Form 304 (XX-XX)

Previous Editions Obsolete

Form 304, Example – July 2020 Call purchases of 200 bales and sales of 1,800 bales; October Call purchases of 6,600 bales and sales of 8,000 bales.

| Unfixed-price Cotton "on-call" pursuant to § 19.02(a); include under "Call Purchases" stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales). | | | |
|---|---|---|---|
| Delivery Month | Delivery Year | Call Purchases ('00 bales) | Call Sales ('00 bales) |
| July | 2020 | 2 | 18 |
| October | 2020 | 66 | 80 |
| | | | |

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## PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

■ 11. The authority citation for part 40 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 7, 7a, 8 and 12, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 12. In § 40.1, revise paragraphs (j)(1)(vii) and (j)(2)(vii) to read as follows:

### § 40.1 Definitions.

* * * * *

(j) * * *

(1) * * *

(vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of a referenced contract as defined in § 150.1 of this chapter, and, if so, the name of either the core referenced futures contract or other referenced contract upon which the new referenced contract submitted under this part 40 is based.

* * * * *

(2) * * *

(vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of economically equivalent swap as defined in § 150.1 of this chapter, and, if so, the name of either the core referenced futures contract or referenced contract, as applicable, to which the swap submitted under this part 40 is economically equivalent.

* * * * *

## PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 13. The authority citation for part 140 continues to read as follows:

**Authority:** 7 U.S.C. 2(a) (12), 12a, 13(c), 13(d), 13(e), and 16(b).

### § 140.97 [Removed and Reserved]

■ 14. Remove and reserve § 140.97.

## PART 150—LIMITS ON POSITIONS

■ 15. The authority citation for part 150 is revised to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, and 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 16. Revise § 150.1 to read as follows:

### § 150.1 Definitions.

As used in this part—

*Bona fide hedging transaction or position* means a transaction or position in commodity derivative contracts in a physical commodity, where:

(1) Such transaction or position:

(i) Represents a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel;

(ii) Is economically appropriate to the reduction of price risks in the conduct and management of a commercial enterprise; and

(iii) Arises from the potential change in the value of—

(A) Assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(B) Liabilities which a person owes or anticipates incurring; or

(C) Services that a person provides or purchases, or anticipates providing or purchasing; or

(2) Such transaction or position qualifies as a:

(i) *Pass-through swap and pass-through swap offset pair.* Paired positions of a pass-through swap and a pass-through swap offset, where:

(A) The pass-through swap is a swap position entered into by one person for which the swap would qualify as a bona fide hedging transaction or position pursuant to paragraph (1) of this definition (the bona fide hedging swap counterparty) that is opposite another person (the pass-through swap counterparty);

(B) The pass-through swap offset:

(*1*) Is a futures contract position, option on a futures contract position, or swap position entered into by the pass-through swap counterparty; and

(*2*) Reduces the pass-through swap counterparty's price risks attendant to the pass-through swap; and

(C) With respect to the pass-through swap offset, the pass-through swap counterparty receives from the bona fide hedging swap counterparty a written representation that the pass-through swap qualifies as a bona fide hedging transaction or position pursuant to paragraph (1) of this definition, and the pass-through swap counterparty may rely in good faith on such written representation, unless the pass-through swap counterparty has information that would cause a reasonable person to question the accuracy of the representation; or

(ii) *Offset of a bona fide hedger's qualifying swap position.* A futures contract position, option on a futures contract position, or swap position entered into by a bona fide hedging swap counterparty that reduces price risks attendant to a previously-entered-into swap position that qualified as a bona fide hedging transaction or position at the time it was entered into for that counterparty pursuant to paragraph (1) of this definition.

*Commodity derivative contract* means any futures contract, option on a futures contract, or swap in a commodity (other than a security futures product as defined in section 1a(45) of the Act).

*Core referenced futures contract* means a futures contract that is listed in § 150.2(d).

*Economically equivalent swap* means, with respect to a particular referenced contract, any swap that has identical material contractual specifications, terms, and conditions to such referenced contract.

(1) Other than as provided in paragraph (2) of this definition, for the purpose of determining whether a swap is an economically equivalent swap with respect to a particular referenced contract, the swap shall not be deemed to lack identical material contractual specifications, terms, and conditions due to different lot size specifications or notional amounts, delivery dates diverging by less than one calendar day, or different post-trade risk management arrangements.

(2) With respect to any natural gas referenced contract, for the purpose of determining whether a swap is an economically equivalent swap to such referenced contract, the swap shall not be deemed to lack identical material contractual specifications, terms, and conditions due to different lot size specifications or notional amounts, delivery dates diverging by less than two calendar days, or different post-trade risk management arrangements.

(3) With respect to any referenced contract or class of referenced contracts, the Commission may make a determination that any swap or class of swaps satisfies, or does not satisfy, this economically equivalent swap definition.

*Eligible affiliate* means an entity with respect to which another person:

(1) Directly or indirectly holds either:

(i) A majority of the equity securities of such entity, or

(ii) The right to receive upon dissolution of, or the contribution of, a majority of the capital of such entity;

(2) Reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such entity; and

(3) Is required to aggregate the positions of such entity under § 150.4 and does not claim an exemption from aggregation for such entity.

*Eligible entity* means a commodity pool operator; the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term ''pool'' or ''commodity pool operator,'' respectively, under § 4.5 of this chapter; the limited partner, limited member or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity's client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity's behalf, but without the eligible entity's day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner, limited member or shareholder of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter, only such limited control as is consistent with its status.

*Entity* means a ''person'' as defined in section 1a of the Act.

*Excluded commodity* means an ''excluded commodity'' as defined in section 1a of the Act.

*Futures-equivalent* means:

(1)(i) An option contract, whether an option on a futures contract or an option that is a swap, which has been:

(A) Adjusted by an economically reasonable and analytically supported exposure to price changes of the underlying referenced contract that has been computed for that option contract as of the previous day's close or the current day's close or computed contemporaneously during the trading day, and

(B) Converted to an economically equivalent amount of an open position in the underlying referenced contract.

(ii) An entity is allowed one business day to liquidate an amount of the position that is in excess of speculative position limits without being considered in violation of the speculative position limits if such excess position results from:

(A) A position that exceeds speculative position limits as a result of an option contract assignment; or

(B) A position that includes an option contract that exceeds speculative position limits when the applicable option contract is adjusted by an economically reasonable and analytically supported exposure to price changes of the underlying referenced contract as of that business day's close of trading, as long as the applicable option contract does not exceed such speculative position limits when evaluated using the previous business day's exposure to the underlying referenced contract. This paragraph (B) shall not apply if such day would be the last trading day of the spot month for the corresponding core referenced futures contract.

(2) A futures contract which has been converted to an economically equivalent amount of an open position in a core referenced futures contract; and

(3) A swap which has been converted to an economically equivalent amount of an open position in a core referenced futures contract.

*Independent account controller* means a person:

(1) Who specifically is authorized by an eligible entity, as defined in this section, independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed

positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

(3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;

(4) Who has no knowledge of trading decisions by any other independent account controller; and

(5) Who is:

(i) Registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or

(ii) A general partner, managing member or manager of a commodity pool the operator of which is excluded from registration under § 4.5(a)(4) of this chapter or § 4.13 of this chapter, *provided that* such general partner, managing member or manager complies with the requirements of § 150.4(c).

*Long position* means, on a futures-equivalent basis, a long call option, a short put option, a long underlying futures contract, or a swap position that is equivalent to a long futures contract.

*Physical commodity* means any agricultural commodity as that term is defined in § 1.3 of this chapter or any exempt commodity as that term is defined in section 1a of the Act.

*Position accountability* means any bylaw, rule, regulation, or resolution that:

(1) Is submitted to the Commission pursuant to part 40 of this chapter in lieu of, or along with, a speculative position limit, and

(2) Requires an entity whose position exceeds the accountability level to consent to:

(i) Provide information about its position to the designated contract market or swap execution facility; and

(ii) Halt increasing further its position or reduce its position in an orderly manner, in each case as requested by the designated contract market or swap execution facility.

*Pre-enactment swap* means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

*Pre-existing position* means any position in a commodity derivative contract acquired in good faith prior to the effective date of any bylaw, rule, regulation, or resolution that specifies a speculative position limit level or a subsequent change to that level.

*Referenced contract* means:

(1) A core referenced futures contract listed in § 150.2(d) or, on a futures-equivalent basis with respect to a particular core referenced futures contract, a futures contract or an option on a futures contract, including a spread, that is either:

(i) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or

(ii) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract; or

(2) On a futures-equivalent basis, an economically equivalent swap.

(3) The definition of referenced contract does not include a location basis contract, a commodity index contract, any guarantee of a swap, a trade option that meets the requirements of § 32.3 of this chapter, any outright price reporting agency index contract, or any monthly average pricing contract.

*Short position* means, on a futures-equivalent basis, a short call option, a long put option, a short underlying futures contract, or a swap position that is equivalent to a short futures contract.

*Speculative position limit* means the maximum position, either net long or net short, in a commodity derivative contract that may be held or controlled by one person absent an exemption, whether such limits are adopted for:

(1) Combined positions in all commodity derivative contracts in a particular commodity, including the spot month futures contract and all single month futures contracts (the spot month and all single month futures contracts, cumulatively, ''all-months-combined'');

(2) Positions in a single month of commodity derivative contracts in a particular commodity other than the spot month futures contract (''single month''); or

(3) Positions in the spot month of commodity derivative contacts in a particular commodity. Such a limit may be established under Federal regulations or rules of a designated contract market or swap execution facility. For referenced contracts other than core referenced futures contracts, single month means the same period as that of the relevant core referenced futures contract.

*Spot month* means:

(1) For physical-delivery core referenced futures contracts, the period of time beginning at the earlier of:

(i) The close of business on the trading day preceding the first day on which delivery notices can be issued by the clearing organization of a contract market or

(ii) The close of business on the trading day preceding the third-to-last trading day and ending when the contract expires, except as follows:

(A) For the *ICE Futures U.S. Sugar No. 11* (SB) core referenced futures contract, the spot month means the period of time beginning at the opening of trading on the second business day following the expiration of the regular option contract traded on the expiring futures contract and ending when the contract expires;

(B) For the *ICE Futures U.S. Sugar No. 16* (SF) core referenced futures contract, the spot month means the period of time beginning on the third-to-last trading day of the contract month and ending when the contract expires; and

(C) For the *Chicago Mercantile Exchange Live Cattle* (LC) core referenced futures contract, the spot month means the period of time beginning at the close of trading on the first business day following the first Friday of the contract month and ending when the contract expires; and

(2) For referenced contracts other than core referenced futures contracts, the spot month means the same period as that of the relevant core referenced futures contract.

*Spread transaction* means an intra-market spread, inter-market spread, intra-commodity spread, or inter-commodity spread, including a calendar spread, quality differential spread, processing spread, product or by-product differential spread, or futures-option spread.

*Swap* means ''swap'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

*Swap dealer* means ''swap dealer'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

*Transition period swap* means a swap entered into during the period commencing on the day of the enactment of the Dodd-Frank Act of 2010 (July 21, 2010), and ending 60 days after the publication in the **Federal Register** of final amendments to this part implementing section 737 of the Dodd-Frank Act of 2010, the terms of which have not expired as of 60 days after the publication date.

■ 17. Revise § 150.2 to read as follows:

**§ 150.2 Federal speculative position limits.**

(a) *Spot month speculative position limits.* For physical-delivery referenced contracts and, separately, for cash-settled referenced contracts, no person may hold or control positions in the spot month, net long or net short, in excess of the levels specified by the Commission.

(b) *Single month and all-months-combined speculative position limits.* For any referenced contract, no person may hold or control positions in a single month or in all-months-combined (including the spot month), net long or net short, in excess of the levels specified by the Commission.

(c) *Relevant contract month.* For purposes of this part, for referenced contracts other than core referenced futures contracts, the spot month and any single month shall be the same as those of the relevant core referenced futures contract.

(d) *Core referenced futures contracts.* Federal speculative position limits apply to referenced contracts based on the following core referenced futures contracts:

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## Core Referenced Futures Contracts

| ***Commodity Type*** | ***Designated Contract Market*** | ***Core Referenced Futures Contract***[1] |
|---|---|---|
| *Legacy Agricultural* | | |
| | Chicago Board of Trade | |
| | | Corn (C) |
| | | Oats (O) |
| | | Soybeans (S) |
| | | Soybean Meal (SM) |
| | | Soybean Oil (SO) |
| | | Wheat (W) |
| | | Hard Winter Wheat (KW) |
| | ICE Futures U.S. | |
| | | Cotton No. 2 (CT) |
| | Minneapolis Grain Exchange | |
| | | Hard Red Spring Wheat (MWE) |
| *Other Agricultural* | | |
| | Chicago Board of Trade | |

| Commodity Type | Designated Contract Market | Core Referenced Futures Contract[1] |
|---|---|---|
| | | Rough Rice (RR) |
| | Chicago Mercantile Exchange | |
| | | Live Cattle (LC) |
| | ICE Futures U.S. | |
| | | Cocoa (CC) |
| | | Coffee C (KC) |
| | | FCOJ-A (OJ) |
| | | U.S. Sugar No. 11 (SB) |
| | | U.S. Sugar No. 16 (SF) |
| *Energy* | | |
| | New York Mercantile Exchange | |
| | | Light Sweet Crude Oil (CL) |
| | | NY Harbor ULSD (HO) |
| | | RBOB Gasoline (RB) |
| | | Henry Hub Natural Gas (NG) |
| *Metals* | | |
| | Commodity Exchange, Inc. | |
| | | Gold (GC) |
| | | Silver (SI) |
| | | Copper (HG) |
| | New York Mercantile Exchange | |
| | | Palladium (PA) |
| | | Platinum (PL) |

[1] The core referenced futures contract includes any successor contracts.

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(e) *Establishment of speculative position limit levels.* The levels of Federal speculative position limits are fixed by the Commission at the levels listed in appendix E to this part.

(f) *Designated contract market estimates of deliverable supply.* Each designated contract market listing a core referenced futures contract shall supply to the Commission an estimated spot month deliverable supply upon request by the Commission, and may supply such estimates to the Commission at any other time. Each estimate shall be accompanied by a description of the methodology used to derive the estimate and any statistical data supporting the estimate, and shall be submitted using the format and procedures approved in writing by the Commission. A designated contract market should use the guidance regarding deliverable supply in appendix C to part 38 of this chapter.

(g) *Pre-existing positions*—(1) *Pre-existing positions in a spot month.* A spot month speculative position limit established under this section shall apply to pre-existing positions, other than pre-enactment swaps and transition period swaps.

(2) *Pre-existing positions in a non-spot month.* A single month or all-months-combined speculative position limit established under this section shall apply to pre-existing positions, other than pre-enactment swaps and transition period swaps.

(h) *Positions on foreign boards of trade.* The speculative position limits established under this section shall apply to a person's combined positions in referenced contracts, including positions executed on, or pursuant to the rules of, a foreign board of trade, pursuant to section 4a(a)(6) of the Act, *provided that:*

(1) Such referenced contracts settle against any price (including the daily or final settlement price) of one or more contracts listed for trading on a designated contract market or swap execution facility that is a trading facility; and

(2) The foreign board of trade makes available such referenced contracts to its members or other participants located in the United States through direct access to its electronic trading and order matching system.

(i) *Anti-evasion provision.* For the purposes of applying the speculative position limits in this section, if used to willfully circumvent or evade speculative position limits:

(1) A commodity index contract, monthly average pricing contract, outright price reporting agency index contract, and/or a location basis contract shall be considered to be a referenced contract;

(2) A bona fide hedging transaction or position recognition or spread exemption shall no longer apply; and

(3) A swap shall be considered to be an economically equivalent swap.

(j) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in paragraph (f) of this section to request estimated spot month deliverable supply from a designated contract market and to provide the format and procedures for submitting such estimates.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

(k) *Eligible affiliates and aggregation.* For purposes of this part, if an eligible affiliate meets the conditions for any exemption from aggregation under § 150.4, the eligible affiliate may choose to utilize that exemption, or it may opt to be aggregated with its affiliated entities.

■ 18. Revise § 150.3 to read as follows:

**§ 150.3 Exemptions.**

(a) *Positions which may exceed limits.* A person may exceed the speculative position limits set forth in § 150.2 to the extent that all applicable requirements in this part are met, *provided that* such person's transactions or positions each satisfy one of the following:

(1) *Bona fide hedging transactions or positions.* Positions that comply with the bona fide hedging transaction or position definition in § 150.1, and are:

(i) Enumerated in appendix A to this part; or

(ii) Approved as non-enumerated bona fide hedging transactions or positions in accordance with paragraph (b)(4) of this section or § 150.9.

(2) *Spread transactions.* Transactions that:

(i) Meet the spread transaction definition in § 150.1; or

(ii) Do not meet the spread transaction definition in § 150.1, but have been approved by the Commission pursuant to paragraph (b)(4) of this section.

(3) *Financial distress positions.* Positions of a person, or a related person or persons, under financial distress circumstances, when exempted by the Commission from any of the requirements of this part in response to a specific request made pursuant to § 140.99(a)(1) of this chapter, where financial distress circumstances include, but are not limited to, situations involving the potential default or bankruptcy of a customer of the requesting person or persons, an affiliate of the requesting person or persons, or a potential acquisition target of the requesting person or persons.

(4) *Conditional spot month limit exemption positions in natural gas.* Spot month positions in natural gas cash-settled referenced contracts that exceed the spot month speculative position limit set forth in § 150.2, *provided that:*

(i) Such positions do not exceed the futures-equivalent of 10,000 NYMEX Henry Hub Natural Gas core referenced futures contracts per designated contract market that lists a cash-settled referenced contract in natural gas;

(ii) Such positions do not exceed the futures-equivalent of 10,000 NYMEX Henry Hub Natural Gas core referenced futures contracts in economically equivalent swaps in natural gas; and

(iii) The person holding or controlling such positions does not hold or control positions in spot month physical-delivery referenced contracts in natural gas.

(5) *Pre-enactment and transition period swaps exemption.* The speculative position limits set forth in § 150.2 shall not apply to positions acquired in good faith in any pre-enactment swap or any transition period swap, *provided however* that a person may net such positions with post-effective date commodity derivative contracts for the purpose of complying with any non-spot month speculative position limit.

(b) *Application for relief.* Any person with a position in a referenced contract seeking recognition of such position as a bona fide hedging transaction or position in accordance with paragraph (a)(1)(ii) of this section, or seeking an exemption for a spread position in accordance with paragraphs (a)(2)(ii) of this section, in each case for purposes of Federal speculative position limits set forth in § 150.2, may apply to the Commission in accordance with this section.

(1) *Required information.* The application shall include the following information:

(i) With respect to an application for recognition of a bona fide hedging transaction or position:

(A) A description of the position in the commodity derivative contract for which the application is submitted, including but not necessarily limited to, the name of the underlying commodity and the derivative position size;

(B) An explanation of the hedging strategy, including a statement that the position complies with the requirements of section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1, and information to demonstrate why the position satisfies such requirements and definition;

(C) A statement concerning the maximum size of all gross positions in commodity derivative contracts for which the application is submitted;

(D) A description of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position for which the application is submitted, including, but not necessarily limited to, information regarding the offsetting cash positions; and

(E) Any other information that may help the Commission determine whether the position satisfies the requirements of section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1.

(ii) With respect to an application for a spread exemption:

(A) A description of the spread position for which the application is submitted;

(B) A statement concerning the maximum size of all gross positions in commodity derivative contracts for which the application is submitted; and

(C) Any other information that may help the Commission determine whether the position is consistent with section 4a(a)(3)(B) of the Act.

(2) *Additional information.* If the Commission determines that it requires additional information in order to determine whether to recognize a position as a bona fide hedging transaction or position or to grant a spread exemption, the Commission shall:

(i) Notify the applicant of any supplemental information required; and

(ii) Provide the applicant with ten business days in which to provide the Commission with any supplemental information.

(3) *Timing of application.* (i) Except as provided in paragraph (b)(3)(ii) of this section, a person seeking relief in accordance with this section must apply to the Commission and receive a notice of approval of such application prior to the date that the position for which the application was submitted would be in excess of the applicable Federal speculative position limit set forth in § 150.2;

(ii) Due to demonstrated sudden or unforeseen increases in its bona fide hedging needs, a person may apply for recognition of a bona fide hedging transaction or position within five business days after the person established the position that exceeded the applicable Federal speculative position limit.

(A) Any application filed pursuant to paragraph (b)(3)(ii) of this section must include an explanation of the circumstances warranting the sudden or unforeseen increases in bona fide hedging needs.

(B) If an application filed pursuant to paragraph (b)(3)(ii) of this section is denied, the person must bring its position within the Federal speculative position limits within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility.

(C) If an application filed pursuant to paragraph (b)(3)(ii) of this section is denied, the Commission will not pursue an enforcement action for a position limits violation for the person holding the position during the period of the Commission's review nor once the Commission has issued its determination so long as the application was submitted in good faith and the person brings its position within the Federal speculative position limits within a commercially reasonable time in accordance with paragraph (b)(3)(ii)(B) of this section.

(4) *Commission determination.* After a review of any application submitted under paragraph (b) of this section and any supplemental information provided by the applicant, the Commission will determine, with respect to the transaction or position for which the application is submitted, whether to recognize all or a specified portion of such transaction or position as a bona fide hedging transaction or position or whether to exempt all or a specified portion of such spread transaction, as applicable. The Commission shall notify the applicant of its determination, and an applicant may exceed Federal speculative position limits set forth in § 150.2, or in the case of applications filed pursuant to paragraph (b)(3)(ii) of this section, the applicant may rely upon the Commission's determination, upon receiving a notice of approval.

(5) *Renewal of application.* With respect to any application approved by the Commission pursuant to this section, a person shall renew such application if there are any material changes to the information provided in the original application pursuant to paragraph (b)(1) of this section or upon request by the Commission.

(6) *Commission revocation or modification.* If the Commission determines, at any time, that a recognized bona fide hedging transaction or position is no longer consistent with section 4a(c)(2) of the Act or the definition of bona fide hedging transaction or position in § 150.1, or that a spread exemption is no longer consistent with section 4a(a)(3)(B) of the Act, the Commission shall:

(i) Notify the person holding such position;

(ii) Provide an opportunity for the applicant to respond to such notification; and

(iii) Issue a determination to revoke or modify the bona fide hedge recognition or spread exemption for purposes of Federal speculative position limits and, as applicable, require the person to reduce the derivative position within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility, or otherwise come into compliance. This notification shall briefly specify the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the position or application is, or appears to be, inconsistent.

(c) *Previously-granted risk management exemptions.* To the extent that exemptions previously granted under § 1.47 of this chapter or by a designated contract market or a swap execution facility are for the risk management of positions in financial instruments, including but not limited to index funds, such exemptions shall no longer apply as of January 1, 2023.

(d) *Recordkeeping.* (1) Persons who avail themselves of exemptions under this section shall keep and maintain complete books and records concerning all details of each of their exemptions, including relevant information about related cash, forward, futures contracts, option on futures contracts, and swap positions and transactions (including anticipated requirements, production, merchandising activities, royalties, contracts for services, cash commodity products and by-products, cross-commodity hedges, and records of bona fide hedging swap counterparties) as applicable, and shall make such books and records available to the Commission upon request under paragraph (e) of this section.

(2) Any person that relies on a written representation received from another person that a swap qualifies as a pass-through swap under paragraph (2) of the definition of bona fide hedging transaction or position in § 150.1 shall keep and make available to the Commission upon request the relevant books and records of such written representation, including any books and records that the person intends to use to demonstrate that the pass-through swap is a bona fide hedging transaction or position, for a period of at least two years following the expiration of the swap.

(3) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(e) *Call for information.* Upon call by the Commission, the Director of the Division of Enforcement, or the Director's delegate, any person claiming an exemption from speculative position limits under this section shall provide to the Commission such information as specified in the call relating to: the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the commodity derivative contracts or cash-market positions which support the claimed exemption; and the relevant business relationships supporting a claimed exemption.

(f) *Aggregation of accounts.* Entities required to aggregate accounts or positions under § 150.4 shall be considered the same person for the purpose of determining whether they are eligible for an exemption under paragraphs (a)(1) through (4) of this section with respect to such aggregated account or position.

(g) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight, or such other employee or employees as the Director may designate from time to time:

(i) The authority in paragraph (a)(3) of this section to provide exemptions in circumstances of financial distress;

(ii) The authority in paragraph (b)(2) of this section to request additional information with respect to a request for a bona fide hedging transaction or position recognition or spread exemption;

(iii) The authority in paragraph (b)(3)(ii)(B) of this section to, if applicable, determine a commercially reasonable amount of time required for a person to bring its position within the Federal speculative position limits;

(iv) The authority in paragraph (b)(4) of this section to determine whether to recognize a position as a bona fide hedging transaction or position or to grant a spread exemption; and

(v) The authority in paragraph (b)(2) or (5) of this section to request that a person submit updated materials or renew their request with the Commission.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 19. Revise § 150.5 to read as follows:

**§ 150.5 Exchange-set speculative position limits and exemptions therefrom.**

(a) *Requirements for exchange-set limits on commodity derivative contracts subject to Federal speculative position limits set forth in § 150.2*—(1) *Exchange-set limits.* For any commodity derivative contract that is subject to a Federal speculative position limit under § 150.2, a designated contract market or swap execution facility that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2.

(2) *Exemptions to exchange-set limits.* A designated contract market or swap execution facility that is a trading facility may grant exemptions from any speculative position limits it sets under paragraph (a)(1) of this section in accordance with the following:

(i) *Exemption levels.* An exemption that conforms to an exemption the Commission identified in:

(A) Sections 150.3(a)(1)(i), (a)(2)(i), (a)(4) and (a)(5) may be granted at a level that exceeds the level of the applicable Federal limit in § 150.2;

(B) Sections 150.3(a)(1)(ii) and (a)(2)(ii) may be granted at a level that exceeds the level of the applicable Federal limit in § 150.2, *provided* the exemption is first approved in accordance with § 150.3(b) or 150.9, as applicable;

(C) Section 150.3(a)(3) may be granted at a level that exceeds the level of the applicable Federal limit in § 150.2, *provided that,* a division of the Commission has first approved such exemption pursuant to a request submitted under § 140.99(a)(1) of this chapter; and

(D) An exemption of the type that does not conform to any of the exemptions identified in § 150.3(a) must be granted at a level that does not exceed the applicable Federal limit in § 150.2 and that complies with paragraph (a)(2)(ii)(G) of this section, unless the Commission has first approved such exemption pursuant to § 150.3(b) or pursuant to a request submitted under § 140.99(a)(1).

(ii) *Application for exemption from exchange-set limits.* With respect to a designated contract market or swap execution facility that is a trading facility that elects to grant exemptions under paragraph (a)(2)(i) of this section:

(A) Except as provided in paragraph (a)(2)(ii)(B) of this section, the designated contract market or swap execution facility shall require an entity to file an application requesting such exemption in advance of the date that such position would be in excess of the limits then in effect. Such application shall include any information needed to enable the designated contract market or swap execution facility and the Commission to determine whether the facts and circumstances demonstrate that the designated contract market or swap execution facility may grant an exemption. Any application for a bona fide hedging transaction or position shall include a description of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position for which the application is submitted, including, but not limited to, information regarding the offsetting cash positions.

(B) The designated contract market or swap execution facility may adopt rules that allow a person, due to demonstrated sudden or unforeseen increases in its bona fide hedging needs, to file an application to request a recognition of a bona fide hedging transaction or position within five business days after the person established the position that exceeded the applicable exchange-set speculative position limit.

(C) The designated contract market or swap execution facility must require that any application filed pursuant to paragraph (a)(2)(ii)(B) of this section include an explanation of the circumstances warranting the sudden or unforeseen increases in bona fide hedging needs.

(D) If an application filed pursuant to paragraph (a)(2)(ii)(B) of this section is denied, the applicant must bring its position within the designated contract market or swap execution facility's speculative position limits within a commercially reasonable time as determined by the designated contract market or swap execution facility.

(E) The Commission will not pursue an enforcement action for a position limits violation for the person holding the position during the period of the designated contract market or swap execution facility's review nor once the designated contract market or swap execution facility has issued its determination, so long as the application was submitted in good faith and the applicant brings its position within the designated contract market or swap execution facility's speculative position limits within a commercially reasonable time as determined by the designated contract market or swap execution facility.

(F) The designated contract market or swap execution facility shall require, for any such exemption granted, that the entity re-apply for the exemption at least annually;

(G) The designated contract market or swap execution facility:

(*1*) May, in accordance with the designated contract market or swap execution facility's rules, deny any such application, or limit, condition, or revoke any such exemption, at any time after providing notice to the applicant, and

(*2*) Shall consider whether the requested exemption would result in positions that would not be in accord with sound commercial practices in the relevant commodity derivative market and/or that would exceed an amount that may be established and liquidated in an orderly fashion in that market; and

(H) Notwithstanding paragraph (a)(2)(ii)(G) of this section, the designated contract market or swap execution facility may grant exemptions, subject to terms, conditions, or limitations, that require a person to exit any referenced contract positions in excess of position limits during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, or to otherwise limit the size of such position during that time period. Designated contract markets and swap execution facilities may refer to paragraph (b) of appendix B or appendix G to part 150, for guidance regarding the foregoing, as applicable.

(3) *Exchange-set limits on pre-existing positions*—(i) *Pre-existing positions in a spot month.* A designated contract market or swap execution facility that is a trading facility shall require compliance with spot month exchange-set speculative position limits for pre-existing positions in commodity derivative contracts other than pre-enactment swaps and transition period swaps.

(ii) *Pre-existing positions in a non-spot month.* A single month or all-months-combined speculative position limit established under paragraph (a)(1) of this section shall apply to any pre-existing positions in commodity derivative contracts, other than pre-enactment swaps and transition period swaps.

(4) *Monthly reports detailing the disposition of each exemption application.* (i) For commodity derivative contracts subject to Federal speculative position limits, the designated contract market or swap execution facility shall submit to the Commission a report each month showing the disposition of any exemption application, including the recognition of any position as a bona fide hedging transaction or position, the exemption of any spread transaction or other position, the renewal, revocation, or modification of a previously granted recognition or exemption, and the rejection of any application, as well as the following details for each application:

(A) The date of disposition;

(B) The effective date of the disposition;

(C) The expiration date of any recognition or exemption;

(D) Any unique identifier(s) the designated contract market or swap execution facility may assign to track the application, or the specific type of recognition or exemption;

(E) If the application is for an enumerated bona fide hedging transaction or position, the name of the enumerated bona fide hedging transaction or position listed in appendix A to this part;

(F) If the application is for a spread transaction listed in the spread transaction definition in § 150.1, the name of the spread transaction as it is listed in § 150.1;

(G) The identity of the applicant;

(H) The listed commodity derivative contract or position(s) to which the application pertains;

(I) The underlying cash commodity;

(J) The maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a bona fide hedging transaction or position, specified by contract month and by the type of limit as spot month, single month, or all-months-combined, as applicable;

(K) Any size limitations or conditions established for a spread exemption or other exemption; and

(L) For a bona fide hedging transaction or position, a concise summary of the applicant's activity in the cash markets and swaps markets for the commodity underlying the commodity derivative position for which the application was submitted.

(ii) The designated contract market or swap execution facility shall submit to the Commission the information required by paragraph (a)(4)(i) of this section:

(A) As specified by the Commission on the Forms and Submissions page at *www.cftc.gov*; and

(B) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission.

(b) *Requirements for exchange-set limits on commodity derivative contracts in a physical commodity that are not subject to the limits set forth in § 150.2*—(1) *Exchange-set spot-month limits.* For any physical commodity derivative contract that is not subject to a Federal speculative position limit under § 150.2, a designated contract market or swap execution facility that is a trading facility shall set a speculative position limit as follows:

(i) *Spot month speculative position limit levels.* For any commodity derivative contract subject to paragraph (b) of this section, a designated contract market or swap execution facility that is a trading facility shall establish speculative position limits for the spot month no greater than 25 percent of the estimated spot month deliverable supply, calculated separately for each month to be listed.

(ii) *Additional sources for compliance.* Alternatively, a designated contract market or swap execution facility that is a trading facility may submit rules to the Commission establishing spot month speculative position limits other than as provided in paragraph (b)(1)(i) of this section, provided that each limit is set at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(2) *Exchange-set limits or accountability outside of the spot month*—(i) *Non-spot month speculative position limit or accountability levels.* For any commodity derivative contract subject to paragraph (b) of this section, a designated contract market or swap execution facility that is a trading facility shall adopt either speculative position limits or position accountability outside of the spot month at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(ii) *Additional sources for compliance.* A designated contract market or swap execution facility that is a trading facility may refer to the non-exclusive acceptable practices in paragraph (b) of appendix F of this part to demonstrate to the Commission compliance with the requirements of paragraph (b)(2)(i) of this section.

(3) *Look-alike contracts.* For any newly listed commodity derivative contract subject to paragraph (b) of this section that is substantially the same as an existing contract listed on a designated contract market or swap execution facility that is a trading facility, the designated contract market or swap execution facility that is a trading facility listing such newly listed contract shall adopt spot month, individual month, and all-months-combined speculative position limits comparable to those of the existing contract. Alternatively, if such designated contract market or swap execution facility seeks to adopt speculative position limits that are not comparable to those of the existing contract, such designated contract market or swap execution facility shall demonstrate to the Commission how the levels comply with paragraphs (b)(1) and/or (b)(2) of this section.

(4) *Exemptions to exchange-set limits.* A designated contract market or swap execution facility that is a trading facility may grant exemptions from any

speculative position limits it sets under paragraph (b)(1) or (2) of this section in accordance with the following:

(i) An entity seeking an exemption shall be required to apply to the designated contract market or swap execution facility for any such exemption from its speculative position limit rules; and

(ii) A designated contract market or swap execution facility that is a trading facility may deny any such application, or limit, condition, or revoke any such exemption, at any time after providing notice to the applicant. Such designated contract market or swap execution facility shall consider whether the requested exemption would result in positions that would not be in accord with sound commercial practices in the relevant commodity derivative market and/or would exceed an amount that may be established and liquidated in an orderly fashion in that market.

(c) *Requirements for security futures products.* For security futures products, speculative position limits and position accountability requirements are specified in § 41.25 of this chapter.

(d) *Rules on aggregation.* For commodity derivative contracts in a physical commodity, a designated contract market or swap execution facility that is a trading facility shall have aggregation rules that conform to § 150.4.

(e) *Requirements for submissions to the Commission.* In order for a designated contract market or swap execution facility that is a trading facility to adopt speculative position limits and/or position accountability pursuant to paragraph (a) or (b) of this section and/or to elect to offer exemptions from any such levels pursuant to such paragraphs, the designated contract market or swap execution facility shall submit to the Commission pursuant to part 40 of this chapter rules establishing such levels and/or exemptions. To the extent that a designated contract market or swap execution facility adopts speculative position limit levels, such part 40 submission shall also include the methodology by which such levels are calculated. The designated contract market or swap execution facility shall review such speculative position limit levels regularly for compliance with this section and update such speculative position limit levels as needed.

(f) *Delegation of authority to the Director of the Division of Market Oversight*—(1) *Commission delegations.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight, or such other employee or employees as the Director may designate from time to time, the authority in paragraph (a)(4)(ii) of this section to provide instructions regarding the submission to the Commission of information required to be reported, pursuant to paragraph (a)(4)(i) of this section, by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at *www.cftc.gov*, and to determine the format, coding structure, and electronic data transmission procedures for submitting such information.

(2) *Commission consideration of delegated matter.* The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) *Commission authority.* Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 20. Revise § 150.6 to read as follows:

**§ 150.6 Scope.**

This part shall only be construed as having an effect on speculative position limits set by the Commission or by a designated contract market or swap execution facility, including any associated recordkeeping and reporting regulations in this chapter. Nothing in this part shall be construed to relieve any designated contract market, swap execution facility, or its governing board from responsibility under section 5(d)(4) of the Act to prevent manipulation and corners. Further, nothing in this part shall be construed to affect any other provisions of the Act or Commission regulations, including, but not limited to, those relating to actual or attempted manipulation, corners, squeezes, fraudulent or deceptive conduct, or to prohibited transactions.

**§ 150.7 [Reserved]**

■ 21. Add reserved § 150.7.

■ 22. Add § 150.8 to read as follows:

**§ 150.8 Severability.**

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

■ 23. Add § 150.9 to read as follows:

**§ 150.9 Process for recognizing non-enumerated bona fide hedging transactions or positions with respect to Federal speculative position limits.**

For purposes of Federal speculative position limits, a person with a position in a referenced contract seeking recognition of such position as a non-enumerated bona fide hedging transaction or position, in accordance with § 150.3(a)(1)(ii), shall apply to the Commission, pursuant to § 150.3(b), or apply to a designated contract market or swap execution facility in accordance with this section. If such person submits an application to a designated contract market or swap execution facility in accordance with this section, and the designated contract market or swap execution facility, with respect to its own speculative position limits established pursuant to § 150.5(a), recognizes the person's position as a non-enumerated bona fide hedging transaction or position, then the person may also exceed the applicable Federal speculative position limit for such position in accordance with paragraph (e) of this section. The designated contract market or swap execution facility may approve such applications only if the designated contract market or swap execution facility complies with the conditions set forth in paragraphs (a) through (e) of this section.

(a) *Approval of rules.* The designated contract market or swap execution facility must maintain rules that establish application processes and conditions for recognizing bona fide hedging transactions or positions consistent with the requirements of this section, and must seek approval of such rules from the Commission pursuant to § 40.5 of this chapter.

(b) *Prerequisites for a designated contract market or swap execution facility to recognize a bona fide hedging transaction or position in accordance with this section.* (1) The designated contract market or swap execution facility lists the applicable referenced contract for trading;

(2) The position meets the definition of bona fide hedging transaction or position in section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1; and

(3) The designated contract market or swap execution facility does not recognize as a bona fide hedging transaction or position any position involving a commodity index contract and one or more referenced contracts, including exemptions known as risk management exemptions.

(c) *Application process.* The designated contract market or swap execution facility's application process meets the following conditions:

(1) *Required application information.* The designated contract market or swap execution facility requires the applicant to provide, and can obtain from the applicant, all information needed to enable the designated contract market or swap execution facility and the Commission to determine whether the facts and circumstances demonstrate that the designated contract market or swap execution facility may recognize a position as a bona fide hedging transaction or position, including the following:

(i) A description of the position in the commodity derivative contract for which the application is submitted, including but not limited to, the name of the underlying commodity and the derivative position size;

(ii) An explanation of the hedging strategy, including a statement that the position complies with the requirements of section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1, and information to demonstrate why the position satisfies such requirements and definition;

(iii) A statement concerning the maximum size of all gross positions in commodity derivative contracts for which the application is submitted;

(iv) A description of the applicant's activity in the cash markets and the swaps markets for the commodity underlying the position for which the application is submitted, including, but not limited to, information regarding the offsetting cash positions; and

(v) Any other information the designated contract market or swap execution facility requires, in its discretion, to determine that the position complies with paragraph (b)(2) of this section, as applicable.

(2) *Timing of application.* (i) Except as provided in paragraph (c)(2)(ii) of this section, the designated contract market or swap execution facility requires the applicant to submit an application and receive a notice of approval of such application from the designated contract market or swap execution facility prior to the date that the position for which such application was submitted would be in excess of the applicable Federal speculative position limits.

(ii) A designated contract market or swap execution facility may adopt rules that allow a person, due to demonstrated sudden or unforeseen increases in its bona fide hedging needs, to file an application with the designated contract market or swap execution facility to request a recognition of a bona fide hedging transaction or position within five business days after the person established the position that exceeded the applicable Federal speculative position limit.

(A) The designated contract market or swap execution facility must require that any application filed pursuant to paragraph (c)(2)(ii) of this section include an explanation of the circumstances warranting the sudden or unforeseen increases in bona fide hedging needs.

(B) If an application filed pursuant to paragraph (c)(2)(ii) of this section is denied by the designated contract market, swap execution facility, or Commission, the applicant must bring its position within the applicable Federal speculative position limits within a commercially reasonable time as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility.

(C) The Commission will not pursue an enforcement action for a position limits violation for the person holding the position during the period of the designated contract market, swap execution facility, or Commission's review nor once a determination has been issued, so long as the application was submitted in good faith and the person complies with paragraph (c)(2)(ii)(B) of this section.

(3) *Renewal of applications.* The designated contract market or swap execution facility requires each applicant to reapply with the designated contract market or swap execution facility to maintain such recognition at least on an annual basis by updating the initial application, and to receive a notice of extension of the original approval from the designated contract market or swap execution facility to continue relying on such recognition for purposes of Federal speculative position limits. If the facts and circumstances underlying a renewal application are materially different than the initial application, the designated contract market or swap execution facility is required to treat such application as a new request submitted through the § 150.9 process and subject to the Commission's 10/2-day review process in paragraph (e) of this section.

(4) *Exchange revocation authority.* The designated contract market or swap execution facility retains its authority to limit, condition, or revoke, at any time after providing notice to the applicant, any bona fide hedging transaction or position recognition for purposes of the designated contract market or swap execution facility's speculative position limits established under § 150.5(a), for any reason as determined in the discretion of the designated contract market or swap execution facility, including if the designated contract market or swap execution facility determines that the position no longer meets the conditions set forth in paragraph (b) of this section, as applicable.

(d) *Recordkeeping.* (1) The designated contract market or swap execution facility keeps full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof. Such records include:

(i) Records of the designated contract market's or swap execution facility's recognition of any derivative position as a bona fide hedging transaction or position, revocation or modification of any such recognition, or the rejection of an application;

(ii) All information and documents submitted by an applicant in connection with its application, including documentation and information that is submitted after the disposition of the application, and any withdrawal, supplementation, or update of any application;

(iii) Records of oral and written communications between the designated contract market or swap execution facility and the applicant in connection with such application; and

(iv) All information and documents in connection with the designated contract market or swap execution facility's analysis of, and action(s) taken with respect to, such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(e) *Process for a person to exceed Federal speculative position limits on a referenced contract*—(1) *Notification to the Commission.* The designated contract market or swap execution facility must submit to the Commission a notification of each initial determination to recognize a bona fide hedging transaction or position in accordance with this section, concurrently with the notice of such determination the designated contract market or swap execution facility provides to the applicant.

(2) *Notification requirements.* The notification in paragraph (e)(1) of this section shall include, at a minimum, the following information:

(i) Name of the applicant;

(ii) Brief description of the bona fide hedging transaction or position being recognized;

(iii) Name of the contract(s) relevant to the recognition;

(iv) The maximum size of the position that may exceed Federal speculative position limits;

(v) The effective date and expiration date of the recognition;

(vi) An indication regarding whether the position may be maintained during the last five days of trading during the spot month, or the time period for the spot month; and

(vii) A copy of the application and any supporting materials.

(3) *Exceeding Federal speculative position limits on referenced contracts.* A person may exceed Federal speculative position limits on a referenced contract after the designated contract market or swap execution facility issues the notification required pursuant to paragraph (e)(1) of this section, unless the Commission notifies the designated contract market or swap execution facility and the applicant otherwise, pursuant to paragraph (e)(5) or (6) of this section, before the ten business day period expires.

(4) *Exceeding Federal speculative position limits on referenced contracts due to sudden or unforeseen circumstances.* If a person files an application for a recognition of a bona fide hedging transaction or position in accordance with paragraph (c)(2)(ii) of this section, then such person may rely on the designated contract market or swap execution facility's determination to grant such recognition for purposes of Federal speculative position limits two business days after the designated contract market or swap execution facility issues the notification required pursuant to paragraph (e)(1) of this section, unless the Commission notifies the designated contract market or swap execution facility and the applicant otherwise, pursuant to paragraph (e)(5) or (6) of this section, before the two business day period expires.

(5) *Commission stay of pending applications and requests for additional information.* The Commission may stay an application that requires additional time to analyze, and/or may request additional information to determine whether the position for which the application is submitted meets the conditions set forth in paragraph (b) of this section. The Commission shall notify the applicable designated contract market or swap execution facility and the applicant of a Commission determination to stay the application and/or request any supplemental information, and shall provide an opportunity for the applicant to respond. The Commission will have an additional 45 days from the date of the stay notification to conduct the review and issue a determination with respect to the application. If the Commission stays an application and the applicant has not yet exceeded Federal speculative position limits, then the applicant may not exceed Federal speculative position limits unless the Commission approves the application. If the Commission stays an application and the applicant has already exceeded Federal speculative position limits, then the applicant may continue to maintain the position unless the Commission notifies the designated contract market or swap execution facility and the applicant otherwise, pursuant to paragraph (e)(6) of this section.

(6) *Commission determination for pending applications.* If, during the Commission's ten or two business day review period in paragraphs (e)(3) and (4) of this section, the Commission determines that a position for which the application is submitted does not meet the conditions set forth in paragraph (b) of this section, the Commission shall:

(i) Notify the designated contract market or swap execution facility and the applicant within ten or two business days, as applicable, after the designated contract market or swap execution facility issues the notification required pursuant to paragraph (e)(1) of this section;

(ii) Provide an opportunity for the applicant to respond to such notification;

(iii) Issue a determination to deny the application, or limit or condition the application approval for purposes of Federal speculative position limits and, as applicable, require the person to reduce the derivatives position within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility, or otherwise come into compliance; and

(iv) The Commission will not pursue an enforcement action for a position limits violation for the person holding the position during the period of the Commission's review nor once the Commission has issued its determination, so long as the application was submitted in good faith and the person complies with any requirement to reduce the position pursuant to paragraph (e)(6)(iii) of this section, as applicable.

(f) *Commission revocation of applications previously approved.* (1) If a designated contract market or a swap execution facility limits, conditions, or revokes any recognition of a bona fide hedging transaction or position for purposes of the respective designated contract market's or swap execution facility's speculative position limits established under § 150.5(a), then such recognition will also be deemed limited, conditioned, or revoked for purposes of Federal speculative position limits.

(2) If the Commission determines, at any time, that a position that has been recognized as a bona fide hedging transaction or position for purposes of Federal speculative position limits is no longer consistent with section 4a(c)(2) of the Act or the definition of bona fide hedging transaction or position in § 150.1, the following applies:

(i) The Commission shall notify the person holding the position and the relevant designated contract market or swap execution facility. After providing such person and such designated contract market or swap execution facility an opportunity to respond, the Commission may, in its discretion, limit, condition, or revoke its determination for purposes of Federal speculative position limits and require the person to reduce the derivatives position within a commercially reasonable time as determined by the Commission in consultation with such person and such designated contract market or swap execution facility, or otherwise come into compliance;

(ii) The Commission shall include in its notification a brief explanation of the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the position or application is, or appears to be, inconsistent; and

(iii) The Commission will not pursue an enforcement action for a position limits violation for the person holding the position during the period of the Commission's review, nor once the Commission has issued its determination, provided the person submitted the application in good faith and reduces the position within a commercially reasonable time, as determined by the Commission in consultation with such person and the relevant designated contract market or swap execution facility, or otherwise comes into compliance.

(g) *Delegation of authority to the Director of the Division of Market Oversight*—(1) *Commission delegations.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight, or such other employee or employees as the Director may designate from time to time, the authority to request additional information, pursuant to paragraph (e)(5) of this section, from the applicable designated contract market or swap execution facility and applicant.

(2) *Commission consideration of delegated matter.* The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) *Commission authority.* Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 24. Add appendices A through G to read as follows:

## Appendix A to Part 150—List of Enumerated Bona Fide Hedges

Pursuant to § 150.3(a)(1)(i), positions that comply with the bona fide hedging transaction or position definition in § 150.1 and that are enumerated in this appendix A may exceed Federal speculative position limits to the extent that all applicable requirements in this part are met. A person holding such positions enumerated in this appendix A may exceed Federal speculative position limits for such positions without requesting prior approval under § 150.3 or § 150.9. A person holding such positions that are not enumerated in this appendix A must request and obtain approval pursuant to § 150.3 or § 150.9 prior to exceeding the applicable Federal speculative position limits—unless such positions qualify for the retroactive approval process, and the person seeks retroactive approval in accordance with § 150.3 or § 150.9.

The enumerated bona fide hedges do not state the exclusive means for establishing compliance with the bona fide hedging transaction or position definition in § 150.1 or with the requirements of § 150.3(a)(1).

(a) *Enumerated hedges*—(1) *Hedges of inventory and cash commodity fixed-price purchase contracts.* Short positions in commodity derivative contracts that do not exceed in quantity the sum of the person's ownership of inventory and fixed-price purchase contracts in the commodity derivative contracts' underlying cash commodity.

(2) *Hedges of cash commodity fixed-price sales contracts.* Long positions in commodity derivative contracts that do not exceed in quantity the sum of the person's fixed-price sales contracts in the commodity derivative contracts' underlying cash commodity and the quantity equivalent of fixed-price sales contracts of the cash products and by-products of such commodity.

(3) *Hedges of offsetting unfixed-price cash commodity sales and purchases.* Both short and long positions in commodity derivative contracts that do not exceed in quantity the amount of the commodity derivative contracts' underlying cash commodity that has been both bought and sold by the same person at unfixed prices:

(i) Basis different delivery months in the same commodity derivative contract; or

(ii) Basis different commodity derivative contracts in the same commodity, regardless of whether the commodity derivative contracts are in the same calendar month.

(4) *Hedges of unsold anticipated production.* Short positions in commodity derivative contracts that do not exceed in quantity the person's unsold anticipated production of the commodity derivative contracts' underlying cash commodity.

(5) *Hedges of unfilled anticipated requirements.* Long positions in commodity derivative contracts that do not exceed in quantity the person's unfilled anticipated requirements for the commodity derivative contracts' underlying cash commodity, for processing, manufacturing, or use by that person, or for resale by a utility as it pertains to the utility's obligations to meet the unfilled anticipated demand of its customers for the customer's use.

(6) *Hedges of anticipated merchandising.* Long or short positions in commodity derivative contracts that offset the anticipated change in value of the underlying commodity that a person anticipates purchasing or selling, *provided that:*

(i) The positions in the commodity derivative contracts do not exceed in quantity twelve months' of current or anticipated purchase or sale requirements of the same cash commodity that is anticipated to be purchased or sold; and

(ii) The person is a merchant handling the underlying commodity that is subject to the anticipatory merchandising hedge, and that such merchant is entering into the position solely for purposes related to its merchandising business and has a demonstrated history of buying and selling the underlying commodity for its merchandising business.

(7) *Hedges by agents.* Long or short positions in commodity derivative contracts by an agent who does not own or has not contracted to sell or purchase the commodity derivative contracts' underlying cash commodity at a fixed price, *provided that* the agent is responsible for merchandising the cash positions that are being offset in commodity derivative contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash-market commitment being offset.

(8) *Hedges of anticipated mineral royalties.* Short positions in a person's commodity derivative contracts offset by the anticipated change in value of mineral royalty rights that are owned by that person, *provided that* the royalty rights arise out of the production of the commodity underlying the commodity derivative contracts.

(9) *Hedges of anticipated services.* Short or long positions in a person's commodity derivative contracts offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by that person, *provided that* the contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the commodity derivative contracts.

(10) *Offsets of commodity trade options.* Long or short positions in commodity derivative contracts that do not exceed in quantity, on a futures-equivalent basis, a position in a commodity trade option that meets the requirements of § 32.3 of this chapter. Such commodity trade option transaction, if it meets the requirements of § 32.3 of this chapter, may be deemed, for purposes of complying with this paragraph (a)(10) of this appendix A, as either a cash commodity purchase or sales contract as set forth in paragraph (a)(1) or (2) of this appendix A, as applicable.

(11) *Cross-commodity hedges.* Positions in commodity derivative contracts described in paragraph (2) of the bona fide hedging transaction or position definition in § 150.1 or in paragraphs (a)(1) through (10) of this appendix A may also be used to offset the risks arising from a commodity other than the cash commodity underlying the commodity derivative contracts, *provided that* the fluctuations in value of the cash commodity underlying the commodity derivative contracts, shall be substantially related to the fluctuations in value of the actual or anticipated cash commodity position or a pass-through swap.

(b) [Reserved]

## Appendix B to Part 150—Guidance on Gross Hedging Positions and Positions Held During the Spot Period

(a) *Guidance on gross hedging positions.* (1) A person's gross hedging positions may be deemed in compliance with the bona fide hedging transaction or position definition in § 150.1, whether enumerated or non-enumerated, *provided that* all applicable regulatory requirements are met, including that the position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise and otherwise satisfies the bona fide hedging definition in § 150.1, and *provided further that:*

(i) The manner in which the person measures risk is consistent and follows historical practice for that person;

(ii) The person is not measuring risk on a gross basis to evade the speculative position limits in § 150.2 or the aggregation rules in § 150.4; and

(iii) The person is able to demonstrate compliance with paragraphs (a)(1)(i) and (ii) of this appendix, including by providing justifications for measuring risk on a gross basis, upon the request of the Commission and/or of a designated contract market, including by providing information regarding the entities with which the person aggregates positions.

(b) *Guidance regarding positions held during the spot period.* The regulations governing exchange-set speculative position limits and exemptions therefrom under § 150.5(a)(2)(ii)(D) provide that designated contract markets and swap execution facilities (''exchanges'') may impose restrictions on bona fide hedging transaction or position exemptions to require the person to exit any such positions in excess of limits during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, or otherwise limit the size of such position. This guidance is intended to provide factors the Commission believes exchanges should consider when determining whether to impose a five-day rule or similar restriction but is not intended to be used as a mandatory checklist. The exchanges may consider whether:

(1) The position complies with the bona fide hedging transaction or position definition in § 150.1, whether enumerated or non-enumerated;

(2) There is an economically appropriate need to maintain such position in excess of Federal speculative position limits during the spot period for such contract, and such need relates to the purchase or sale of a cash commodity; and

(3) The person wishing to exceed Federal position limits during the spot period:

(i) Intends to make or take delivery during that time period;

(ii) Has the ability to take delivery for any long position at levels that are economically appropriate (*i.e.,* the delivery comports with the person's demonstrated need for the commodity and the contract is the most economical source for that commodity);

(iii) Has the ability to deliver against any short position (*i.e.,* has inventory on hand in a deliverable location and in a condition in which the commodity can be used upon delivery and that delivery against futures contracts is economically appropriate, as it is the best sales option for that inventory).

## Appendix C to Part 150—Guidance Regarding the Definition of Referenced Contract

This appendix C provides guidance regarding the ''referenced contract'' definition in § 150.1, which provides in paragraph (3) of the definition of referenced contract that the term referenced contract does not include a location basis contract, a commodity index contract, a swap guarantee, a trade option that meets the requirements of § 32.3 of this chapter, a monthly average pricing contract, or an outright price reporting agency index contract. The term ''referenced contract'' is used throughout part 150 of the Commission's regulations to refer to contracts that are subject to Federal position limits. A position in a contract that is not a referenced contract is not subject to Federal position limits, and, as a consequence, cannot be netted with positions in referenced contracts for purposes of Federal position limits. This guidance is intended to clarify the types of contracts that would qualify as a location basis contract, commodity index contract, monthly average pricing contract, or outright price reporting agency index contract.

Compliance with this guidance does not diminish or replace, in any event, the obligations and requirements of any person to comply with the regulations provided under this part, or any other part of the Commission's regulations. The guidance is for illustrative purposes only and does not state the exclusive means for a contract to qualify, or not qualify, as a referenced contract as defined in § 150.1, or to comply with any other provision in this part.

(a) *Guidance.* (1) As provided in paragraph (3) of the ''referenced contract'' definition in § 150.1, the following types of contracts are not deemed referenced contracts, meaning such contracts are not subject to Federal position limits and cannot be netted with positions in referenced contracts for purposes of Federal position limits: location basis contracts; commodity index contracts; swap guarantees; trade options that meet the requirements of § 32.3 of this chapter; monthly average pricing contracts; and outright price reporting agency index contracts.

(2) *Location basis contract.* For purposes of the referenced contract definition in § 150.1, a location basis contract means a commodity derivative contract that is cash-settled based on the difference in:

(i) The price, directly or indirectly, of:

(A) A particular core referenced futures contract; or

(B) A commodity deliverable on a particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; and

(ii) The price, at a different delivery location or pricing point than that of the same particular core referenced futures contract, directly or indirectly, of:

(A) A commodity deliverable on the same particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; or

(B) A commodity that is listed in appendix D to this part as substantially the same as a commodity underlying the same core referenced futures contract.

(3) *Commodity index contract.* For purposes of the referenced contract definition in § 150.1, a commodity index contract means an agreement, contract, or transaction that is based on an index comprised of prices of commodities that are not the same or substantially the same, and that is not a location basis contract, a calendar spread contract, or an intercommodity spread contract as such terms are defined in this guidance, where:

(i) A calendar spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract, or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract, or transaction; and

(ii) An intercommodity spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.

(4) *Monthly average pricing contract* means a contract that satisfies one of the following:

(i) The contract's price is calculated based on the equally-weighted arithmetic average of the daily prices of the underlying referenced contract for the entire corresponding calendar month or trade month, as applicable; or

(ii) In determining the price of such contract, the component daily prices, in the aggregate, during the spot month of the underlying referenced contract comprise no more than 40 percent of such contract's weighting.

(5) *Outright price reporting agency index contract* means any outright commodity derivative contract whose settlement price is based solely on an index published by a price reporting agency that surveys cash-market transaction prices, *provided, however,* that this term does not include any commodity derivative contract that settles at a basis, or differential, between a referenced contract and a price reporting agency index.

(b) [Reserved]

## Appendix D to Part 150—Commodities Listed as Substantially the Same for Purposes of the Term ''Location Basis Contract'' as Used in the Referenced Contract Definition

The following table lists each relevant core referenced futures contract and associated commodities that are treated as substantially the same as a commodity underlying a core referenced futures contract for purposes of the term ''location basis contract'' as such term is used in the referenced contract definition under § 150.1, and as such term is discussed in appendix C to this part.

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LOCATION BASIS CONTRACT LIST OF SUBSTANTIALLY THE SAME COMMODITIES

| Core Referenced Futures Contract | Commodities Considered Substantially the Same (regardless of location) | Source(s) for Specification of Quality |
|---|---|---|
| NYMEX Light Sweet Crude Oil futures contract (CL) | 1. Light Louisiana Sweet (LLS) Crude Oil | 1a) NYMEX Argus LLS vs. WTI (Argus) Trade Month futures contract (E5) |
| | | 1b) NYMEX LLS (Argus) vs. WTI Financial futures contract (WJ) |
| | | 1c) ICE Futures Europe Crude Diff—Argus LLS vs WTI 1st Line Swap futures contract (ARK) |
| | | 1d) ICE Futures Europe Crude Diff—Argus LLS vs WTI Trade Month Swap futures contract (ARL) |
| | | |
| NYMEX New York Harbor ULSD Heating Oil futures contract (HO) | 1. Chicago ULSD | 1a) NYMEX Chicago ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (5C) |
| | 2. Gulf Coast ULSD | 2a) NYMEX Group Three ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (A6) |
| | | 2b) NYMEX Gulf Coast ULSD (Argus) Up-Down futures contract (US) |
| | | 2c) NYMEX Gulf Coast ULSD (Platts) Up-Down Spread futures contract (LT) |
| | | 2d) ICE Futures Europe Diesel Diff- Gulf Coast vs Heating Oil 1st Line Swap futures contract (GOH) |
| | | 2e) CME Clearing Europe Gulf Coast ULSD( Platts) vs. New York Heating Oil (NYMEX) Spread Calendar swap (ELT) |
| | | 2f) CME Clearing Europe New York Heating Oil (NYMEX) vs. |

| Core Referenced Futures Contract | Commodities Considered Substantially the Same (regardless of location) | Source(s) for Specification of Quality |
|---|---|---|
| | | European Gasoil (IC) Spread Calendar swap (EHA) |
| | 3. California Air Resources Board Spec ULSD (CARB no. 2 oil) | 3a) NYMEX Los Angeles CARB Diesel (OPIS) vs. NY Harbor ULSD Heating Oil futures contract (KL) |
| | 4. Gas Oil Deliverable in Antwerp, Rotterdam, or Amsterdam Area | 4a) ICE Futures Europe Gasoil futures contract (G) |
| | | 4b) ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs Gasoil 1st Line Swap futures contract (HOT) |
| | | 4c) ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs Low Sulphur Gasoil 1st Line Swap futures contract (ULL) |
| | | 4d) NYMEX NY Harbor ULSD Heating Oil vs. Gasoil futures contract (HA) |
| | | |
| NYMEX RBOB Gasoline futures contract (RB) | 1. Chicago Unleaded 87 gasoline | 1a) NYMEX Chicago Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (3C) |
| | | 1b) NYMEX Group Three Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (A8) |
| | 2. Gulf Coast Conventional Blendstock for Oxygenated Blending (CBOB) 87 | 2a) NYMEX Gulf Coast CBOB Gasoline A1 (Platts) vs. RBOB Gasoline futures contract (CBA) |
| | | 2b) NYMEX Gulf Coast Unl 87 (Argus) Up-Down futures contract (UZ) |
| | 3. Gulf Coast CBOB 87 (Summer Assessment) | 3a) NYMEX Gulf Coast CBOB Gasoline A2 (Platts) vs. RBOB Gasoline futures contract (CRB) |
| | 4. Gulf Coast Unleaded 87 (Summer Assessment) | 4a) NYMEX Gulf Coast 87 Gasoline M2 (Platts) vs. RBOB Gasoline futures contract (RVG) |
| | 5. Gulf Coast Unleaded 87 | 5a) NYMEX Gulf Coast Unl 87 Gasoline M1 (Platts) vs. RBOB Gasoline futures contract (RV) |

| Core Referenced Futures Contract | Commodities Considered Substantially the Same (regardless of location) | Source(s) for Specification of Quality |
|---|---|---|
| | | 5b) CME Clearing Europe Gulf Coast Unleaded 87 Gasoline M1 (Platts) vs. New York RBOB Gasoline (NYMEX) Spread Calendar swap (ERV) |
| | 6. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Regular | 6a) NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL) |
| | 7. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Premium | 7a) NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL) |
| | 8. Euro-BOB OXY NWE Barges | 8a) NYMEX RBOB Gasoline vs. Euro-bob Oxy NWE Barges (Argus) (1000mt) futures contract (EXR) |
| | | 8b) CME Clearing Europe New York RBOB Gasoline (NYMEX) vs. European Gasoline Euro-bob Oxy Barges NWE (Argus) (1000mt) Spread Calendar swap (EEXR) |
| | 9. Euro-BOB OXY FOB Rotterdam | 9a) ICE Futures Europe Gasoline Diff—RBOB Gasoline 1st Line vs. Argus Euro-BOB OXY FOB Rotterdam Barge Swap futures contract (ROE) |

**Appendix E to Part 150—Speculative Position Limit Levels**

[1] Step-down spot month limits apply to positions net long or net short as follows: 600 contracts at the close of trading on the first business day following the first Friday of the contract month; 300 contracts at the close of trading on the business day prior to the last five trading days of the contract month; and 200 contracts at the close of trading on the business day prior to the last two trading days of the contract month.

[2] For persons that are not availing themselves of the § 150.3(a)(4) conditional spot month limit exemption in natural gas, the 2,000 contract spot month speculative position limit level applies to: (1) the physically-settled NYMEX Henry Hub Natural Gas (NG) core referenced futures contract and any other physically-settled contract that qualifies as a referenced contract to NYMEX Henry Hub Natural Gas (NG) under the definition of ''referenced contract'' under § 150.1, in the aggregate across all exchanges listing a physically-settled NYMEX Henry Hub Natural Gas (NG) referenced contract and the OTC swaps market, net long or net short; and (2) the cash-settled NYMEX Henry Hub Natural Gas (NG) referenced contracts, net long or net short, on a per-exchange basis for each exchange that lists one or more cash-settled NYMEX Henry Hub Natural Gas (NG) referenced contract(s) rather than aggregated across such exchanges. Further, an additional 2,000 contract limit, net long or net short, applies across all cash-settled economically equivalent NYMEX Henry Hub Natural Gas (NG) OTC swaps.

[3] Step-down spot month limits apply to positions net long or net short as follows: 6,000 contracts at the close of trading three business days prior to the last trading day of the contract; 5,000 contracts at the close of trading two business days prior to the last trading day of the contract; and 4,000 contracts at the close of trading one business day prior to the last trading day of the contract.

| Contract | Spot Month | Single Month and All-Months-Combined |
|---|---|---|
| **Legacy Agricultural** | | |
| Chicago Board of Trade Corn (C) | 1,200 | 57,800 |
| Chicago Board of Trade Oats (O) | 600 | 2,000 |
| Chicago Board of Trade Soybeans (S) | 1,200 | 27,300 |
| Chicago Board of Trade Soybean Meal (SM) | 1,500 | 16,900 |
| Chicago Board of Trade Soybean Oil (SO) | 1,100 | 17,400 |
| Chicago Board of Trade Wheat (W) | 1,200 | 19,300 |
| Chicago Board of Trade KC HRW Wheat (KW) | 1,200 | 12,000 |
| Minneapolis Grain Exchange Hard Red Spring Wheat (MWE) | 1,200 | 12,000 |
| ICE Futures U.S. Cotton No. 2 (CT) | 900 | 5,950 (single month) 11,900 (all-months-combined) |
| **Other Agricultural** | | |
| Chicago Board of Trade Rough Rice (RR) | 800 | Not Applicable |
| Chicago Mercantile Exchange Live Cattle (LC) | 600/300/200[1] | Not Applicable |
| ICE Futures U.S. Cocoa (CC) | 4,900 | Not Applicable |
| ICE Futures U.S. Coffee C (KC) | 1,700 | Not Applicable |
| ICE Futures U.S. FCOJ-A (OJ) | 2,200 | Not Applicable |
| ICE Futures U.S. Sugar No. 11 (SB) | 25,800 | Not Applicable |

| Contract | Spot Month | Single Month and All-Months-Combined |
|---|---|---|
| ICE Futures U.S. Sugar No. 16 (SF) | 6,400 | Not Applicable |
| **Energy** | | |
| New York Mercantile Exchange Henry Hub Natural Gas (NG) | 2,000[2] | Not Applicable |
| New York Mercantile Exchange Light Sweet Crude Oil (CL) | 6,000/5,000/4,000[3] | Not Applicable |
| New York Mercantile Exchange NY Harbor ULSD (HO) | 2,000 | Not Applicable |
| New York Mercantile Exchange RBOB Gasoline (RB) | 2,000 | Not Applicable |
| **Metal** | | |
| Commodity Exchange, Inc. Copper (HG) | 1,000 | Not Applicable |
| Commodity Exchange, Inc. Gold (GC) | 6,000 | Not Applicable |
| Commodity Exchange, Inc. Silver (SI) | 3,000 | Not Applicable |
| New York Mercantile Exchange Palladium (PA) | 50 | Not Applicable |
| New York Mercantile Exchange Platinum (PL) | 500 | Not Applicable |

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## Appendix F to Part 150—Guidance on, and Acceptable Practices in, Compliance With the Requirements for Exchange-Set Limits and Position Accountability on Commodity Derivative Contracts

The following are guidance and acceptable practices for compliance with § 150.5. Compliance with the acceptable practices and guidance does not diminish or replace, in any event, the obligations and requirements of the person to comply with the other regulations provided under this part. The acceptable practices and guidance are for illustrative purposes only and do not state the exclusive means for establishing compliance with § 150.5.

(a) *Acceptable practices for compliance with § 150.5(b)(2)(i) regarding exchange-set limits or accountability outside of the spot month.* A designated contract market or swap execution facility that is a trading facility may satisfy § 150.5(b)(2)(i) by complying with either of the following acceptable practices:

(1) *Non-spot month speculative position limits.* For any commodity derivative contract subject to § 150.5(b), a designated contract market or swap execution facility that is a trading facility sets individual single month or all-months-combined levels no greater than any one of the following:

(i) The average of historical position sizes held by speculative traders in the contract as a percentage of the average combined futures and delta-adjusted option month-end open interest for that contract for the most recent calendar year;

(ii) The level of the spot month limit for the contract;

(iii) 5,000 contracts (scaled-down proportionally to the notional quantity per contract relative to the typical cash-market transaction if the notional quantity per contract is larger than the typical cash-market transaction, and scaled up proportionally to the notional quantity per contract relative to the typical cash-market transaction if the notional quantity per contract is smaller than the typical cash-market transaction); or

(iv) 10 percent of the average combined futures and delta-adjusted option month-end open interest in the contract for the most recent calendar year up to 50,000 contracts, with a marginal increase of 2.5 percent of open interest thereafter.

(2) *Non-spot month position accountability.* For any commodity derivative contract subject to § 150.5(b), a designated contract market or swap execution facility that is a trading facility adopts position accountability, as defined in § 150.1.

(b) [Reserved]

## Appendix G to Part 150—Guidance on Spread Transaction Exemptions Granted for Contracts that are Subject to Federal Speculative Position Limits

Positions that comply with § 150.3(a)(2)(i) or (ii) may exceed Federal speculative position limits, provided that the entity separately requests a spread transaction exemption from the relevant exchange's position limits established pursuant to proposed § 150.5(a). The following provides guidance to exchanges and market participants on the use of spread transaction exemptions granted pursuant to § 150.5(a). Exchanges and market participants may also consider this guidance for purposes of spread transaction exemptions granted pursuant to § 150.5(b). The following guidance includes recommendations for exchanges and market participants to consider when granting or relying on spread transaction exemptions for positions that include referenced contracts that are subject to Federal speculative position limits.

(a) *General guidance on spread transaction exemptions for referenced contracts.* (1) When granting spread transaction exemptions pursuant to § 150.5(a), an exchange should:

(i) Collect sufficient information from the market participant to be able to:

(A) Understand the spread strategy, consistent with § 150.5(a)(2)(ii)(A); and

(B) Verify that there is a material economic relationship between the legs of the spread transaction, consistent with the requirement in § 150.5(a)(2)(ii)(G) to grant exemptions in accordance with sound commercial practices;

(ii) Consider whether granting the spread transaction exemption would, to the maximum extent practicable:

(A) Ensure sufficient market liquidity for bona fide hedgers; and

(B) Not unduly reduce the effectiveness of Federal speculative position limits to:

(*1*) Diminish, eliminate, or prevent excessive speculation;

(*2*) Deter and prevent market manipulations, squeezes, and corners; and

(*3*) Ensure that the price discovery function of the underlying market is not disrupted;

(iii) Consider implementing safeguards to ensure that when granting spread transaction exemptions, especially during the spot period, the exchange is able to comply with all statutory and regulatory obligations, including the requirements of:

(A) DCM Core Principle 2 and SEF Core Principle 2, as applicable, to, among other things, prohibit abusive trading practices on its markets by members and market participants, and prohibit any other manipulative or disruptive trading practices prohibited by the Act or Commission regulations;

(B) DCM Core Principle 4 and SEF Core Principle 4, as applicable, to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures;

(C) DCM Core Principle 5 and SEF Core Principle 6, as applicable, to implement exchange-set position limits in a manner that reduces the potential threat of market manipulation or congestion; and

(D) DCM Core Principle 12, as applicable, to protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and to promote fair and equitable trading on the contract market;

(iv) Ensure that any spread exemption transaction does not impede convergence or facilitate the formation of artificial prices; and

(v) Provide a cap or limit on the maximum size of all gross positions permitted under the spread transaction exemption.

(2) The Commission reminds market participants that when utilizing a spread transaction exemption, compliance with Federal speculative position limits or an exemption thereto does not confer any type of safe harbor or good faith defense to a claim that the participant has engaged in an attempted or perfected manipulation or willfully circumvented or evaded speculative position limits, consistent with the Commission's anti-evasion provision in § 150.2(i).

(b) *Guidance on transactions permitted under the spread transaction definition.* (1) The Commission understands that market participants are generally familiar with the meaning of intra-market spreads, inter-market spreads, intra-commodity spreads, and inter-commodity spreads, as those terms are used in the spread transaction definition in § 150.1. However, for the avoidance of confusion, the Commission provides the following descriptions of such spread strategies to assist exchanges in their analysis of whether a spread position complies with the spread transaction definition. The Commission generally understands that the following spread strategies are typically defined as follows:

(i) *Intra-market spread* means a long (short) position in one or more commodity derivative contracts in a particular commodity, or its products or by-products, and a short (long) position in one or more commodity derivative contracts in the same, or similar, commodity, or its products or by-products, on the same designated contract market or swap execution facility.

(ii*) Inter-market spread* means a long (short) position in one or more commodity derivative contracts in a particular commodity, or its products or by-products, at a particular designated contract market or swap execution facility and a short (long) position in one or more commodity derivative contracts in that same, or similar, commodity, or its products or by-products, away from that particular designated contract market or swap execution facility.

(iii) *Intra-commodity spread* means a long (short) position in one or more commodity derivatives contracts in a particular commodity, or its product or by-products, and a short (long) position in one or more commodity derivative contracts in the same, or similar, commodity, or its products or by-products.

(iv) *Inter-commodity spread* means a long (short) position in one or more commodity derivatives contracts in a particular commodity, or its product or by-products, and a short (long) position in one or more commodity derivative contracts in a different commodity or its products or by-products.

(2) The following is a non-exhaustive list of spread strategies that comply with the spread transaction definition in § 150.1:

(i) An inter-market spread transaction in which the legs of the transaction are futures contracts in the same, or similar commodity, or its products or its by-products, and same calendar month or expiration;

(ii) A spread transaction in which one leg is a referenced contract, as defined in § 150.1, and the other leg is a commodity derivative contract, as defined in § 150.1, that is not a referenced contract (including over-the-counter commodity derivative contracts);

(iii) A spread transaction between a physically-settled contract and a cash-settled contract;

(iv) A spread transaction between two cash-settled contracts; and

(v) Spread transactions that are ''legged in,'' that is, carried out in two steps, or alternatively are ''combination trades,'' that is, all components of the spread are executed simultaneously or contemporaneously.

(3) A spread transaction exemption cannot be used to exceed the conditional spot month limit exemption, in § 150.3(a)(4), for positions in natural gas.

(4) The spread transaction definition does not include a single cash-settled agreement, contract or transaction that, by its terms and conditions:

(i) Simply represents the difference (or basis) between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction (whether or not a referenced contract), and

(ii) Does not comprise separate long and short positions.

(5) The spread transaction definition does not include a spread position involving a commodity index contract and one or more referenced contracts.

(c) *Guidance on cash-and-carry exemptions.* The spread transaction definition in § 150.1 would permit transactions commonly known as ''cash-and-carry'' trades whereby a market participant enters a long futures position in the spot month and an equivalent short futures position in the following month, in order to guarantee a return that, at minimum, covers the costs of its carrying charges, *such as* the cost of financing, insuring, and storing the physical inventory until the next expiration (including insurance, storage fees, and financing costs, as well as other costs such as aging discounts that are specific to individual commodities). With this exemption, the market participant is able to take physical delivery of the product in the nearby month and may redeliver the same product in a deferred month. When determining whether to grant, and when monitoring, cash-and-carry spread transaction exemptions, the exchange should consider:

(1) Implementing safeguards to require a market participant relying on such an exemption to reduce its position below the speculative Federal position limit within a timely manner once market prices no longer permit entry into a full carry transaction;

(2) Implementing safeguards that require market participants to liquidate all long positions in the nearby contract month before the price of the nearby contract month rises to a premium to the second (2nd) contract month; and

(3) Requiring market participants that seek to rely on such exemption to:

(i) Provide information about their expected cost of carrying the physical commodity, and the quantity of stocks currently owned in exchange-licensed warehouses or tank facilities; and

(ii) Agree that before the price of the nearby contract month rises to a premium to the second (2nd) contract month, the market participant will liquidate all long positions in the nearby contract month.

## PART 151 [REMOVED AND RESERVED]

■ 27. Under the authority of section 8a(5) of the Commodity Exchange Act, 7 U.S.C. 12a(5), remove and reserve part 151.

Issued in Washington, DC, on November 12, 2020, by the Commission.

**Christopher Kirkpatrick,**

*Secretary of the Commission.*

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

## Appendices to Position Limits for Derivatives—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

## Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz and Stump voted in the affirmative. Commissioners Behnam and Berkovitz voted in the negative.

## Appendix 2—Statement of Support of Chairman Heath P. Tarbert

I am very proud to bring to a final vote the Commission's rule on speculative position limits. Like my fellow Commissioners and so many who have held these seats before us, I promised during my confirmation hearing that I would work to finalize this rule. So to the Senate Committee on Agriculture, Nutrition, and Forestry, to the market participants who rely on futures markets, and to the American people, I am pleased to say—promise made, promise kept.

Today, we are removing a cloud that has hung over both the CFTC and the derivatives markets for a decade. Market participants, particularly Americans who need these markets to hedge the risks inherent in their businesses, will finally have regulatory certainty.

### Long Journey of Position Limits

Ralph Waldo Emerson is quoted as saying ''Life is a journey, not a destination.'' Lucky for him, his journey did not involve position limits. This rule has been one of the most difficult undertakings in CFTC history.

The Commission has issued five position limits proposals over the past 10 years. The first was adopted in 2011, but vacated by the U.S. District Court for the District of Columbia before it took effect. One proposal issued in 2013, and two more in 2016, were never finalized. All told, those four proposals received thousands of comments from the public—the vast majority of which objected to the proposals for good reason. Much ink was spilled, and many trees were felled over those proposals.

Finally, the Commission issued its fifth position limits proposal in January of this year. Today we will finalize that rule. But it is important to note we are not completely rejecting prior attempts. Instead, we build on the good from previous proposals while recognizing and fixing their shortcomings.

Any position limits rule involves a balancing act. To paraphrase a famous saying—*You can please some of the people all the time, and all the people some of the time, but*—as is certainly the case with position limits—*you can't please all the people all the time.*

That is especially true given the three things the Commission is tasked with balancing for position limits:

1. Whether position limits on a particular contract are more helpful than harmful;

2. which positions should be subject to the limits and which should not; and

3. at what levels position limits should be set to allow for liquid markets but not excessive speculation.

### Recognizing Dead Ends

Prior position limits proposals ultimately failed because they were unable to strike the correct balance on these three points.

First, prior proposals were based on a plausible, but ultimately unsupportable, interpretation—''the mandate.'' The mandate would mean there is no balancing test; instead, all futures would be subject to Federal limits. Given the wide range of futures in our markets, this approach would require the CFTC to evaluate thousands of contracts. It also would necessitate limits on everything—regardless of the benefits those limits would bring or the burdens they would impose.

Second, prior proposals failed to recognize all the ways that participants use futures markets to hedge price risks. Agricultural, energy, and metal futures markets are a vital to American businesses, which is why Congress explicitly excluded bona fide hedging positions from position limits. Reading the term bona fide hedging too broadly risks inviting the wolf of speculative activity into the market wearing sheep's clothing. Reading it too narrowly creates the possibility of locking out the businesses that need these markets to manage their risks. And taking away that ability to manage risk jeopardizes economic growth.

As a result, the Commission's prior proposals were too restrictive on what constitutes bona fide hedging. They threw up too many roadblocks for businesses to access futures markets. Ultimately, an overly rigid interpretation of bona fide hedging stood in the way of finalizing a position limits rule.

Finally, prior proposals set limits that were both too low and too rigid. Those limits did not balance the need for liquidity and price discovery against the risks of excessive speculation, which is the real mandate of Congress. The proposed limits were frozen in time, not budging from limits last updated as far back as 1999.

### Getting Back on the Right Path

Recognizing the missteps of the past yields a path to success. Unlike prior position limits proposals that garnered a library of negative comment letters, this proposal is overwhelmingly supported by businesses and trade groups across many facets of our real economy.

There are several differences that will let today's rule succeed where others failed.

First, the rule recognizes the limits of limits. Position limits are *one* method to combat corners and squeezes, but that does not mean they are the singular tool that should always be deployed. Position limits are like a medicine that can help cure a disease, but also carries potential side effects. That is why Congress told us to use them only when ''necessary.'' The necessity finding is like a doctor's prescription—someone needs to evaluate the risks of the disease against the side effects.

In addition, the rule takes into account market participants' needs. As I have always said, position limits is the rare case where the exception is as important as the rule. Today's rule lays out a robust set of enumerated bona fide hedge exemptions to ensure that participants in the physical commodity markets can access the futures markets. Building on the proposal, we have added clarity around unfixed price transactions and storage.

The rule also acknowledges the different ways people access the markets. We have streamlined the process for pass-through swap exemptions, making it easier for dealers to provide liquidity to commercial users in the swaps market. And the rule clarifies that someone can take a position during the Commission's 10-day review period of an exchange-granted, non-enumerated exemption. In short, we have built a robust set of enumerated exemptions and a workable non-enumerated exemption process.

The rule also strikes a balance with respect to the limits themselves. The January proposal included significant increases to spot and non-spot limits for the legacy agricultural products. Many commenters were concerned about these increases, particularly for non-spot limits.

The level of the non-spot limits in the final rule are a function of the significant growth in the market and the long delay in making adjustments. Open interest in many of the legacy grains contracts has doubled or tripled since we last updated position limits, reflecting the usefulness of these contracts as a benchmark for cash market transactions and faith in CFTC-regulated markets. The non-spot limits we are adopting are the same percentage of today's open interest as the 2011 limits were compared to open interest back then. Our markets have grown tremendously, and we cannot expect them to be subject to the same limits they were 10 years ago.

It is important to remember that Federal position limits are a ceiling, not a floor.

Exchanges have their own limits, which can be no higher than what we specify. And exchanges can calibrate those limits quickly to account for issues with deliverable supply or other cash market issues. As we have seen play out over the past decade, the CFTC has a difficult time adjusting position limits. Therefore, exchange-set limits are a way to fine tune position limits on a particular market within the outer bounds of the Federal limits. Similar to the process for granting non-enumerated exemptions, we are leveraging the knowledge of the exchanges as well as their ability to act more nimbly to respond to market needs.

**Arriving at the Destination**

Some of my colleagues may see these features of the final rule as a flaw. While there are significant departures from prior proposals, after four *failed* attempts, that departure is exactly what we need. The flexibility in the necessity finding, the exemption process, and the adjusted limits are what make this rule workable. Otherwise, we are just repeating past mistakes and hoping for a different result—the very definition of insanity.

So let me conclude by saying that we have come a long way. Today we have reached the end of an arduous journey. We have learned from our mistakes and adjusted our approach. We have balanced the interests of all the participants in these markets—some of which are in diametric opposition to one another. Most importantly, we have crafted a workable and flexible system. The rule sets hard limits, but leverages the flexibility of exchanges to adjust for a particular market. The rule recognizes the variety of ways that businesses use these markets to hedge their risks, while recognizing how vital it is to have a method to address the unknown unknowns. And the rule acknowledges that position limits are not always necessary and sets out a solid methodology for determining when they are.

I again want to thank the CFTC staff and my fellow Commissioners for their tireless commitment to finishing this journey. I look forward to voting in favor of this final rule.

## Appendix 3—Supporting Statement of Commissioner Brian Quintenz

I am pleased to support the agency's revitalized approach to position limits. The rulemaking finalized today follows four proposals since the passage of the Dodd-Frank Act [1] and is, by far, the strongest of them all. I commend Chairman Tarbert for his leadership in completing this rulemaking. I am very pleased that today's final rule echoes the key policy points I outlined in my remarks before the 2018 Commodity Markets Council State of the Industry Conference.[2] The new position limits regime will provide commercial market participants with sufficient flexibility to hedge their risks efficiently and will promote liquidity and price discovery.

Today's rule promotes flexibility, certainty, and market integrity for end-users—farmers, ranchers, energy producers, transporters, processors, manufacturers, merchandisers, and all who use physically-settled derivatives to risk manage their exposure to physical goods. The rule includes an expansive list of enumerated and self-effectuating bona fide hedge exemptions and spread exemptions, and a streamlined, exchange-centered process to adjudicate non-enumerated bona fide hedge exemption requests. I am pleased that the rule seriously considered the usability of hedging exemptions, and I thank Commissioner Stump for her leadership on that point.

In contrast to the Commission's failed proposed rulemakings in 2011, 2013, and 2016, this rule is the most true to the CEA in many significant respects. It requires, as has long been the Commission's practice, a necessity finding before imposing limits. It includes economically equivalent swaps. And, perhaps most importantly, it balances the interests among promoting liquidity, deterring manipulation, and ensuring the price discovery function of the underlying market is not disrupted.[3] The confluence of these factors occurs most acutely in the spot month for physically-settled contracts. In the spot month, price convergence is exceptionally vulnerable to potential manipulation or disruption due to outsized positions. By establishing position limits for non-legacy contracts only in the spot month, the rule elegantly balances the countervailing policy interests enumerated in the statute.

**Responding to the Public's Concerns**

Through staff's serious consideration of over 70 public comments, the final rule significantly improves on what appears in the proposal. Examples of modifications based on public comment include considerations of gross hedging, price risk, the pass-through swap exemption, spot month limits for natural gas and cotton, a special non-spot single-month limit for cotton, spread exemptions, and the Commission's review of exchange-granted non-enumerated hedge exemptions.

With regard to enumerated bona fide hedges, the final rule took into account several suggestions from commenters. The proposed enumerated hedges were already a significant improvement upon previously proposed hedge exemptions (for example, eliminating a mandatory "five-day rule" [4] and no longer conditioning cross-commodity hedging on a needlessly rigid quantitative test). Now, under the final rule, the enumerated hedges will be even more practical. For example, the final rule makes clear that a hedger with only an unfixed-price cash commodity sale or purchase, but not an offsetting pair, may rely on one of the three anticipatory hedges, provided that the other elements of such hedge are also met, even though the hedger is ineligible to elect the hedge for a pair of unfixed-price sale and purchase transactions.[5] The final rule also makes clear that the new anticipatory merchandising hedge can be used both by integrated energy firms and by firms that limit their business to merchandising. Furthermore, the final rule permits the anticipatory merchandising hedge to now be used in connection with storage hedges.

I support the final rule's determination to delay by two years two important elements that will require significant changes in the marketplace: The imposition of position limits on swaps economically equivalent to the referenced futures contracts and the required unwinding of previously elected risk management exemptions.[6] It is prudent to allow for additional time for financial entities to adjust to these significant new policies.

**Necessity Finding**

Today's rule correctly premises new limits on a finding that they are necessary to diminish, eliminate, or prevent the burden on interstate commerce from extraordinary price movements caused by excessive speculation ("necessity finding") in specific contracts, as Congress has long required in the CEA and its legislative precursors since 1936.[7] I am pleased that the rule complies with the District Court's ruling in the ISDA-position limits litigation: That the Commission must decide whether Section 4a of the CEA mandates the CFTC set new limits or only permits the CFTC to set such limits pursuant to a necessity finding.[8] As the District Court noted, "the Dodd-Frank amendments do not constitute a clear and unambiguous mandate to set position limits." [9] I agree with the rule's determination that, when read together, paragraphs (1) and (2) of Section 4a demand a necessity finding.

Section 4a(a)(2)(A) states that the Commission shall establish limits "in accordance with the standards set forth in paragraph (1) of this subsection." [10] Paragraph (1) establishes the Commission's

[1] 76 FR 4752 (Jan. 26, 2011); 78 FR 75680 (Dec. 12, 2013); 81 FR 38458 (June 13, 2016) ("supplemental proposal"); and 81 FR 96704 (Dec. 30, 2016). The Commodity Exchange Act (CEA) addresses position limits in Section (Sec.) 4a (7 U.S.C. 6a).

[2] Remarks of Commissioner Brian Quintenz before the CMC State of the Industry 2018 Conference, *https://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz5*.

[3] Sec. 4a(a)(3).

[4] Previous versions of enumerated hedges had required a hedger to eliminate positions in excess of position limits during the last five days of the spot month.

[5] Preamble discussion of Exemptions from Federal Position Limits. The hedge for a pair of offsetting unfixed-price transactions is described in Appendix B, paragraph (a)(3), and the anticipatory hedges are described in Appendix B, paragraphs (a)(4)–(6).

[6] Whereas the general compliance date for the final rule is January 1, 2022, the compliance date for these two items is January 1, 2023.

[7] Sec. 4a(1).

[8] *ISDA et al.* v. *CFTC*, 887 F. Supp. 2d 259, 278 and 283–84 (D.D.C. Sept. 28, 2012).

[9] *Id.* at 280.

[10] Sec. 4a(a)(2)(A) ("In accordance with the standards set forth in paragraph (1) of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.")

authority to, ''proclaim and fix such limits on the amounts of trading . . . as the Commission finds are necessary to diminish, eliminate or prevent [the] burden'' on interstate commerce caused by unreasonable or unwarranted price moves associated with excessive speculation. This language dates back almost verbatim to legislation passed in 1936, in which Congress directed the CFTC's precursor to make a necessity finding before imposing position limits. The Congressional report accompanying the CEA from the 74th Congress includes the following directive, ''[Section 4a of the CEA] gives the Commodity Exchange Commission the power, after due notice and opportunity for hearing and a finding of a burden on interstate commerce caused by such speculation, to fix and proclaim limits on futures trading . . .'' [11] In its ISDA opinion, the District Court noted the following: ''This text clearly indicated that Congress intended for the CFTC to make a 'finding of a burden on interstate commerce caused by such speculation' prior to enacting position limits.'' [12]

I support the rule's view that the most natural reading of Section 4a(a)(2)(A)'s reference to paragraph (1)'s ''standards'' is that it logically includes the ''necessity'' standard. Paragraph (1)'s requirement to make a necessity finding, along with the aggregation requirement, provide substantive guidance to the Commission about when and how position limits should be implemented.

If Congress intended to mandate that the Commission impose position limits on all physical commodity derivatives, there is little reason it would have referred to paragraph (1) and the Commission's long established practice of necessity findings. Instead, Congress intended to focus the Commission's attention on whether position limits should be considered for a broader set of contracts than the legacy agricultural contracts, but did not mandate those limits be imposed.

**Setting New Limits ''As Appropriate''**

The rule determines that position limits are necessary to diminish, eliminate, or prevent the burden on interstate commerce posed by unreasonable or unwarranted prices moves that are attributable to excessive speculation in 25 referenced commodity markets that each play a crucial role in the U.S. economy. Conversely, the rule also finds that the contracts on which the referenced limits are placed are the only contracts which met the necessity finding. The rule explicitly states that no other contracts met this test.

I am aware that there is significant skepticism in the marketplace and among academics as to whether position limits are an appropriate tool to guard against extraordinary price movements caused by extraordinarily large position size. Some argue there is no evidence that excessive speculation currently exists in U.S. derivatives markets.[13] Others believe that large and sudden price fluctuations are not caused by hyper-speculation, but rather by market participants' interpretations of basic supply and demand fundamentals.[14] In contrast, still others believe that outsized speculative positions, however defined, may aggravate price volatility, leading to price run-ups or declines that are not fully supported by market fundamentals.[15]

In my opinion, one thing is predominately clear: position limits should not be viewed as a means to counteract long-term directional price moves. The CFTC is not a price setting agency and we should not impede the market from reflecting long term supply and demand fundamentals. A case in point is palladium, the physically-settled contract which has seen the largest sustained price increase recently,[16] and which has also seen its exchange-set position limit decline four times since 2014 to what is now the smallest limit of any contract in the referenced contract set.[17] Nevertheless, between the start of 2018 and the end of 2019, palladium futures prices rose 76%.[18] Taking these conflicting views and facts into account, it is clear the Commission correctly stated in its 2013 proposal, ''there is a demonstrable lack of consensus in the [academic] studies'' as to the effectiveness of position limits.[19]

With that healthy dose of skepticism, and in strict accordance with the balance of factors which Dodd Frank added to the CEA for the Commission to consider, I think the rule appropriately focuses on the time period and contract type where position limits can have the most positive, and the least negative, impact—the spot month of physically settled contracts—while also calibrating those limits to function as just one of many tools in the Commission's regulatory toolbox that can be used to promote credible, well-functioning derivatives and cash commodity markets.

Because of the significance of these 25 core referenced futures contracts to the underlying cash markets, the level of liquidity in the contracts, as well as the importance of these cash markets to the national economy, I think it is appropriate for the Commission to protect the physical delivery process and promote convergence in these critical commodity markets. Further, the limits issued today are higher than in the past, notably because the rule utilizes current estimates of deliverable supply—numbers which haven't been updated since 1999.[20]

**Taking End-Users Into Account**

Perhaps more than any other area of the CFTC's regulations, position limits directly affect the participants in America's real economy: Farmers, ranchers, energy producers, manufacturers, merchandisers, transporters, and other commercial end-users that use the derivatives market as a risk management tool to support their businesses. I am pleased that today's rule takes into account many of the serious concerns that end-users voiced in response to this rulemaking's proposal, and in response to the CFTC's previous four unsuccessful position limits proposals.

Importantly, and in response to many comments, this rule, for the first time, expands the possibility for enterprise-wide hedging,[21] (including additional clarification provided in the proposal in response to comments), establishes an enumerated anticipated merchandising exemption,[22] eliminates the ''five-day rule'' for enumerated hedges,[23] and no longer requires the filing of certain cash market information with the Commission that the CFTC can obtain from exchanges.[24] Regarding enterprise-wide hedging—otherwise known as ''gross hedging''—the rule will provide an energy company, for example, with increased flexibility to hedge different units of its business separately if those units face different economic realities. The final rule eliminates the requirement that exchanges document their justifications when allowing

[11] H.R. Rep. 74–421, at 5 (1935).

[12] 887 F. Supp. 2d 259, 269 (fn 4).

[13] Testimony of Erik Haas (Director, Market Regulation, ICE Futures U.S.) before the CFTC at 70 (Feb. 26, 2015) (''We point out the makeup of these markets, primarily to show that any regulations aimed at excessive speculation is a solution to a nonexistent problem in these contracts.''), *available at: https://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript022615.pdf*.

[14] BAHATTIN BÜYÜKŞAHIN & JEFFREY HARRIS, CFTC, THE ROLE OF SPECULATORS IN THE CRUDE OIL FUTURES MARKET 1, 16–19 (2009) (''Our results suggest that price changes leads the net position and net position changes of speculators and commodity swap dealers, with little or no feedback in the reverse direction. This uni-directional causality suggests that traditional speculators as well as commodity swap dealers are generally trend followers.''), *available at http://www.cftc.gov/idc/groups/public/@swaps/documents/file/plstudy_19_cftc.pdf*; Testimony of Philip K. Verleger, Jr. before the CFTC, Aug. 5, 2009 (''The increase in crude prices between 2007 and 2008 was caused by the incompatibility of environmental regulations with the then-current global crude supply. Speculation had nothing to do with the price rise.''), *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/hearing080509_verleger.pdf*.

[15] For a discussion of studies discussing supply and demand fundamentals and the role of speculation, *see* 81 FR 96704, 96727 (Dec. 30, 2016). *See, e.g.,* Hamilton, Causes and Consequences of the Oil Shock of 2007–2008, Brookings Paper on Economic Activity (2009); Chevallier, Price Relationships in Crude oil Futures: New Evidence from CFTC Disaggregated Data, Environmental Economics and Policy Studies (2012).

[16] *Platinum, gold slide as dollar soars; palladium eases off record,* Reuters (Sept. 30, 2019), *available at: https://www.reuters.com/article/global-precious/precious-platinum-gold-slide-as-dollar-soars-palladium-eases-off-record-idUSL3N26L3UV*.

[17] Between 2014 and 2017, the CME Group lowered the spot month position limit in the contract four times, from 650, to 500, to 400, to 100, to the current limit of 50 (NYMEX regulation 40.6(a) certifications, filed with the CFTC, 14–463 (Oct. 31, 2014), 15–145 (Apr. 14, 2015), 15–377 (Aug. 27, 2015), and 17–227 (June 6, 2017)), *available at: https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ProductTermsandConditions*.

[18] Palladium futures were at $1,087.35 on Jan. 2, 2018 and at $1,909.30 on Dec. 31, 2019. Historical prices *available at: https://futures.tradingcharts.com/historical/PA_/2009/0/continuous.html*.

[19] 78 FR 75694 (Dec. 12, 2013).

[20] 64 FR 24038 (May 5, 1999).

[21] Appendix B, paragraph (a).

[22] Appendix A, paragraph (a)(6).

[23] Preamble discussion of Exemptions from Federal Position Limits.

[24] Elimination of CFTC Form 204.

gross hedging; clarifies that market participants are not required to develop written policies or procedures that set forth when gross versus net hedging is appropriate; and clarifies that gross hedging is permissible for both enumerated and non-enumerated hedges.[25]

With respect to cross-commodity hedging, today's rule completely rejects the arbitrary, unworkable, ill-informed, and frankly, ludicrous ''quantitative test'' from the 2013 proposal.[26] That test would have required a correlation of at least 0.80 or greater in the spot markets prices of the two commodities for a time period of at least 36 months in order to qualify as a cross-hedge.[27] Under this test, longstanding hedging practices in the electric power generation and transmission markets would have been prohibited. Today's rule not only shuns this Government-Knows-Best approach, it also establishes new flexibility for the cross-commodity hedging exemption, allowing it to be used in conjunction with other enumerated hedges, such as hedges of anticipated merchandising transactions.[28] For example, an energy marketer anticipating buying and selling jet fuel to supply airports will be eligible for a hedge exemption in connection with trading heating oil futures, a commonly-used cross-commodity hedge for jet fuel.

**Bona Fide Hedges and Coordination With Exchanges**

For those market participants who employ non-enumerated bona fide hedging practices in the marketplace, the final rule creates a streamlined, exchange-focused process to approve those requests for purposes of both exchange-set and Federal limits. I am pleased that commenters were generally supportive of the proposed process. As the marketplaces for the core referenced futures contracts addressed by the proposal, the DCMs have significant experience in, and responsibility towards, a workable position limits regime. CEA core principles require DCMs and swap execution facilities to set position limits, or position accountability levels, for the contracts that they list in order to reduce the threat of market manipulation.[29] DCMs have long administered position limits in futures contracts for which the CFTC has not set limits, including in certain agricultural, energy, and metals markets. In addition, the exchanges have been strong enforcers of their own rules: During 2018 and 2019, CME Group and ICE Futures US concluded 32 enforcement matters regarding position limits.

As part of their stewardship of their own position limits regimes, DCMs have long granted bona fide hedging exemptions in those markets where there are no Federal limits. Today's final rule provides what I believe is a workable framework to utilize exchanges' long standing expertise in granting exemptions that are not enumerated by CFTC rules.[30] This rule also recognizes that the CEA does not provide the Commission with free rein to delegate all of the authorities granted to it under the statute.[31] The Commission itself, through a majority vote of the five Commissioners, retains the ability to reject an exchange-granted non-enumerated hedge request within 10 days of the exchange's approval.[32] The Commission has successfully and responsibly used a similar process for both new contract listings as well as exchange rule filings, and I am pleased to see the final rule expand that approach to non-enumerated hedge exemption requests that will limit the uncertainty for bone fide commercial market participants.

**Limits on Swaps**

The CEA requires the Commission to consider limits not only on exchange-traded futures and options, but also on ''economically equivalent'' swaps.[33] Today's final rule provides the market with far greater certainty on the universe of such swaps than the previous proposed rulemakings. Prior proposals failed to sufficiently explain what constituted an ''economically equivalent swap,'' thereby ensuring that compliance with position limits was essentially unworkable, given real-time aggregation requirements and ambiguity over in-scope contracts. In stark contrast, today's rule narrows the scope of ''economically equivalent'' swaps to those with material contractual specifications, terms, and conditions that are identical to exchange-traded contracts.[34] For example, in order for a swap to be considered ''economically equivalent'' to a physically-settled core referenced futures contract, that swap would also have to be physically-settled, because settlement type is considered a material contractual term. I believe the narrowly-tailored definition included in today's rule will provide market participants with clarity over those contracts subject to position limits. I think it is prudent that the final rule took commenters' concerns about updating compliance systems into account by delaying for an additional year, beyond the general compliance date of January 1, 2022, that is until January 1, 2023, the imposition of position limits on economically equivalent swaps.

**Conclusion**

During my confirmation hearing in front of the Senate Committee on Agriculture, Forestry and Nutrition on July 27, 2017, I was asked to directly commit to finalizing a position limits rule. My response was brief, but unquestionable: ''Yes, I commit to support finalizing a position limits rule.'' Making such a commitment to a committee of the U.S. Congress in sworn testimony is something I take very seriously, second only to taking my oath to defend the Constitution of the United States. With today's vote, I am very pleased to have made good on that commitment three years in the making and am even more proud of the product with which I was able to fulfill it.

## Appendix 4—Dissenting Statement of Commissioner Rostin Behnam Introduction

The last time we gathered as a Commission to discuss position limits I used some of my time to speak a bit about the award winning movie, *Ford* v. *Ferrari*.[1] At that point, we were nearing the airing of the 92nd Academy Awards and this action-packed drama had earned four nominations—not to mention the distinction of being one of the few films I actually saw in a theater. For those of you who have not found it in one of your quarantine movie queues, *Ford* v. *Ferrari* tells the true story of American car designer Carroll Shelby and British-born driver Ken Miles who built a race car for Ford Motor Company—the GT40—and competed with Enzo Ferrari's dominating, iconic red racing cars at the 1966 24 Hours of Le Mans.[2] I used the film and racing metaphors throughout my speaking and written statements to highlight serious concerns that the proposed amendments to the CFTC rules addressing position limits (the ''Proposal'') signified yet one more instance where the Commission seemed to be comfortable with deferring core, congressionally mandated duties to others and calling it a victory.[3]

We are here today to finalize the Proposal.[4] In just short of nine months, we have come to terms with life during a global pandemic complete with economic turmoil and pockets of historic market volatility. Amid the mere 60-day open comment period following the Proposal's publication in the **Federal Register** (graciously extended by 16 days to May 15th in light of the pandemic[5]), on April 20th, the price of the West Texas Intermediate crude oil futures contract (''WTI contract''), a key benchmark in the energy and financial markets, experienced an unprecedented collapse one day prior to the last day of trading and expiration for May delivery.[6] Defying market mechanics, the

[25] Preamble discussion, Execution Summary, section 6. Legal Standards for Exemptions from Position Limits.

[26] 78 FR 75717 (Dec. 12, 2013).

[27] *Id.*

[28] Appendix A, paragraph (a)(11).

[29] DCM Core Principle 5 (sec. 5 of the CEA, 7 U.S.C. 7) (implemented by CFTC regulation 38.300) and SEF Core Principle 6 (sec. 5h of the CEA, 7 U.S.C. 7b–3) (implemented by CFTC regulation 37.600).

[30] Regulation 150.9.

[31] Preamble discussion of regulation 150.9, including references to cases pointing out the extent to which an agency can delegate to persons outside of the agency.

[32] Regulation 150.9(e)(6).

[33] Sec. 4a(5).

[34] Regulation 150.1.

[1] Statement of Dissent by Commissioner Rostin Behnam Regarding Position Limits for Derivatives; Proposed Rule, *https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement013020* (the ''*Dissent*'').

[2] Ford v Ferrari, Fox Movies, *https://www.foxmovies.com/movies/ford-v-ferrari* (Last visited Oct. 13, 2020).

[3] Dissent.

[4] *See* Position Limits for Derivatives, 85 FR 11596 (Feb. 27, 2020).

[5] *See* Press Release Number 8146–20, CFTC, CFTC Extends Certain Comment Periods in Response to COVID–19 (Apr. 10, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8146-20*; Extension of Currently Open Comment Periods for Rulemakings in Response to the COVID–19 Pandemic, 85 FR 22690, 22691 (Apr. 23, 2020).

[6] *See* Statement of Commissioner Dan M. Berkovitz on Recent Trading in the WTI Futures Contract before the Energy and Environmental

price of the contract fell from $17.73 per barrel at market open, to a closing settlement price of negative $37.63—with the price dropping approximately $40 in the last 20 minutes of trading.[7] And, while we are still in recovery, with great fanfare after almost 10 years, the Commission is going to establish the position limits regime required under the Dodd-Frank Act. I am reminded again of Ken who, at the 1966 24 Hours of Le Mans, went against his gut, giving way and leaving behind a milestone in car racing that to this day remains elusive.

If you have not seen the movie, this is a spoiler alert: Ken did not win Le Mans in '66. While he was one and a half laps ahead of two other GT40s, he was given orders to slow down so that the three Fords in the lead would cross the finish line in a dead heat formation. Ken lost his well-deserved win because the 24 Hours of Le Mans awards the victory to the car that covers the greatest distance in 24 hours. In the event of a tie, the rules provided that the car that had started farther down the grid had traveled the greater distance. Ken's GT 40 had started in the grid roughly 60 feet ahead of the GT40 driven by Bruce McLaren and Chris Amon, who were the declared winners.[8]

In the film, Ken seems to accept his loss with quiet dignity. However, in reality he was fully aware that in many respects, he had been robbed. From what I've read, Ken likely articulated his feelings a bit more colorfully.[9]

The point is that bringing something across the finish line doesn't always equate to a success. As detailed in my questions today, I believe that by going against our Congressional mandate and clear statutory intent by overly deferring to the exchanges, we have relinquished a claim to victory in this final position limits rule which in many ways has itself felt like the CFTC's version of the 24 hours of Le Mans. Therefore, I will go with my gut and not be part of the formation in supporting this final rule.

**A Long Road, But a Fast Finish**

It has been nine years since the Commission first set out to establish the position limits regime required by amendments to section 4a of the Commodity Exchange Act (the ''Act'' or ''CEA'') [10] under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[11] While today's final rule purports to respect Congressional intent and the purpose and language of CEA section 4a, in reality, it pushes the bounds of reasonable interpretation by overly deferring to the exchanges [12] and allowing them to take the lead in administering a position limits regime.

In passing the Dodd-Frank Act, Congress understood that for the derivatives markets in physical commodities to perform optimally, there needed to be limits on the amount of control exerted by a single person (or persons acting in agreement). In fact, Congress has understood this need since at least 1936, when it first authorized the Commission's predecessor to impose limits on speculative positions in order to prevent the harms caused by excessive speculation. In tasking the Commission with establishing limits and the framework around their operation, Congress was aware of our relationship with the exchanges, but nevertheless opted for our experience and our expertise to meet the policy objectives of the Act.

Last January, as the Commission voted on the Proposal that is being finalized today, I warned that we seemed to be pushing to go faster and just get to the finish line, making real-time adjustments without regard to even trying for that ''perfect lap.'' [13] Just nine months later, nothing has changed. If anything, we seem to be further prioritizing just crossing the finish line over achieving a rule that actually follows Congressional intent and its first order priority: Protecting market participants from excessive speculation.

**Letting the Exchanges Make the Call**

As I argued in regard to the proposal, my principal disagreement is with the Commission's determination to in effect disregard the tenets supporting the statutorily created parallel Federal and exchange-set position limit regime, and take a back seat when it comes to administration and oversight.[14] Like Ken Miles, the Commission is relinquishing a rightful lead in an act of deference. In doing so, the Commission claims victory for recognizing that the exchanges are better positioned in terms of resources, information, knowledge, and agility, and therefore ought to take the wheel. While this may seem like the logical move, it ignores that even if we operate as a team, our incentives and interests are not fully aligned. Based on consideration of the Commission's mission, and Congressional intent as evinced in the Dodd-Frank Act amendments to CEA section 4a and elsewhere in the Act, I continue to believe that (1) the Commission is required to establish position limits based on its reasoned and expert judgment within the parameters of the Act; (2) the Commission has not provided a rational basis for its determination *not* to establish Federal limits outside of the spot month for referenced contracts based on commodities other than the nine legacy agricultural commodities; and (3) the Commission's seemingly unlimited flexibility in deciding to (a) significantly broaden the bona fide hedging definition, (b) codify an expanded list of self-effectuating enumerated bona fide hedges, and (c) provide for exchange recognition of non-enumerated bona fide hedge exemptions with respect to Federal limits, is both inexplicably complicated to parse and inconsistent with Congressional intent.

Not only does the final version of the rule fail to address these deficiencies in the proposal, it actually goes and makes many of these issues worse.

**Ignoring a Mandate**

Like the proposal, this final rule goes to great lengths to reconcile whether CEA section 4a(a)(2)(A) requires the Commission to make an antecedent necessity finding before establishing any position limit,[15] with the implication that if a necessity finding is required, then the Commission could rationalize imposing no limits at all. Looking back at the record, what is necessary is that the Commission complies with the mandate in the Dodd-Frank Act.[16] In the 2011 Proposal, the Commission provided a review of CEA section 4a(a)—interpreting the various provisions, giving effect to each paragraph, acknowledging the Commission's own informational and experiential limitations regarding the swaps markets at that time, and focusing on the Commission's primary mission of fostering fair, open and efficient functioning of the commodity derivatives markets.[17] Of note, ''Critical to fulfilling this statutory mandate,'' the Commission pronounced, ''is protecting market users and the public from undue burdens that may result from 'excessive speculation.' '' [18] Federal position limits, as predetermined by Congress, are most certainly the only means towards addressing the burdens of excessive speculation when such limits must address a ''proliferation of economically equivalent instruments trading in multiple trading venues.'' [19] Exchange-set position limits or accountability levels simply cannot meet the mandate.

In exercising its authority, the Commission may evaluate whether exchange-set position limits, accountability provisions, or other tools for contracts listed on such exchanges are currently in place to protect against manipulation, congestion, and price distortions.[20] Such an evaluation—while permissible—is just one factor for consideration. The existence of exchange-set limits or accountability levels, on their own, can neither predetermine deference nor be justified absent substantial consideration. As I argued in my dissenting statement regarding

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Markets Advisory Committee Meeting (May 7, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement050720*.

[7] *See* Bloomberg News, *The 20 Minutes that Broke the U.S. Oil Market,* Bloomberg (Apr. 25, 2020), *https://www.bloomberg.com/news/articles/2020-04-25/the-20-minutes-that-broke-the-u-s-oil-market?sref=DzeLiNol*.

[8] Press Release, Ford Division News Bureau, For Immediate Release at 8 (July 5, 1966), made available in PDF at Wikipedia, the Free Encyclopedia, 1966 24 Hours of Le Mans, at *https://en.wikipedia.org/wiki/1966_24_Hours_of_Le_Mans*.

[9] Matthew Phelan, *What's Fact and What's Fiction in Ford* v. *Ferrari,* Slate (Nov. 18, 2019), *https://slate.com/culture/2019/11/ford-v-ferrari-fact-vs-fiction-le-mans-ken-miles.html*.

[10] *See* Position Limits for Derivatives, 76 FR 4752 (proposed Jan. 26, 2011) (the ''2011 Proposal'').

[11] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 sec. 737, 124 Stat. 1376, 1722–25 (2010) (the ''Dodd-Frank Act'').

[12] Unless otherwise indicated, the use of the term ''exchanges'' throughout this statement refers to designated contract markets (''DCMs'') and swap execution facilities (''SEFs'').

[13] Dissent.

[14] *Id.*

[15] *See* Final Rule at III.

[16] The Commission's analysis in support of its denial of a mandate misconstrues form over substance and assumes the answer it is looking for. The Commission seems to suggest that it is free to ignore a Congressional mandate if it determines that Congress is wrong about the underlying policy. *See* Final Rule at III.A.

[17] 76 FR at 4752–4754.

[18] *Id.* at 4753.

[19] *Id.* at 4754–4755.

[20] *See* 76 FR at 4755.

the Proposal, the authority and jurisdiction of individual exchanges are necessarily different than that of the Commission. They do not always have congruent interests to the Commission in monitoring instruments that do not trade on or subject to the rules of their particular platform or the market participants that trade them. They do not have the attendant authority to determine key issues such as whether a swap performs or affects a significant price discovery function, or what instruments fit into the universe of economically equivalent swaps. They are not permitted to define bona fide hedging transactions or grant exemptions for purposes of Federal position limits. It is therefore clear that CEA section 4a, as amended by the Dodd-Frank Act ''warrants extension of Commission-set position limits beyond agricultural products to metals and energy commodities.'' [21]

**''If it ain't broke, don't fix it''**

In spite of all of this—the foregoing mandate; the clear Congressional intent in CEA section 4a(a)(3)(A); and the Commission's real experience and expertise (including its unique data repository)—the Commission's final rule only maintains Federal non-spot month limits for the nine legacy agricultural contracts (with questionably appropriate modifications), ''because the Commission has observed no reason to eliminate them.'' [22] Essentially, the Commission concludes: ''if it ain't broke, don't fix it.'' In keeping with this relatively riskless course of action, the Commission similarly concludes that Federal non-spot month limits are not necessary for the remaining 16 proposed core referenced futures contracts identified in the Final Rule.

In so doing, the Commission ignores Congressional intent. The Commission never considers that Congress directed the Commission to establish limits—not accountability levels. The Commission's observation that exchange-set accountability levels have ''functioned as-intended'' until this point in time ignores the wider purpose and function of aggregate position limits established by the Commission, and is shortsighted given the ever expanding universe of economically equivalent instruments trading across multiple trading venues. As I pointed out in my dissenting statement regarding the Proposal, it seems odd to conclude that Congress envisioned that its painstaking amendments to CEA section 4a were a directive for the Commission to check the box that the current system is working perfectly.

**Hedging on Bona Fide Hedging**

Today's Final Rule provides for significantly broader bona fide hedging opportunities that will be largely self-effectuating, and the Commission defers to the exchanges in recognizing non-enumerated bona fide hedging. While I support enhancing the cooperation between the Commission and the exchanges, the Commission here is cooperating by dropping back. The Commission's decision to essentially give up primary authority to recognize non-enumerated bona fide hedges seems both careless and inconsistent with Congressional intent.

I raised these concerns last January when we voted on the Position Limits Proposal. Unfortunately, rather than retaking the lead, the Commission further cedes authority to the exchanges. The Proposal provided the Commission with the authority to reject an exchange's grant of non-enumerated bona fide hedge recognition, and provided a window of ten business days (or two in the case of sudden or unforeseen circumstances) for the Commission to make this determination. I pointed out in my dissent that this did not give the Commission nearly enough time or guidance to properly make a determination. In today's Final Rule, the Commission actually further reduces its ability to make an independent determination. Now, market participants will be able to establish positions based upon an exchange's non-enumerated bona fide hedge recognition during the Commission's 10-day review period, and the Commission cannot determine that the person holding the position has committed a position limits violation during the Commission's ongoing review or upon issuing its determination. This reduces the Commission's review to an ineffectual afterthought.

**Trust the Process**

A clear theme in my statements regarding our many rules over the last few years is this: Process matters. Sharing our viewpoints with the public matters. Following the Administrative Procedure Act,[23] and giving the public an opportunity for meaningful comment on our proposals, matters. We are at our best when we involve all five Commissioners and our many stakeholders in the process.

I want to thank the Chairman for consistently providing the Commissioners with drafts of proposed and final rules 30 days in advance of an open meeting. I believe there have only been two major exceptions over the course of our many laps in the last year: The position limits proposal, and the position limits final rule. In the case of the final rule, we did not receive a full draft until last Friday—six days before the open meeting. This simply is not enough time for the Commission to engage in a fulsome discussion of the merits of the rule, and makes the final rule more or less a fait accompli. Perhaps most perplexing is that we did not receive a draft of the cost benefit considerations until two weeks ago. This is literally a rule where a prior iteration resulted in a court challenge—one that the Commission lost.[24] If ever a rule required more consideration by the Commission itself, this would seem to be it. Instead, the Commissioners actually had less time to review and consider the rule than we normally do.

When we focus on just getting to the finish line, and do not take the time for meaningful consideration and dialogue, we risk failing to take into account everything that we should in our rulemakings. Subsequent to the issuance of the Position Limits Proposal, there was a major market event resulting from the ongoing pandemic that may have important implications for our position limits regime. As the NYMEX Light Sweet Crude Oil (CL) contract, also known as the WTI contract, neared expiration in April 2020, the contract experienced extreme volatility, with the market trading below zero for the first time. The Commission received at least eight comments that addressed this event; a number of commenters noted that the extreme volatility was driven by speculators. The speculators, unable to physically deliver upon expiration for various reasons, had no choice but to exit the contract at whatever price was available. Commission staff continues to review and analyze this event, and the rule today recognizes that the analysis may impact the rule itself. Today's preamble states: ''The Commission will continue to analyze the events of April 20 to evaluate whether any changes to the position limits regulations may be warranted in light of the circumstances surrounding the volatility in the WTI contract.''[25] This begs the question—if the Commission is currently in the midst of this analysis, why not wait to finalize position limits until the analysis is complete?

**Conclusion**

Before concluding, I want to acknowledge and thank the Commission staff who worked on the Proposal, today's final rule, and every related study, matter, and undertaking to support it for the better part of 10 years. You were the design team, the engineers, the production team and the pit crew. You kept us on course at a pace set by our Chairman, and you have performed at the top of your field.

Back in '66, by holding back, Ken Miles lost the win at Le Mans, which denied him the ''Triple Crown'' of endurance racing: The 24 Hours of Daytona, the 12 Hours of Sebring, and the 24 Hours of Le Mans. No driver has won all three races in the same year,[26] and Ken missed out because he was part of a team and Ford had been good to him.[27] He committed and moved forward without the victory that should have been his because he was the best driver that day. I am committed to vote and move forward, even if it means giving up the triple crown of the day. But I will not go against my gut.

## Appendix 5—Statement of Commissioner Dawn D. Stump Overview

With all that has transpired in our country and in our lives this year, it feels like ages ago that we gathered together in person to consider proposing amendments to update the Commission's rules regarding position limits back at the end of January. At the time,

[21] *Id.*

[22] Final Rule at II.B.2.i.

[23] 5 U.S.C. 553(b).

[24] *Int'l Swaps & Derivatives Ass'n* v. *U.S. Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[25] Final Rule at I.G.

[26] Martin Raffauf, *Porsche and the Triple Crown of endurance racing,* Porsche Road & Race (Dec. 7, 2018), *https://www.porscheroadandrace.com/porsche-and-the-triple-crown-of-endurance-racing/.*

[27] Phelan, *supra* note 9.

I said that there were three guideposts by which I would evaluate that proposal: First, is it reasonable in design? Second, is it balanced in approach? And third, is it workable in practice for both market participants and for the Commission?

Since I believed the answer to each of these questions was yes, I supported issuing the proposal. And by and large, my belief has been confirmed by the comments we received from those who trade in this country's derivatives markets. In the months since January, we have heard from all corners of the marketplace—agricultural interests, energy interests, managed fund advisors, and dealers that provide liquidity, to name a few—that have voiced support for the fundamental architecture of the position limits framework that we proposed. Their support stands in stark contrast to the serious concerns they had expressed about the several previous position limit proposals put forward by the Commission during the past decade.

Of course, each interest had its issues with one aspect or another in the proposal. That is to be expected, given the varied and sometimes divergent objectives for our position limit rules set out in the Commodity Exchange Act (''CEA'').[1] Congress has tasked us with adopting position limits that: (1) On the one hand, diminish, eliminate or prevent excessive speculation in derivatives and deter and prevent market manipulation, squeezes, and corners; while on the other hand, and simultaneously (2) ensuring sufficient market liquidity for bona fide hedgers and ensuring that the price discovery function of the underlying market is not disrupted and does not shift to foreign competitors.

Reasonable minds will always differ as to exactly where to draw the line among these statutory objectives. But while we must always strive for perfection, we cannot permit that aspiration to paralyze us from acting to improve our rule sets. The final position limit rules before us smooth some of the rough edges in the proposal, and they address the areas in which I expressed some misgivings at the time. They incorporate valuable input we have received from the exchanges that operate the markets and the businesses that trade in those markets.

And above all, the final rulemaking is reasonable in design, balanced in approach, and workable in practice. For these reasons, I am pleased to support it.

**Bona Fide Hedging and Spread Transactions: Policy and Process**

In commenting on the proposal in January, I noted two areas that I felt could be improved: (1) The list of enumerated bona fide hedging transactions and positions; and (2) the process for reviewing hedging transactions outside of that list. I want to briefly address each of these concerns, in turn.

*Enumerated Bona Fide Hedges*

The CEA prohibits the Commission from adopting position limit rules that apply to bona fide hedging transactions or positions, as such terms are defined by the Commission. It gives the Commission the authority to define the term ''bona fide hedging transactions and positions'' to ''permit producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs . . .''[2] Congress thereby recognized the critical function of our derivatives markets in enabling those whom we all depend upon to deliver goods and services to hedge their risks—both risks they currently bear as well as those they reasonably anticipate.[3]

The Commission's proposal recognized this as well, as it expanded the list of ''enumerated'' bona fide hedging transactions that are identified in our current rules. Positions taken as a result of these enumerated hedging transactions constitute bona fide hedging, and therefore are not subject to Federal speculative position limits. This expansion of the list of enumerated bona fide hedges is entirely appropriate (indeed, it is long overdue). Hedging practices at companies that produce, process, trade, and use agricultural, energy, and metals commodities have become far more sophisticated, complex, and global over time, and the Commission's list of enumerated hedging practices to which its position limit rules do not apply has failed to keep pace with these realities.

And given Congress' recognition of the appropriateness of hedging legitimate anticipated business needs,[4] the proposal also added, at my request, anticipatory merchandising as an enumerated bona fide hedge. There is no policy basis for distinguishing hedging risks of anticipated merchandising from hedging risks of other activities in the physical supply chain.

Yet, I was concerned in January that our proposed list of enumerated bona fide hedges still might not be as robust as it should be. We needed input on this question from market participants—especially those in the energy and metals sectors where we are applying Federal position limits for the first time. And that input was nearly unanimous in recommending that hedging the risk of unfixed-price forward transactions be added to the list of enumerated bona fide hedges.

Hedges of offsetting unfixed-price cash commodity sales and purchases have historically been recognized as an enumerated bona fide hedge under our rules, and that was carried over in the proposal, too. These are hedges of risk incurred where a market participant has both bought and sold the underlying cash commodity at unfixed prices. We received many comments, though, urging us to include as an enumerated bona fide hedge those situations in which the purchase or sale, but not both, is an unfixed-price forward transaction. Some commenters asked that the historical enumerated hedge for offsetting unfixed-price cash commodity sales *and* purchases be expanded to cover unfixed-price cash commodity sales *or* purchases; others asked the Commission to create a new, stand-alone enumerated bona fide hedge category for these unfixed-price transactions. The final rulemaking concludes that neither step is necessary because, as suggested by still other commenters, commercial market participants may qualify for one of the enumerated anticipatory bona fide hedges that will be available, to the extent of their demonstrated anticipated need.[5]

*Spread Transactions*

Although the treatment of spread transactions for purposes of Federal position limits is distinct from the treatment of bona fide hedging transactions, I would like to take a short detour to note an important similarity between the two. That is, we also received numerous comments suggesting that the proposed definition of a spread transaction, which would be exempt from Federal position limits, was too narrow.

At the suggestion of commenters, the final rulemaking adds the well-established categories of intra-market, inter-market, and intra-commodity spreads to the list of defined spreads that fall outside the Federal position limits regime. The release notes that as a result, the spread transaction definition captures most, if not all, spread exemptions currently granted by exchanges and used by market participants. The rulemaking appropriately recognizes that these spread positions simply do not raise the type of concerns that position limits are intended to address.

*The Non-Enumerated Bona Fide Hedge Recognition Process*

Getting the list of enumerated bona fide hedges right is important because they are ''self-effectuating'' for purposes of Federal position limits. In other words, a trader need not count positions that result from enumerated bona fide hedging transactions towards the Federal position limits, and does not need to apply to the Commission for approval (although the trader still must receive approval from the relevant exchange to exceed exchange-set limits).

Other hedging practices, generally referred to as ''non-enumerated'' hedges, can still be

[1] CEA Section 4a(a), 7 U.S.C. 6a(a).

[2] CEA Section 4a(c)(1), 7 U.S.C. 6a(c)(1).

[3] The CEA provides that a bona fide hedging transaction or position is one that, among other things, ''is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise.'' CEA Section 4a(c)(2)(A)(ii), 7 U.S.C. 6a(c)(2)(A)(ii). The Commission's policy in administering Federal position limits in the agricultural sector over the years has been to limit this economically appropriate test to the hedging of price risk. However, as set forth in the final rulemaking release, the Commission acknowledges, consistent with that historical policy, that price risk can be impacted by various non-price risks.

[4] CEA Section 4a(c)(1), 7 U.S.C. 6a(c)(1). *See also* CEA Section 4a(c)(2)(A)(iii)(I), 7 U.S.C. 6a(c)(2)(A)(iii)(I) (bona fide hedging transaction or position is a transaction or position that, among other things, ''arises from the potential change in the value of . . . assets that a person owns, produces, manufactures, processes, or merchandises or *anticipates* owning, producing, manufacturing, processing, or merchandising . . .'' (emphasis added)).

[5] These enumerated anticipatory bona fide hedges include: (1) The existing enumerated bona fide hedge for unsold anticipated production; (2) the existing enumerated bona fide hedge for anticipated requirements; and (3) the new enumerated bona fide hedge established in this rulemaking for anticipated merchandising.

recognized as bona fide hedging, but only after a review process. A trader can either ask the exchange and the Commission to separately review and approve the proposed non-enumerated hedging activity for purposes of exchange and Federal limits, respectively, or it can follow what the rulemaking calls a ''streamlined'' process. Under that process, if an exchange recognizes a non-enumerated transaction as a bona fide hedge for purposes of the exchange's position limits, the Commission would then review the exchange's bona fide hedge recognition for application to Federal limits as well. The Commission must notify the exchange and market participant of any denial within 10 business days, or 2 business days in the case of an application based on a sudden or unforeseen increase in the trader's bona fide hedging needs (although that timeline can be extended if the Commission issues a stay or requests additional information).

In January, I expressed reservations about whether this 10/2-day process would be workable in practice for either market participants or the Commission because it appeared to be both too long and too short: (1) Too long to be workable for market participants that may need to take a hedge position quickly; and (2) too short for the Commission to meaningfully review the relevant circumstances related to the exchange's recognition of the hedge as bona fide. But while some commenters took the ''too long'' view and others took the ''too short'' view, the majority of commenters were generally supportive of this process.

The final rulemaking adopts the 10/2-day process, with an adjustment recommended by several commenters as well as participants in a meeting of the Commission's Energy and Environmental Markets Advisory Committee (''EEMAC'')[6] that discussed the position limits proposal. That is, the final rulemaking now provides that a trader can exceed Federal limits based on the exchange's approval of the non-enumerated hedge while the Commission is conducting its assessment. This is not a delegation of authority to the exchange, since the Commission will still make the final determination whether positions resulting from the non-enumerated hedging transaction should count towards Federal position limits. Thus, a trader that exceeds Federal limits in reliance on the initial exchange determination runs the risk that the Commission will later deny the requested non-enumerated hedge. In that event, the trader will have to reduce the position to come into compliance with limits within a commercially reasonable period of time.

Is it a perfect process? It is not. My preference would have been that recognition of non-enumerated hedges be the responsibility of the exchanges, which are most familiar with both their own markets and the hedging practices of participants in those markets. The Commission, in turn, has the tools it needs to monitor this process through its routine, ongoing review of the exchanges. But those who participate in the markets have generally expressed the view that this is a reasonable, balanced, and workable process. And so, I support it.

**Response to Commenter Objections**

Before concluding, I would like to briefly respond to a couple of points raised by commenters that were critical of the proposed position limit rules. Some commenters argued that: (1) The amendments to the CEA's position limit provisions that were enacted as part of the Dodd-Frank Act[7] constitute a mandate for the Commission to establish Federal position limits without having to make an antecedent finding that such limits are necessary to achieve the CEA's objectives; and (2) the rules we are adopting improperly abdicate Commission responsibilities with respect to Federal position limits to the exchanges.

*The Commission's Mandate To Impose Position Limits it Finds Are Necessary*

As I read the statute, the CEA's position limit provisions, as amended by the Dodd-Frank Act, mandate the Commission to impose position limits that it finds are necessary. The basis for my view is set out in detail in my Statement in support of the proposal last January, which included an explanatory graphic. Both of these documents are available on the Commission's website for those who are interested,[8] and so I will not repeat that analysis here. Suffice it to say, though, that I have not seen anything in the comment letters we received that changes my view.

*The Role of the Exchanges*

I fundamentally disagree with the suggestion that the amended position limit rules that we are adopting in any way reflect an inappropriate reliance by the Commission on the exchanges. My disagreement is rooted in several considerations.

First, the CEA itself states without limitation that it is the purpose of the CEA to serve the public interests described in the statute ''through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission.''[9] This is an overarching statement of purpose by Congress, and is the lens through which all other provisions of the CEA—including its position limit provisions—must be interpreted. And nothing in the amendments to those position limit provisions enacted as part of the Dodd-Frank Act indicate otherwise.

Second, the rules we are adopting do not delegate any authority of the Commission to the exchanges. With respect to applications for non-enumerated bona fide hedges in particular, the Commission will be informed by an exchange's determination whether to recognize the hedge for purposes of exchange-set limits. But the determination whether to do so with respect to Federal limits is the Commission's alone to make, and a trader who trades in reliance on an exchange determination risks having to reduce the position if the Commission subsequently disagrees with the exchange's determination.

Third, the exchanges know their markets.[10] They have a comprehensive understanding of the traders that participate in those markets as well as current hedging practices in agricultural, energy, and metals commodities. Indeed, the expertise of the exchanges makes them uniquely well-suited to make the initial determination on requests for non-enumerated bona fide hedges in real-time.

Finally, I return once again to my foundational principles: Reasonable, balanced, and workable. A system in which a business must put its economic needs and risk management efforts on hold while the Commission undertakes to learn about its operations and hedging activities in order to pass upon a request for a non-enumerated bona fide hedge violates all three principles.

**Conclusion**

After nearly a decade of trying, we stand on the cusp of amending the Commission's position limit rules, which are sorely in need of updating. Before us is a thorough and well-reasoned final rulemaking release that considers the extensive comments we received, and clearly presents the Commission's rationale in addressing those comments and adopting the rules in the form that we are adopting them. The fact that this release is before us less than nine months after we issued the proposal—in the midst of a pandemic, no less—is a tribute to the dedication, perseverance, and analytical capabilities of the professionals in the Commission's Division of Market Oversight, Office of General Counsel, and Chief Economist's Office. Their work on this rulemaking has been nothing short of amazing.

My fellow Commissioners and I have each publicly committed that we would work to finish a position limits rulemaking. The time has come to fulfill that commitment. The release that staff has presented is reasonable in design, balanced in approach, and workable for both market participants and the Commission. I am pleased to support it.

[6] *See, e.g.,* Transcript of CFTC Energy and Environmental Markets Advisory Committee Meeting at 103:14–17, Comment by Thomas LaSala, CME Group (May 7, 2020) (''the Commission should permit a participant to exceed Federal position limits during the 10-day/2-day Commission review period of an exchange-granted exemption''), *available at https://www.cftc.gov/sites/default/files/2020/06/1591218221/eemactranscript050720.pdf.*

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (2010) (''Dodd-Frank Act'').

[8] *See* Statement of Commissioner Dawn D. Stump Regarding Proposed Rule: Position Limits for Derivatives (January 30, 2020), and Commodity Exchange Act § 4a(a): Finding Position Limits Necessary is a Prerequisite to the Mandate for Establishing Such (January 30, 2020), *available at https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement013020.*

[9] CEA Section 3(b), 7 U.S.C. 5(b).

[10] It is notable that, due to certain trading dynamics unique to natural gas contracts, including the existence of liquid cash-settled contracts trading on three different exchanges, the final rulemaking for the Federal conditional spot-month limit is derived from the existing exchange framework that has been in place for approximately a decade.

## Appendix 6—Dissenting Statement of Commissioner Dan M. Berkovitz

### I. Introduction

I dissent from today's position limits final rule (''Final Rule''). The Final Rule fails to achieve the most fundamental objective of position limits: To prevent the harms arising from excessive speculation. It is another disappointing chapter in the Commission's 10-year saga to implement Congress's mandate in the Dodd-Frank Act to impose speculative position limits in the energy, metals, and agricultural markets. In a number of instances, the Final Rule appears more intent on limiting the actions and discretion of the Commission than it does on actually limiting such speculation.

As I previously observed, the proposed rule demoted the Commission from head coach to Monday-morning quarterback. The Final Rule declares that the players on the field are the referees. In this arena, the public interest loses.

I support effective position limits to restrain excessive speculation in physical commodity markets, coupled with legitimate bona fide hedge exemptions for commercial market participants. The Final Rule, however, fails to address excessive speculation in several key respects:

*First,* the Final Rule impermissibly permits private entities to devise new bona fide hedge exemptions, while simultaneously constricting the Commission's review and enforcement of such privately-created exemptions.

*Second,* the Final Rule fails to address trading at settlement (''TAS'') transactions. The potential for market manipulation through the use of TAS is well documented. The Final Rule was a valuable but wasted opportunity to address an important type of transaction in many commodity markets that, if abused, can present risks to orderly trading and price discovery.

*Third,* while the Final Rule eliminates the risk management exemptions that had been granted to a limited number of index funds, it also increases the non-spot month limits to accommodate the speculative positions of these funds in the futures markets. Cumulatively, index funds can have a substantial price impact and exacerbate volatility. Their monthly position rolls can also distort inter-month spreads. Yet the Commission performed no assessment of the impact of potential increases in this type of speculation that these higher limits would permit.[1]

*Fourth,* the Final Rule misinterprets the Dodd-Frank Act and reverses decades of precedent by declaring, for the first time, that the Commission must make antecedent necessity findings on a commodity-by-commodity basis prior to imposing Federal speculative position limits.

### II. Physical Commodity Markets Benefit From Position Limits and Appropriate Bona Fide Hedge Exemptions

Position limits help prevent market manipulation and price distortion arising from excessively large speculative positions in futures, options, and swaps tied to physical commodities. Section 4a of the CEA reflects Congress's long-standing determination that excessive speculation in a commodity can cause ''sudden,'' ''unreasonable,'' or ''unwarranted'' fluctuations and changes in commodity prices.[2] Section 4a directs the Commission to establish speculative position limits to address these harms, while also providing that such limits shall not apply to ''transactions or positions which are shown to be bona fide hedging transactions or positions, *as those terms are defined by the Commission* . . . .''[3]

Experience from decades of limits in agricultural commodities teaches that a properly crafted position limits regime is an ''effective prophylactic measure'' to protect American businesses, consumers, and market participants that rely on physical commodity derivatives markets.[4] The parameters of an effective position limits regime are well established. They include: (1) Meaningful limits on excessive speculation to help prevent market manipulation and price distortion; (2) recognition of bona fide hedging activities and exemptions to permit producers, end-users, merchants, and others to manage their commercial risks; and (3) clear divisions of responsibility, consistent with the CEA, that recognize the complimentary but distinct roles of exchanges, the Commission, and market participants in administering a position limits regime.

Federal speculative position limits have been in place to protect derivatives markets since the 1930s. The Commission or its predecessors adopted position limits for grains in 1938, cotton in 1940, and soybeans in 1951. In 1981, the Commission adopted rules requiring exchange limits for all commodities for which there were no Federal limits—a rule which notably did not require an antecedent, commodity-by-commodity necessity finding. The Commission has also consistently relied on exchanges to help administer the position limits regime, including position accountability and enumerated bona fide hedge exemptions.

These efforts, spanning over 80 years, have helped prevent manipulation and price distortion through a complementary system that relies on the respective expertise of Commission, exchange, and market participant stakeholders. The Final Rule discards this balance. The Final Rule relies excessively on exchanges and market participants to permit positions as bona fide hedges, and in so doing impermissibly delegates the Commission's statutory responsibility to determine what constitutes a bona fide hedge.[5]

### III. Significant Flaws in the Final Rule

#### *A. The Final Rule Permits Market Participants To Violate Federal Speculative Position Limits With No Prior Commission Recognition of a Bona Fide Hedge Exemption*

The Final Rule explicitly permits market participants to violate Federal speculative position limits with no bona fide hedge exemption from the Commission. It impermissibly delegates the Commission's statutory responsibility to define bona fide hedging to the very market participants with large speculative positions that section 4a is intended to restrain, as well as to the exchanges, who have no authority to determine what is a hedge under Federal law.

First, the Final Rule authorizes market participants to create their own bona fide hedge exemptions and exceed speculative position limits for ''sudden or unforeseen increases in their bona fide hedging needs.'' No prior approval from the Commission or an exchange is required to exceed the limits established by the Commission, and market participants may file their hedge applications up to five days *after* violating the applicable position limit. The Final Rule offers no guardrails on what can be considered a ''sudden or unforeseen'' circumstance. In an efficient market, all future price movements are inherently unforeseeable; that is the reason for hedging to begin with.[6] Further, in today's interconnected markets, where the speed of light is the limiting factor on the transmission of information, sudden and unforeseen circumstances arise virtually every millisecond. This provision may swallow the Final Rule.

Second, the Final Rule authorizes a market participant to exceed *Federal* speculative positon limits if an exchange permits it to exceed the *exchange's* position limits. In other words, an exchange determination can enable a market participant to violate *Federal* limits even in the absence of a Commission determination. Here again, the Final Rule ignores the Commission's statutory responsibility to define bona fide hedging. Exchanges have a critical role in any properly balanced position limits regime, but they are not authorized by the CEA to define Federal hedge exemptions, nor are they authorized to green-light violations of Federal position limits.

This process for market participants to ''self-recognize'' non-enumerated hedges that

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[1] For detailed comments on the effects of large speculative positions of index funds, *see* Better Markets Comments Letter, at 8–12 (May 15, 2020).

[2] 7 U.S.C. 6a.

[3] 7 U.S.C. 6a(c)(1) (emphasis added).

[4] Establishment of Speculative Position Limits, 46 FR 50938 (Oct. 16, 1981).

[5] ''[W]hile Federal agency officials may sub-delegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not sub-delegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.'' *U.S. Telecom Ass'n* v. *FCC,* 359 F.3d 554, 565–68 (D.C. Cir. 2004) (citations omitted).

[6] ''The basic efficient market hypothesis positions that the market cannot be beaten because it incorporates all important determining information into current share prices. Therefore, stocks trade at the fairest value, meaning that they can't be purchased undervalued or sold overvalued. The theory determines that the only opportunity investors have to gain higher returns on their investments is through purely speculative investments that pose a substantial risk.'' J. B. Maverick, The Weak, Strong, and Semi-Strong Efficient Market Hypotheses, Investopedia, available at *https://www.investopedia.com/ask/answers/032615/what-are-differences-between-weak-strong-and-semistrong-versions-efficient-market-hypothesis.asp* (updated Sept. 30, 2020). The unpredictability of the market has long been recognized. ''If you can look into the seeds of time, and say which grain will grow and which will not, speak then unto me.'' William Shakespeare, Macbeth, Act 1, Scene 3 (1623).

they wish had been enumerated under Federal law undoes the existing, Commission-led procedures that have worked well for decades.

The Final Rule reflects a multi-year, iterative process of notice and comment rulemaking to comprehensively determine which practices should constitute bona fide hedging. Members of the public and industry participants have enjoyed multiple opportunities to inform the Commission on this topic, including through additional proposed position limits rules in 2013 and twice in 2016. The Final Rule's enumerated hedges reflect the Commission's extensive dialogue and reasoned deliberations, and they recognize a wide array of hedging practices identified by commenters. To my knowledge, the Commission is not aware of any novel hedging practices that were not addressed during this rulemaking process.

Commission regulations currently allow for the recognition of non-enumerated bona fide hedges through a 30-day, Commission-led review process. The Commission must recognize the requested hedge as bona fide before a market participant can put the hedge on the exchange and exceed position limits. This process has worked well for decades. The Final Rule replaces it with a new system that allows market participants to make their own bona fide hedge determinations and exceed Federal position limits in advance of any reasoned, considered evaluation by the Commission.

1. The 10 and 2 Day Review Periods Are Inadequate for the Commission To Consider Applications for Exemptions After an Exchange Determination

The Final Rule attempts to cure the impermissible statutory delegation described above through crammed, after-the-fact reviews of market participants' hedge applications and violations of position limits rules.

Market participants who request prospective non-enumerated bona fide hedge exemptions from an exchange may violate Federal speculative position limits upon being granted the exemption. The exchange must then forward the application and other materials to the Commission for the beginning of a constricted 10-day review period.

The Commission, for its part, must complete the difficult task of evaluating the law, facts, and circumstances with respect to cash market risks that have already been incurred and commodity positions that have already been posted on an exchange. Commission determinations regarding the validity of positions that have already been entered into will be complicated by the commercial implications involved in unwinding such positions. Further, in the event that the Commission determines to deny the application, the Commission must provide the applicant with notice and opportunity to respond. In the case of positions established due to ''sudden or unforeseen'' events, the Final Rule calls for a two-day review. This is an unrealistic and unworkable timeframe. This fig leaf of a ''review'' cannot provide legal cover for the impermissible delegation.

2. The Final Rule Adopts a Policy of Non-Enforcement for Position Limit Violations

Both the rule text and the preamble to the Final Rule leave no doubt that any person who puts on a position in excess of a position limit prior to receiving Commission approval of the exemption is in violation of the speculative position limits. However, where an application for a non-enumerated bona fide hedge is submitted retroactively to either an exchange or the Commission due to ''sudden or unforeseen circumstances,'' or where an exchange has approved an application for an exemption from the exchange limit, the Commission limits its ability to prosecute such violations by declaring that, ''as a matter of policy,'' it will not pursue an enforcement action as long as the application was submitted in ''good faith.''

The Final Rule does not define ''good faith.'' Perhaps this is because the concept of good faith traditionally is used as a safe harbor to protect persons who reasonably believe they are acting in compliance with the law. For example, when exercising its prosecutorial discretion for violations of the swap dealer business conduct standards, the Commission considers whether the swap dealer attempted in ''good faith'' to follow policies and procedures reasonably designed to comply with the CEA and Commission Regulations.[7] This application of the good faith doctrine is consistent with the long-established understanding of the term.[8] In the Final Rule, however, the Commission turns this doctrine on its head and mandates prosecutorial discretion where a market participant knowingly acts *in violation* of the law by putting on a position in excess of the legal limit.

Notably, the Commission describes its position not to enforce these violations as ''a matter of policy.'' So although this non-enforcement policy is adopted as part of this rulemaking, it is nonetheless just that—a statement of policy. As the Supreme Court has recognized, ''general statements of policy,'' or ''statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power,'' are not subject to the notice-and-comment procedures of the Administrative Procedure Act.[9] Accordingly, the Commission may change this enforcement policy at any time without engaging in a notice-and-comment rulemaking.

Significantly, in its comment letter, the entity with the most experience in retroactive applications for hedge exemptions, the CME Group, pointed out to the Commission the importance of being able to take enforcement action for position limit violations that have occurred when retroactive applications are denied. It stated:

Today at the exchange level, CME Group considers firms to be in violation of a position limit if they exceed a limit and the exemption application is denied. We believe the Commission should implement this standard rather than permitting the proposed grace period for denial of an exemption application. Otherwise, market participants with excessively large speculative positions could exploit the grace period accompanying an application for an exemption and intentionally go over the applicable limit without consequences—all the while disrupting orderly market operations. In our experience, the prospect of having an application denied and being found in violation of position limits has worked to deter market participants from attempting to exploit the retroactive exemption process.[10]

Although the Final Rule is replete with deference to the experience of the exchanges in implementing the position limits regime, and creates a process specifically reliant upon the exchange's expertise in granting hedge exemptions, here in the context of enforcing violations and deterring abuse, the Commission oddly rejects that expertise.

*B. The Final Rule Fails To Address TAS Transactions or the Historic Collapse of WTI Crude Oil Futures*

On April 20, 2020, the price of the May futures contract for West Texas Intermediate (''WTI'') crude oil traded on the New York Mercantile Exchange collapsed from $17.73 per barrel at the market open to a closing price of *negative* $37.63. This single-day fall in prices of approximately $55 per barrel is unprecedented, and was accompanied by a massive disconnect between May crude oil futures and the price of crude oil in the physical market.

WTI crude oil futures are a key benchmark in global energy markets and can impact the overall U.S. economy. Following the WTI event, I called upon the Commission to determine the causes of this unprecedented price movement and divergence from physical markets, and to work with CME to ''take whatever measures may be appropriate to ensure that trading in the WTI futures contract is orderly and supports convergence of the futures and physical markets.'' [11]

[7] *See* Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734, 9744, 9746, 9750 (Feb. 17, 2012).

[8] *See, e.g., CFTC* v. *Monex Credit Co.,* No. SACV–171868, 2020 WL 1625808, at *4–5 (C.D. Cal. Feb. 12, 2020) (finding that controlling persons did not establish good faith defense to liability under 7 U.S.C. 13b where they knowingly or recklessly violated the CEA or were aware or should have been aware that employees were violating the CEA, or did not reasonably enforce system designed to promote legal compliance) (citing *Monieson* v. *CFTC,* 996 F.2d 852, 860–861 (7th Cir. 1993)); *U.S.* v. *Leon,* 468 U.S. 897 (1984) and *Massachusetts* v. *Sheppard,* 468 U.S. 981 (1984) (establishing good faith doctrine as exemption to Fourth Amendment exclusionary rule when police officer reasonably believed conduct to be legal).

[9] Nor are blanket statements of policy that abandon an agency's responsibility to enforce the law constitutionally permissible. *Crowley Caribbean Transp., Inc.* v. *Peña,* 37 F.3d 671, 677 (DC Cir. 1994) (''[A]n agency's pronouncement of a broad policy against enforcement poses special risks that it 'has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.''') (citing *Heckler* v. *Chaney,* 470 U.S. 821, 833 n.4 (1985)).

[10] CME Comment Letter (May 14, 2020).

[11] Statement of Commissioner Dan M. Berkovitz on Recent Trading in the WTI Futures Contract before the Energy and Environmental Markets

Almost six months later, the Commission has yet to complete its investigation or issue even preliminary results. It should not take this long for the world's leading derivatives regulator to understand the historic collapse of a benchmark contract that it has overseen for decades.

Independently of the Commission's investigation, public commentary following the WTI event focused on TAS transactions and the well-known integrity concerns regarding TAS under certain market conditions.[12] TAS transactions represent the purchase or sale of an underlying exchange commodity at the closing price for that commodity or at a specified differential. Notably, exchange rules may permit TAS transactions to be netted intraday against futures positions in that commodity established via outright purchases and sales. Such netting could permit a trader to establish very large long or short positions in the outright futures contracts, while remaining below speculative position limits on a net basis.

The Final Rule recognizes the importance of netting practices and rules in several regards. For example, it prohibits the spot-month netting of physically settled contracts with linked cash settled contracts. The Final Rule explains that allowing such netting during the spot month ''could lead to disruptions in the price discovery function of the core referenced futures contract or allow a market participant to manipulate the price of the core referenced futures contract.'' The Final Rule is silent, however, with respect to any limitations on the netting of TAS with outright futures.

One commenter on the Final Rule reminded the Commission in significant detail of the market integrity issues associated with TAS orders.[13] But even apart from the comment letters on the proposed rule, and apart from the WTI event, the potential for manipulation through the use of offsetting TAS contracts has been well-known.[14] Further, the CFTC has direct experience with this issue: it has brought two manipulation cases where WTI TAS orders were an integral part of the manipulative scheme.[15] Given the Commission's familiarity with the potential for manipulation and disruption of the price discovery process arising from an abuse of the TAS order type, the failure of the Final Rule to address in any manner these well-known dangers to market integrity is inexcusable.

*C. The Final Rule Misconstrues the CEA by Requiring Antecedent, Commodity-by-Commodity Necessity Findings Prior to Imposing Federal Position Limits*

The Final Rule misinterprets the Dodd-Frank Act and reverses decades of Commission interpretation and finds that an antecedent, commodity-by-commodity necessity finding is required prior to imposing Federal speculative position limits. The Final Rule further states that this ''is the best interpretation'' of CEA section 4a(a)(2), and that the Commission's prior interpretations are ''not compelling.''

I addressed this issue extensively in my dissenting opinion on the proposed position limits rule, and I reiterate those views now.[16] Neither the statutory language of CEA section 4a(a)(2), nor the district court's decision in *ISDA* v. *CFTC,* require an antecedent necessity finding prior to imposing position limits. The Final Rule's new interpretation, which the Commission concedes is a ''change'' from prior interpretations, is mistaken.[17]

As articulated in my prior dissent, the Final Rule's interpretation of CEA section 4a(a)(2) ''defies history and common sense.'' [18] Following hard on the heels of the 2008 financial crisis and the collapse of the Amaranth hedge fund in 2006, it is implausible that the drafters of the Dodd-Frank Act intended what the Commission has now adopted. The Final Rule requires the Commission to believe that a Congress in the midst of the financial crisis, aware the CEA had never been interpreted to require predicate necessity findings for position limits, and engaged in a historic effort to regulate financial markets, would nonetheless make it *harder* for the Commission to impose Federal speculative position limits. The Commission's revisionist legislative history is neither accurate nor credible.

## IV. Conclusion

The Final Rule departs from both legal interpretations and policy frameworks that have served commodity markets well for decades.

Most significantly, the Final Rule impermissibly delegates the authority to recognize non-enumerated hedge exemptions; provides farcically short review periods for private-entity hedge determinations; attempts to enshrine a policy of non-enforcement for position limits violations; fails to address the well-known risks of TAS transactions; and reinterprets the CEA to require antecedent necessity findings prior to imposing Federal position limits.

I cannot support such a flawed rule.

[FR Doc. 2020–25332 Filed 1–5–21; 11:15 am]

**BILLING CODE 6351–01–P**

Advisory Committee Meeting (May 7, 2020), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement050720*.

[12] *See, e.g.,* Matt Levine, It's a Good Time to Cut Dividends, Money Stuff (Apr. 29, 2020), available at *https://www.bloomberg.com/news/articles/2020-08-04/oil-s-plunge-below-zero-was-500-million-jackpot-for-a-few-london-traders?sref=DzeLiNol* (''If you combine these two facts—a lot of TAS contracts and not much volume around the settlement time—you get a well-known theoretical problem. . . . The basic pattern—agree in advance to buy (sell) stuff at the official settlement price at some fixed future time, and then sell (buy) a bunch of that stuff in the minutes leading up to the official settlement time with the effect of pushing down (up) the price at which you are buying (selling)—is incredibly common . . . .''); Craig Pirrong, Streetwise Professor Blog, WTI–WTF? Part 3: Did CLK20 Get TAS-ed? (Apr. 30, 2020), available at *https://streetwiseprofessor.com/2020/04/*.

[13] Better Markets Comment Letter, at 13–14 (May 15, 2020).

[14] *See, e.g.,* Craig Pirrong, Derived Pricing: Fragmentation, Efficiency, and Manipulation, Bauer College of Business, University of Houston, at 10 (Jan. 14, 2019), available at *https://streetwiseprofessor.com/2020/04/* (''The analysis in Section 2 demonstrates that TAS contracts create trading opportunities with asymmetric price impacts. This suggests that TAS may therefore also create opportunities for profitable trade-based manipulation, and this is indeed the case.''); *see also* Paul Peterson, Trading at Settlement for Agricultural Futures: Results from the First Month, farmdoc daily (July 29, 2015), available at *https://farmdocdaily.illinois.edu/2015/07/trading-at-settlement-for-agricultural-futures.html* (''Over the years TAS has been associated with several efforts to artificially influence the daily settlement price through 'banging the close' and other forms of manipulation [citations omitted].'').

[15] *See In re Optiver US LLC,* CFTC No. 08 Civ 6560, 2012 WL 1632613 (Apr. 19, 2012); *In re Shak,* CFTC No. 14–03, 2013 WL 11069360 (Nov. 25, 2013) (consent order).

[16] *See* Dissenting Statement of Commissioner Dan M. Berkovitz Regarding Proposed Rule on Position Limits for Derivatives (Jan. 30, 2020), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement013020*.

[17] Significantly, however, at the Commission's meeting on the proposal rule, the Commission's Office of General Counsel clarified that a necessity finding is required only with respect to the Commission's establishment of Federal position limits. The Office of General Counsel stated that a necessity finding was neither a prerequisite for a Commission directive to the exchanges to establish limits, nor prior to establishing the standards for such limits. The Commission's legal interpretation in the Final Rule is identical to the interpretation in the proposed rule in this regard as well.

[18] For a detailed discussion of how the Commission's necessity finding misconstrues the CEA as amended by the Dodd-Frank Act, *see* Dissenting Statement of Commissioner Dan M. Berkovitz Regarding Proposed Rule on Position Limits for Derivatives (Jan. 30, 2020), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement013020b*.

# FEDERAL REGISTER

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Part III

## Securities and Exchange Commission

17 CFR Parts 227, 229, 230, et al.
Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets; Final Rule

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Parts 227, 229, 230, 239, 240, 249, 270, and 274

**[Release Nos. 33–10884; 34–90300; IC–34082; File No. S7–05–20]**

**RIN 3235–AM27**

## Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments to facilitate capital formation and increase opportunities for investors by expanding access to capital for small and medium-sized businesses and entrepreneurs across the United States. Specifically, the amendments simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation while preserving or enhancing important investor protections. The amendments also seek to close gaps and reduce complexities in the exempt offering framework that may impede access to investment opportunities for investors and access to capital for businesses and entrepreneurs.

**DATES:**

*General:* This final rule is effective on March 15, 2021.

*Exceptions:* 1. Revised 17 CFR 227.100(b)(7) (amendatory instruction 2), previously effective until Sept. 1, 2021 at 85 FR 27132, May 7, 2020, is now effective from January 14, 2021, to March 1, 2023.

2. Newly redesignated and revised 17 CFR 227.201(aa) (amendatory instruction 4) is effective from January 14, 2021, and remains effective until September 1, 2021.

3. 17 CFR 227.201(bb) (amendatory instruction 5) and 17 CFR 227.301(e) (amendatory instruction 10) are effective from January 14, 2021, to March 1, 2023.

4. Amendments to 17 CFR 227.303(g) (amendatory instruction 11) and 17 CFR 227.304(e) (amendatory instruction 12) are effective from January 14, 2021, and remain effective until September 1, 2021.

5. The amendments to the introductory paragraph in the Optional Question and Answer Format for an Offering Statement of Form C (referenced in § 239.900) are applicable from January 14, 2021, to March 1, 2023.

**FOR FURTHER INFORMATION CONTACT:** Anthony Barone or John Byrne, Special Counsel, Office of Small Business Policy, or Steven G. Hearne, Senior Special Counsel, Office of Rulemaking, at (202) 551–3460, Division of Corporation Finance; Jennifer Songer, Branch Chief, or Lawrence Pace, Senior Counsel, at (202) 551–6999, Investment Adviser Regulation Office, Division of Investment Management; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are adopting amendments to:

| Commission Reference | CFR citation (17 CFR) |
|---|---|
| Regulation Crowdfunding: | |
| Rules 100 through 504 | §§ 227.100 through 227.504. |
| Rule 100 | § 227.100. |
| Rule 201 | § 227.201. |
| Rule 203 | § 227.203. |
| Rule 204 | § 227.204. |
| Rule 206 | § 227.206. |
| Rule 301 | § 227.301. |
| Rule 303 | § 227.303. |
| Rule 304 | § 227.304. |
| Rule 503 | § 227.503. |
| | § 227.504. |
| Securities Act of 1933 (Securities Act):[1] | |
| Rule 147 | § 230.147. |
| Rule 147A | § 230.147A. |
| Rule 148 | § 230.148. |
| Rule 152 | § 230.152. |
| Rule 155 | § 230.155. |
| Rule 241 | § 230.241. |
| Regulation A: | |
| Rules 251 through 263 | §§ 230.251 through 230.263. |
| Rule 251 | § 230.251. |
| Rule 255 | § 230.255. |
| Rule 259 | § 230.259. |
| Rule 262 | § 230.262. |
| Regulation D: | |
| Rules 500 through 508 | §§ 230.500 through 230.508. |
| Rule 500 | § 230.500. |
| Rule 502 | § 230.502. |
| Rule 504 | § 230.504. |
| Rule 506 | § 230.506. |
| Regulation S–K: | |
| Items 10 through 1305 | §§ 229.10 through 229.1305. |
| Item 601 | § 229.601. |
| Form S–6 | § 239.16. |
| Form N–14 | § 239.23. |
| Form 1–A | § 239.90. |
| Form C | § 239.900. |
| Securities Exchange Act of 1934 (Exchange Act):[2] | |
| Rule 12g–6 | § 240.12g–6. |
| Rule 12g5–1 | § 240.12g5–1. |
| Form 20–F | § 249.220f. |
| Form 8–K | § 249.308. |
| Investment Company Act of 1940 (Investment Company Act):[3] | |
| Rule 3a–9 | § 270.3a–9. |
| Form N–8B–2 | § 274.12. |
| Securities Act and Investment Company Act: | |
| Form N–1A | §§ 239.15A and 274.11A. |
| Form N–2 | §§ 239.14 and 274.11a–1. |
| Form N–3 | §§ 239.17a and 274.11b. |
| Form N–4 | §§ 239.17b and 274.11c. |
| Form N–5 | §§ 239.24 and 274.5. |
| Form N–6 | §§ 239.17c and 274.11d. |

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] 15 U.S.C. 80a–1 *et seq.*

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### I. Introduction and Background

On March 4, 2020, the Securities and Exchange Commission (the ''SEC'' or ''Commission'') proposed amendments to simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation while preserving or enhancing important investor protections.[4] Specifically, the Commission proposed amendments that (1) address the ability of issuers to move from one exemption to another, (2) set clear and consistent rules governing offering communications between investors and issuers, (3) address potential gaps and inconsistencies in our rules relating to offering and investment limits, and (4) harmonize certain disclosure requirements and bad actor disqualification provisions.

The Securities Act requires that every offer [5] and sale of securities be registered with the Commission, unless an exemption from registration is available. The Securities Act, however, also contains a number of exemptions from its registration requirements and authorizes the Commission to adopt additional exemptions. Section 3 of the Securities Act generally provides exemptions that are based on characteristics of the securities themselves.[6] Section 4 of the Securities Act identifies transactions that are exempt from the registration requirements.[7] In addition, Section 28 of the Securities Act authorizes the Commission to exempt other persons, securities, or transactions to the extent necessary or appropriate in the public interest and consistent with the protection of investors.[8] The current exempt offering framework is complex and made up of differing, exemption-specific requirements and conditions. The scope of the exempt offering framework has evolved over time through Commission rules and legislative changes, including most recently through the Jumpstart Our Business Startups Act of 2012 (''JOBS Act''),[9] the Fixing America's Surface Transportation Act of 2015,[10] and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.[11] On June 18, 2019, the Commission issued a concept release that solicited public comment on possible ways to simplify, harmonize, and improve the exempt offering framework under the Securities Act to promote capital formation and expand investment opportunities while maintaining appropriate investor protections.[12] While commenters on the Concept Release expressed many perspectives on what changes would best serve the interests of emerging companies raising capital, a consistent theme in many comments was that many elements of the current structure work effectively and a major restructuring is not needed.[13]

Building on the comments received in response to the Concept Release and other comments and recommendations received from the SEC Small Business Capital Formation Advisory Committee, the SEC Investor Advisory Committee, the annual Government-Business Forums on Small Business Capital Formation (each a ''Small Business Forum''), and other market participants, the Commission proposed a set of amendments that would generally retain the current exempt offering structure and reduce potential friction points. The proposed amendments were intended to facilitate capital formation while preserving and in some cases enhancing investor protections. The proposed amendments were further intended to address gaps and complexities in the exempt offering framework and help provide viable alternatives to the dominant capital raising tools.

We received many comment letters on the Proposing Release expressing a range of views.[14] We also received comments and recommendations on the Proposing Release from the SEC Small Business Capital Formation Advisory Committee [15] and the 2020 Small Business Forum.[16] After considering the public comments received and the other comments and recommendations, we are adopting the amendments substantially as proposed but with certain modifications in response to commenters' feedback. We believe that the final rules will facilitate the use of the exempt offering framework, particularly by smaller issuers.[17] We acknowledge concerns about and recommendations relating to transparency and investor protections in the private securities marketplace.[18] We further acknowledge concerns that by encouraging exempt offerings, these amendments could reduce incentives for issuers to conduct registered public offerings. However, we estimate, as discussed further in Section IV (Economic Analysis) below, that while these amendments may encourage more exempt offerings, these offerings will

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[4] *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33–10763 (Mar. 4, 2020) [85 FR 17956 (Mar. 31, 2020)] (''Proposing Release'').

[5] *See* 15 U.S.C. 77b(a)(3) (noting that an offer includes every attempt to dispose of a security or interest in a security, for value; or any solicitation of an offer to buy a security or interest in a security).

[6] *See* 15 U.S.C. 77c. However, some Section 3 exempted securities are identified based on the transaction in which they are offered or sold. For example, Section 3(b)(1) of the Securities Act authorizes the Commission to exempt certain issues of securities where the aggregate amount offered does not exceed $5 million. 15 U.S.C. 77c(b)(1).

[7] *See* 15 U.S.C. 77d.

[8] 15 U.S.C. 77z–3.

[9] Public Law 112–106, 126 Stat. 306 (2012). The JOBS Act, among other things: (1) Directed the Commission to revise Rule 506 to eliminate the prohibition against general solicitation or general advertising for offers and sales of securities to accredited investors (*See* Section 201(a)(1)); (2) Added Section 4(a)(6) [15 U.S.C. 77d(a)(6)] and Section 4A [15 U.S.C. 77d–1(b)] to the Securities Act and directed the Commission to issue rules to permit certain crowdfunding offerings (*See* Section 302); and (3) Directed the Commission to expand Regulation A (*See* Section 401).

[10] Public Law 114–94, 129 Stat. 1312 (2015).

[11] Public Law 115–174, 132 Stat. 1296 (2018).

[12] *See* Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33–10649 (June 18, 2019) [84 FR 30460 (June 26, 2019)] (''Concept Release'').

[13] *See, e.g.,* Letter from AngelList Advisors, LLC dated Sept. 25, 2019; Letter from CrowdCheck, Inc. dated Oct. 30, 2019; and Letter from Crowdfund Capital Advisors dated Sept. 24, 2019, in response to the Concept Release, *available at https://www.sec.gov/comments/s7-08-19/s70819.htm. See also* Recommendation of the SEC Small Business Capital Formation Advisory Committee regarding the exemptive offering framework (Dec. 13, 2019), *available at https://www.sec.gov/spotlight/sbcfac/recommendation-harmonization-general-principles.pdf* (''2019 Small Business Advisory Committee Recommendation on the Exemptive Offering Framework''); and Report of the 2019 SEC Government-Business Forum on Small Business Capital Formation (Dec. 2019), *available at https://www.sec.gov/files/small-business-forum-report-2019.pdf* (''2019 Forum Report'').

[14] Unless otherwise indicated, comments cited in this release are to comment letters received in response to the Proposing Release, which are available at *https://www.sec.gov/comments/s7-05-20/s70520.htm.*

[15] *See* Letter from SEC Small Business Capital Formation Advisory Committee dated May 28, 2020 (''SEC SBCFAC Letter'').

[16] *See* Final Report of the 2020 SEC Government-Business Forum on Small Business Capital Formation (June 2020), *available at https://www.sec.gov/files/2020-oasb-forum-report-final_0.pdf* (''2020 Forum Report'').

[17] We are mindful of concerns expressed in the Recommendation of the SEC Small Business Capital Formation Advisory Committee regarding how our capital markets are serving underrepresented founders and investors (Aug. 26, 2020), available at *https://www.sec.gov/spotlight/sbcfac/underrepresented-founders-recommendation.pdf.* The recommendation states that minority- and women-owned businesses and funds face barriers to entry due to less access to capital than their peers. We believe that the amendments adopted in this release will enable small businesses generally to access capital through exempt offerings more effectively and we encourage further specific, tangible suggestions for action by the Commission and are committed to continued engagement on this topic.

[18] *See* Letter from North American Securities Administrators Association, Inc. dated October 21, 2020 (''NASAA Letter II''). NASAA Letter II recommended requiring the filing of a Form D concurrent with the beginning of a general solicitation, expanding the Form D to capture additional information about the offering, the filing of a closing Form D amendment, and certain legends for Rule 506(c) offerings. While we did not propose and are not adopting these recommended changes, we are committed to continued engagement to enhance small business capital formation and investor protection.

have only a marginal impact on the number of registered offerings.[19] Commenters' views on different aspects of the proposed amendments, as well as their effects, are discussed topically below.

## II. Discussion of Final Amendments

We are amending the exempt offering framework to close gaps and reduce complexities that may impede access to capital for issuers and thereby limit investment opportunities, while preserving or enhancing important investor protections. The amendments generally:

- Modernize and simplify the Securities Act integration framework for registered and exempt offerings;
- Set clear and consistent rules governing offering communications between issuers and investors;
- Increase offering and investment limits for certain exemptions; and
- Harmonize certain disclosure requirements and bad actor disqualification provisions.

Table 1 summarizes key characteristics of the most commonly used exemptions [20] from registration, as amended by this release.[21]

TABLE 1—OVERVIEW OF CAPITAL-RAISING EXEMPTIONS

| Type of offering | Offering limit within 12-month period | General solicitation | Issuer requirements | Investor requirements | SEC filing requirements | Restrictions on resale | Preemption of state registration and qualification |
|---|---|---|---|---|---|---|---|
| Section 4(a)(2) | None | No | None | Transactions by an issuer not involving any public offering. *See SEC* v. *Ralston Purina Co.* | None | Yes. Restricted securities. | No. |
| 17 CFR 230.506(b) (''Rule 506(b)'' of Regulation D). | None | No | ''Bad actor'' disqualifications apply. | Unlimited accredited investors. Up to 35 sophisticated but non-accredited investors in a 90-day period. | 17 CFR 239.500 (''Form D''). | Yes. Restricted securities. | Yes. |
| 17 CFR 230.506(c) (''Rule 506(c)'') of Regulation D. | None | Yes | ''Bad actor'' disqualifications apply. | Unlimited accredited investors. Issuer must take reasonable steps to verify that all purchasers are accredited investors *. | Form D | Yes. Restricted securities. | Yes. |
| Regulation A: Tier 1 | $20 million | Permitted; before qualification, testing the waters permitted before and after the offering statement is filed. | U.S. or Canadian issuers. Excludes blank check companies, registered investment companies, business development companies, issuers of certain securities, certain issuers subject to a Section 12(j) order, and Regulation A and Exchange Act reporting companies that have not filed certain required reports. ''Bad actor'' disqualifications apply.* No asset-backed securities. | None | Form 1–A, including two years of financial statements. Exit report | No | No. |
| Regulation A: Tier 2 | $75 million | | | Non-accredited investors are subject to investment limits based on the greater of annual income and net worth, unless securities will be listed on a national securities exchange. | Form 1–A, including two years of audited financial statements. Annual, semi-annual, current, and exit reports. | No | Yes. |

[19] *See* discussion of the Broad Economic Considerations in Section IV.A. below, noting among other things that the amendments with the greatest potential to expand the use of individual exemptions affect the smallest market segments (Regulation Crowdfunding and Regulation A), whose issuers tend to be at a much earlier stage of development than those that conduct a traditional initial public offering. In addition, based on data collected on Regulation D offerings from 2009 through 2019, given the small size of a typical Regulation D issuer and offering, the amendments, including the adoption of a new comprehensive integration framework, are unlikely to reduce the incentives or need of issuers contemplating registered offerings. *See infra* note 596, *infra* Table 7 and related discussion.

[20] Commission rules also provide exemptions for certain offerings where the purpose of the offering is other than to raise capital. For example, 17 CFR 230.701 (''Rule 701'') exempts certain sales of securities made to compensate employees, consultants, and advisors.

[21] Generally, Table 1 is organized by typical offering size from largest to smallest. The information in this table is not comprehensive and is intended only to highlight some of the more significant aspects of the current rules. Certain regulatory exemptions from registration provide specific frameworks or safe harbors to comply with statutory exemptions. For example, offers and sales of securities by an issuer that satisfy the conditions in paragraphs (b) and (c) of Rule 506 are deemed to be transactions not involving any public offering within the meaning of Section 4(a)(2) of the Securities Act [15 U.S.C. 77d(a)(2)]. *See* 17 CFR 230.506(a). Similarly, Rule 147 provides a safe harbor under Section 3(a)(11) of the Securities Act [15 U.S.C. 77c(a)(11)]. In contrast, for example, Rule 147A is a stand-alone exemption promulgated by the Commission pursuant to its authority under Section 28 of the Securities Act [15 U.S.C. 77z–3]. *See* 17 CFR 230.147A(a).

TABLE 1—OVERVIEW OF CAPITAL-RAISING EXEMPTIONS—Continued

| Type of offering | Offering limit within 12-month period | General solicitation | Issuer requirements | Investor requirements | SEC filing requirements | Restrictions on resale | Preemption of state registration and qualification |
|---|---|---|---|---|---|---|---|
| Rule 504 of Regulation D. | $10 million | Permitted in limited circumstances. | Excludes blank check companies, Exchange Act reporting companies, and investment companies. ''Bad actor'' disqualifications apply. | None | Form D | Yes. Restricted securities except in limited circumstances. | No. |
| Regulation Crowdfunding; Section 4(a)(6). | $5 million | Testing the waters permitted before Form C is filed. Permitted with limits on advertising after Form C is filed. Offering must be conducted on an internet platform through a registered intermediary. | Excludes non-U.S. issuers, blank check companies, Exchange Act reporting companies, and investment companies. ''Bad actor'' disqualifications apply. | No investment limits for accredited investors. Non-accredited investors are subject to investment limits based on the greater of annual income and net worth. | Form C, including two years of financial statements that are certified, reviewed or audited, as required. Progress and annual reports. | 12-month resale limitations. | Yes. |
| Intrastate: Section 3(a)(11). | No Federal limit (generally, individual State limits between $1 and $5 million). | Offerees must be in-state residents. | In-state residents ''doing business'' and incorporated in-state; excludes registered investment companies. | Offerees and purchasers must be in-state residents. | None | Securities must come to rest with in-state residents. | No. |
| Intrastate: Rule 147 | No Federal limit (generally, individual State limits between $1 and $5 million). | Offerees must be in-state residents. | In-state residents ''doing business'' and incorporated in-state; excludes registered investment companies. | Offerees and purchasers must be in-state residents. | None | Yes. Resales must be within State for six months. | No. |
| Intrastate: Rule 147A | No Federal limit (generally, individual State limits between $1 and $5 million). | Yes | In-state residents and ''doing business'' in-state; excludes registered investment companies. | Purchasers must be in-state residents. | None | Yes. Resales must be within State for six months. | No. |

We discuss specific aspects of the final amendments in detail below.

*A. Integration*

The integration doctrine seeks to prevent an issuer from improperly avoiding registration by artificially dividing a single offering into multiple offerings such that Securities Act exemptions would apply to the multiple offerings that would not be available for the combined offering.[22] The Securities Act integration framework for registered and exempt offerings consists of a mixture of rules and Commission guidance for determining whether multiple securities transactions should be considered part of the same offering. As the number of exemptions from registration available to issuers has evolved over time, the integration framework has grown more complex.[23]

The Commission first articulated the integration concept in 1933 and further developed it in two interpretive releases issued in the 1960s.[24] The interpretive releases state that determining whether a particular securities offering should be integrated with another offering requires an analysis of the specific facts and circumstances of the offerings. The Commission identified the following five factors to consider in determining whether the offerings should be integrated: (1) Whether the different offerings are part of a single plan of financing; (2) Whether the offerings involve issuance of the same class of security; (3) Whether the offerings are made at or about the same time; (4) Whether the same type of consideration is to be received; and (5) Whether the offerings are made for the same general purpose.[25]

In adopting Regulation D in 1982, the Commission relied on the five-factor test in establishing a framework used to determine whether two offerings that fall outside of the 17 CFR 230.502(a) (''Rule 502(a)'') safe harbor should be integrated and treated as one offering.[26] The Rule 502(a) safe harbor provided that offers and sales more than six months before a Regulation D offering or more than six months after the completion of a Regulation D offering will not be considered part of the same offering. This provided issuers with a bright-line test on which they could rely to avoid the integration of multiple offerings. However, for offerings occurring within six months of each other, the determination as to whether separate sales of securities were part of the same offering (*i.e.,* were considered integrated) depended on the particular facts and circumstances of the offerings, including an analysis of the five-factor test.[27]

In 2007, the Commission issued guidance setting forth a framework for analyzing the integration of simultaneous registered and private offerings, where the five-factor test does not apply.[28] The Commission noted that the determination as to whether the filing of a registration statement should be considered to be a general

[22] *See, e.g.,* Revisions of Limited Offering Exemptions in Regulation D, Release No. 33–8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007)] (''Regulation D 2007 Proposing Release''), at Section II.C.1.

[23] *See* Proposing Release, at Section II.A.

[24] *See* Release No. 33–97 (Dec. 28, 1933); Section 3(a)(11) Exemption for Local Offerings, Release No. 33–4434 (Dec. 6, 1961) [26 FR 11896 (Dec, 13, 1961)] (''Section 3(a)(11) Release''); and Non-Public Offering Exemption, Release No. 33–4552 (Nov. 6, 1962) [27 FR 11316 (Nov. 16, 1962)] (''Non-Public Offering Exemption Release'').

[25] *See* Section 3(a)(11) Release; and Non-Public Offering Exemption Release.

[26] *See* Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, Release No. 33–6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)] (''Regulation D Adopting Release''). *See also* Rule 502(a).

[27] Notwithstanding the fact that Rule 502(a) only applies to Regulation D offerings, the integration framework in Rule 502(a)—including the use of the five-factor test for determining the integration of offerings occurring within six months of each other—is often referred to when considering integration issues arising in other exempt offerings that do not have their own integration guidelines, such as Section 4(a)(2).

[28] *See* Regulation D 2007 Proposing Release, at Section II.C.1.

solicitation or general advertising [29] that would affect the availability of the Section 4(a)(2) exemption for a concurrent private placement should be based on a consideration of whether the investors in the private placement were solicited by the registration statement or through some other means that would not foreclose the availability of the Section 4(a)(2) exemption.[30]

More recently, in connection with the Regulation A and Regulation Crowdfunding rulemakings in 2015 and the Rule 147 and Rule 147A rulemaking in 2016, the Commission set forth a facts-and-circumstances integration framework in the context of concurrent exempt offerings.[31] The facts-and-circumstances integration framework applies to situations where one offering permits general solicitation and the other does not, as well as situations where both offerings rely on exemptions permitting general solicitation. Under this analysis, where an integration safe harbor is not available, integration of concurrent or subsequent offers and sales of securities with any offering conducted under Regulation A, Regulation Crowdfunding, Rule 147, or Rule 147A will depend on the particular facts and circumstances, including whether each offering complies with the requirements of the exemption on which the particular offering is relying.[32]

We believe that statutory and regulatory changes to the Securities Act exemptive structure, including those arising from the JOBS Act, developments in the capital markets, and the evolution of communications technology make it necessary and appropriate for the Commission to modernize and simplify the Securities Act integration framework for registered and exempt offerings and its application throughout the Securities Act rules. New Rule 152 builds on the approach to integration in the Commission's recent rulemakings and provides a comprehensive integration framework composed of a general principle of integration, as set forth in new 17 CFR 230.152(a) (''Rule 152(a)''), and four safe harbors applicable to all securities offerings under the Securities Act, including registered and exempt offerings, as set forth in new 17 CFR 230.152(b) (''Rule 152(b)'').

Tables 2(a) and 2(b) provide an overview of the general integration principle and safe harbors in new Rule 152, each discussed in more detail below.

TABLE 2(a)—OVERVIEW OF THE GENERAL INTEGRATION PRINCIPLE IN NEW RULE 152 [33]

| Integration Principle in New Rule 152(a) | |
|---|---|
| General Principle of Integration | If the safe harbors in Rule 152(b) do not apply, in determining whether two or more offerings are to be treated as one for the purpose of registration or qualifying for an exemption from registration under the Securities Act, offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or that an exemption from registration is available for the particular offering. |
| Application of the General Principle to an exempt offering prohibiting general solicitation. 17 CFR 230.152(a)(1) (''Rule 152(a)(1)''). | The issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either:<br>(i) Did not solicit such purchaser through the use of general solicitation; or<br>(ii) Established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation. |
| Application of the General Principle to concurrent exempt offerings that each allow general solicitation. 17 CFR 230.152(a)(2) (''Rule 152(a)(2)''). | In addition to satisfying the requirements of the particular exemption relied on, general solicitation offering materials for one offering that include information about the material terms of a concurrent offering under another exemption may constitute an offer of the securities in such other offering, and therefore the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any legend requirements and communications restrictions. |

[29] *See* Section II.B. *infra* for a discussion of the terms ''general solicitation'' and ''general advertising.'' In this release, we sometimes refer to both general solicitation and general advertising as they relate to an offer of securities as ''general solicitation.''

[30] *See* Regulation D 2007 Proposing Release. The Commission stated that issuers should analyze whether the offering is exempt under Section 4(a)(2) ''on its own,'' including whether securities were offered and sold to the private placement investors through the means of a general solicitation in the form of the registration statement. The Commission provided the following examples: If an issuer files a registration statement and then seeks to offer and sell securities without registration to an investor who became interested in the purportedly private placement offering by means of the registration statement, then the Section 4(a)(2) exemption would not be available for that offering. If the prospective private placement investor became interested in the concurrent private placement through some means other than the registration statement that was consistent with Section 4(a)(2), such as through a substantive, pre-existing relationship with the issuer or direct contact by the issuer or its agents outside of the public offering effort, then the filing of the registration statement generally would not impact the potential availability of the Section 4(a)(2) exemption for that private placement and the private placement could be conducted while the registration statement for the public offering was on file with the Commission. Similarly, if the issuer is able to solicit interest in a concurrent private placement by contacting prospective investors who (1) were not identified or contacted through the marketing of the public offering, and (2) did not independently contact the issuer as a result of the general solicitation by means of the registration statement, then the private placement could be conducted in accordance with Section 4(a)(2) while the registration statement for a separate public offering was pending. *See id.*

[31] *See* Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), Release No. 33–9741 (Mar. 25, 2015) [80 FR 21805 (Apr. 20, 2015)] (''2015 Regulation A Release'') at Section II.B.5; Crowdfunding, Release No. 33–9974 (Oct. 30, 2015) [80 FR 71387 (Nov. 16, 2015)] (''Crowdfunding Adopting Release'') at Section II.A.1.c; and Exemptions to Facilitate Intrastate and Regional Securities Offerings, Release No. 33–10238 (Oct. 26, 2016) [81 FR 83494 (Nov. 21, 2016)] (''Intrastate and Regional Offerings Release'') at Section II.B.5.

[32] For a concurrent offering under Rule 506(b), purchasers in the Rule 506(b) offering could not be solicited by means of a general solicitation used in connection with an offering under Regulation A (including any ''testing-the-waters'' communications), Regulation Crowdfunding, or Rule 147 or 147A. The issuer would need to establish that purchasers in the Rule 506(b) offering were solicited through other means. For example, the issuer may have had a pre-existing substantive relationship with such purchasers. *See* 2015 Regulation A Release, at Section II.B.5; Crowdfunding Adopting Release, at Section II.A.1.c; and Intrastate and Regional Offerings Release, at Section II.B.5.

[33] Revised introductory language has been added to new Rule 152 clarifying that the plan or scheme to evade the registration requirements language applies to the entire rule, and not just the safe harbors, as proposed. Specifically, the new introductory language states that because of the objectives of Rule 152 and the policies underlying the Securities Act, the provisions of the rule will not have the effect of avoiding integration for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act.

TABLE 2(b)—OVERVIEW OF THE INTEGRATION SAFE HARBORS IN NEW RULE 152 [34]

| Non-Exclusive Integration Safe Harbors in New Rule 152(b) | |
|---|---|
| Safe Harbor 1: 17 CFR 230.152(b)(1) ("Rule 152(b)(1)"). | Any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, will not be integrated with such other offering; provided that, for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of Rule 152(a)(1) shall apply. |
| Safe Harbor 2: 17 CFR 230.152(b)(2) ("Rule 152(b)(2)"). | Offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with 17 CFR 230.901 through 230.905 ("Regulation S") will not be integrated with other offerings. |
| Safe Harbor 3: 17 CFR 230.152(b)(1) ("Rule 152(b)(3)"). | An offering for which a Securities Act registration statement has been filed will not be integrated if it is made subsequent to: (i) A terminated or completed offering for which general solicitation is not permitted; (ii) a terminated or completed offering for which general solicitation is permitted that was made only to qualified institutional buyers ("QIBs") and institutional accredited investors ("IAIs"); or (iii) an offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the commencement of the registered offering. See 17 CFR 230.144(a)(1) for the definition of "qualified institutional buyer," and 17 CFR 230.501(a)(1), (2), (3), (7), (8), (9), (12), and (13) for a list of entities that are considered "institutional accredited investors." |
| Safe Harbor 4: 17 CFR 230.152(b)(1) ("Rule 152(b)(4)"). | Offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated if made subsequent to any terminated or completed offering. |

1. Integration Principles and Application (Rule 152(a) General Principle and Introductory Language to Rule 152)

a. Proposed Amendments

The Commission proposed to revise the integration framework by establishing a general principle of integration in a revised Rule 152 that would require an issuer to consider the particular facts and circumstances of each offering, including whether the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or that an exemption from registration is available for the particular offering.[35] The general principle of integration, as set forth in proposed Rule 152(a), would be available for all offers and sales of securities not covered by one of the four safe harbors set forth in proposed Rule 152(b).

The Commission also proposed to include two provisions applying the general integration principles that would supplement and provide greater specificity and guidance in applying the facts-and-circumstances analysis. Proposed Rule 152(a)(1) would codify and build on Commission guidance [36] setting forth a framework for analyzing how an issuer can conduct simultaneous registered and private offerings by providing that for an exempt offering for which general solicitation is not permitted, offers and sales would not be integrated with other offerings if the issuer has a reasonable belief, based on the facts and circumstances, that the purchasers in each exempt offering were not solicited through the use of general solicitation, or the purchasers in each exempt offering established a substantive relationship with the issuer (or person acting on the issuer's behalf) prior to the commencement of the offering prohibiting general solicitation. Proposed Rule 152(a)(2) would clarify that for an exempt offering permitting general solicitation that includes information about the material terms of a concurrent exempt offering also permitting general solicitation, the offering materials must comply with all the requirements for, or restrictions on, offers under each exemption, including any legend requirements or communications restrictions.

In addition, consistent with the introductory language of Rule 155, the introductory language in proposed Rule 152 specified that the four proposed safe harbors would not be available to any issuer for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act.

b. Comments

i. Integration Framework and Establishment of General Principle of Integration

Consistent with comments that we received on the Concept Release [37] and recommendations of the annual Small Business Forums [38] that generally supported clarifying and modernizing the existing integration standards, many commenters supported the proposal to provide a comprehensive integration framework applicable to all securities

[34] No integration analysis under Rule 152(a) is required if any of the non-exclusive safe harbors in Rule 152(b) apply. In addition, the revised introductory language to new Rule 152 clarifies that the plan or scheme to evade the registration requirements language encompasses the entire rule, including the safe harbors.

[35] This proposed facts-and-circumstances analysis of integration would replace the traditional five-factor test first articulated by the Commission in 1962.

[36] *See* Regulation D 2007 Proposing Release, at Section II.C.1.

[37] *See, e.g.,* Letter responding to the Concept Release from Davis Polk & Wardwell LLP dated Sept. 24, 2019; Letter responding to the Concept Release from Dechert LLP dated Sept. 24, 2019; Letter responding to the Concept Release from CrowdCheck dated Oct. 30, 2019 ("CrowdCheck Concept Release Letter"); and Letter responding to the Concept Release from Securities Industry and Financial Markets Association dated Sept. 24, 2019. *See also* 2019 Small Business Advisory Committee Recommendation on the Exemptive Offering Framework (stating "Integration should be revised so that the exemptions can be better utilized."). *But see* Letter responding to the Concept Release from Public Investors Advocate Bar Association dated Sept. 24, 2019 (positing that shortening the six month period in Rule 502(a) would "serve to promote" Ponzi schemes); and Letter responding to the Concept Release from North American Securities Administrators Association dated Oct. 11, 2019 (positing that "loosening" integration safe harbors would "increase the likelihood of regulatory arbitrage or create gaps in the investor protection landscape"). Comment letters received in response to the Concept Release are available at *https://www.sec.gov/comments/s7-08-19/s70819.htm.*

[38] *See* Final Report of the 2016 SEC Government-Business Forum on Small Business Capital Formation (Mar. 2017), available at *https://www.sec.gov/info/smallbus/gbfor35.pdf* ("2016 Forum Report"); Final Report of the 2017 SEC Government-Business Forum on Small Business Capital Formation (Mar. 2018), available at *https://www.sec.gov/files/gbfor36.pdf* ("2017 Forum Report"); and Final Report of the 2018 SEC Government-Business Forum on Small Business Capital Formation (June 2019), available at *https://www.sec.gov/info/smallbus/gbfor37.pdf* ("2018 Forum Report") (all three forums recommending that the Commission clarify the relationship between exempt offerings in which general solicitation is not permitted and exempt offerings in which general solicitation is permitted, and that Rule 152 applies to a Rule 506(c) offering so that an issuer using Rule 506(c) may subsequently engage in a registered public offering without adversely affecting the Rule 506(c) offering exemption). *See also* 2019 Forum Report (recommending using consistent terms in exempt offering rules for ease of understanding, as well as bright line rules and examples).

offerings under the Securities Act, including registered and exempt offerings, by establishing a general principle of integration and four safe harbors in new Rule 152.[39] These commenters generally supported the Commission's proposal to create one broadly applicable framework to clarify the ability of issuers to engage in contemporaneous or close in time offerings under independent exemptions or pursuant to an effective registration statement. Several of these commenters stated that the structure of proposed Rule 152 would make clear the interaction between the integration provisions in proposed Rule 152(a) and the non-exclusive safe harbors in proposed Rule 152(b).[40] The SEC Small Business Capital Formation Advisory Committee also supported the proposed integration framework, specifically stating their belief that the new general principle of integration and the four proposed non-exclusive safe harbors would reduce the complexities across the offering framework by consistently defining and clarifying integration.[41]

A number of commenters opposed the proposed integration framework.[42] Some of these commenters expressed concerns that the proposed amendments would reduce the need or incentive for companies to go public [43] or allow issuers to evade the registration requirements of the Securities Act.[44] Two of these commenters also raised concerns about potential abuse of the general principle by an issuer identifying investors through a general solicitation in one offering and then selling securities to those investors in an offering for which general solicitation is prohibited.[45] Another commenter recommended that the integration analysis should involve two separate determinations: Whether offerings are functionally the same offering should be determined first; followed by an analysis of whether the integrated offerings satisfy the requirements of an exemption.[46]

Several commenters who supported the concept of revising the integration framework offered alternative approaches to the proposal.[47] One of these commenters stated the current integration doctrine should be replaced with general anti-evasion principles and noted its potential adverse effect on early-stage companies.[48] Another commenter recommended elimination of the current integration doctrine and expressed concern that it has negative effects, particularly for small companies that commonly rely on Section 4(a)(2), Rule 504 or Rule 506(b) for their offerings.[49]

Some commenters specifically supported our proposal to replace the five-factor test with the Commission's more recent approach to integration adopted in 2015 and 2016 rulemakings involving Regulation A, Regulation Crowdfunding and Rules 147 and 147A, namely whether the issuer can establish that each offering either complies with the registration requirements of the Securities Act or that an exemption from registration is available for the particular offering.[50] Other commenters specifically recommended retaining the current five-factor test.[51] One commenter questioned the need for the proposed new framework, stating that it was not aware of significant problems in applying the current five-factor test,[52] while another commenter stated its concern that the proposal could permit concurrent and serial offerings that are clearly part of a single plan of financing to avoid integration.[53]

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[39] *See, e.g.,* Letter from Geraci LLP dated May 29, 2020 (''Geraci Law Letter''); Letter from Ketsal dated June 30, 2020 (''Ketsal Letter''); Letter from Netcapital Funding Portal Inc. dated May 31, 2020 (''Netcapital Letter''); Letter from Republic dated June 1, 2020 (''Republic Letter''); Letter from Sō.Capital Inc. dated June 1, 2020 (''Sō.Capital Letter''); Letter from William Hubbard, Hubbard Business Counsel dated June 1, 2020 (''W. Hubbard Letter''); Letter from David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation dated June 1, 2020 (''D. Burton Letter''); Letter from CrowdCheck Inc. dated June 11, 2020 (''CrowdCheck Letter''); Letter from Shearman & Sterling LLP dated June 18, 2020 (''Shearman & Sterling Letter''); Letter from Institute for Portfolio Alternatives dated June 25, 2020 (''IPA Letter''); and Letter from Federal Regulation of Securities Committee, the Private Equity and Venture Capital Committee, and the Commercial Finance Committee of the Business Law Section of the American Bar Association dated July 27, 2020 (''ABA Letter''). One commenter supporting the proposal suggested that the proposal would provide clarifying guidance that would enable issuers to raise capital in reliance on Rule 506(c) which may reduce the disparity between the amount of capital raised in reliance on Rule 506(b) versus Rule 506(c). *See* Letter from Fried, Frank Harris Shriver & Jacobson LLP dated June 1, 2020 (''Fried Frank Letter'').

[40] *See, e.g.,* W. Hubbard Letter; D. Burton Letter; and ABA Letter (stating that the proposed structure would add clarity, reduce complexity and provide greater confidence to issuers in planning and choosing their capital raising options). *But see* CrowdCheck Letter (recommending that specific fact patterns be included in the safe harbors rather than in the provisions that apply the general principle).

[41] *See* SEC SBCFAC Letter.

[42] *See* Letter from Better Markets, et al. dated June 2, 2020 (''Better Markets Letter''); Letter from Consumer Federation of America dated June 4, 2020 (''CFA Letter''); Letter from CFA Institute dated June 12, 2020 (''CFA Institute Letter''); Letter from Robert E. Rutkowski dated June 4, 2020 (''R. Rutkowski Letter''); Letter from Rutheford B. Campbell, Jr. dated Aug. 3, 2020 (''R. Campbell Letter''); Letter from Committee on Securities Law of the Business Law Section of the Maryland State Bar Association dated June 1, 2020 (''Md. St. Bar Assoc. Letter''); and Letter from Council of Institutional Investors dated May 28, 2020 (''CII Letter'') (expressing concern that the proposed integration framework and expansion of the safe harbors would weaken the integration doctrine and result in the inclusion of large numbers of non-accredited investors in exempt offerings). *See also* Letter from North American Securities Administrators Association, Inc. dated June 1, 2020 (''NASAA Letter'') (stating its objection to a 30-day safe harbor in proposed Rule 152(b)(1), although not objecting to the goal of harmonizing the integration regime and the safe harbors in proposed Rule 152(b)(2) through (4)).

[43] *See* CFA Letter (stating its concern that the amendments could result in issuers being able to raise unlimited amounts of capital from an unlimited number of investors through exempt offerings, without ever needing to go through the registration process). *See generally* CFA Institute Letter; and R. Rutkowski Letter.

[44] *See, e.g.,* CFA Letter (stating that ''the original goal of preventing issuers from artificially separating related transactions into multiple offerings to avoid the registration requirement is gone under this approach, so long as the individual offerings each satisfy a particular exemption''); and R. Rutkowski Letter (suggesting that the proposal would allow issuers to avoid registration requirements by dividing large financings into multiple smaller exempt offerings).

[45] *See, e.g.,* CFA Letter; and Md. St. Bar Assoc. Letter. *But see* IPA Letter; and Fried Frank Letter (stating that an offering made more than 30 days after the termination of another offering should not be integrated, regardless of whether the purchasers in the exempt offering may have been solicited using general solicitation).

[46] *See* Md. St. Bar Assoc. Letter.

[47] *See* CrowdCheck Letter; Letter from John R. Clarke, dated May 30, 2020 (''J. Clarke Letter'') (stating that the integration framework should be replaced with a filing requirement describing all historical and current exempt and registered offerings made by the issuer); and Letter from Invesco Ltd. dated June 1, 2020 (''Invesco Letter'') (recommending a single safe harbor permitting offerings ''so long as those offerings are reasonably conducted commensurate with the requirements under such rules'').

[48] *See* CrowdCheck Letter (stating that, although the proposed rule ''is a distinct improvement on the current state of affairs,'' they would prefer for the Commission to ''eliminate the concept of integration altogether and rely on general anti-evasion principles'').

[49] *See* R. Campbell Letter (stating that the integration doctrine ''drives up offering costs and provides no protection for investors'' and ''its pernicious effects fall most heavily on small issuers''). This commenter raised a concern that, as proposed with its references to purchasers in ''each exempt offering,'' the requirements of Rule 152(a)(1) would rarely be met for offerings under Section 4(a)(2), Rule 504, or Rule 506(b)).

[50] *See* ABA Letter; J. Clarke Letter; CrowdCheck Letter; Geraci Letter (suggesting that it is difficult for issuers to determine whether subsequent offers might be integrated into a single offering under the five-factor test of integration); and W. Hubbard Letter (suggesting that the five-factor test may continue to be useful in limited situations).

[51] *See* CFA Letter; and Md. St. Bar Assoc. Letter.

[52] *See* Md. St. Bar Assoc. Letter.

[53] *See* CFA Letter (stating that the purpose of integration is to look at the totality of a financing scheme rather than different components in isolation). *See also* R. Rutkowski Letter (stating that the proposed integration framework greatly weakens the integration doctrine by permitting issuers to conduct multiple exempt offerings regardless of whether such offerings are part of a single plan of financing, so long as each offering qualifies for an exemption from Securities Act

ii. Introductory Language of Rule 152

One commenter suggested that the Commission expand the introductory language to the proposed rule, concerning a ''plan or scheme to evade the registration requirements of the Act'' to include not just the rule's safe harbors, as proposed, but rather the entire rule, including the rule's general principle of integration.[54] This commenter also suggested that the Commission provide examples of facts and circumstances that might be relevant in applying the general principle of integration set forth in proposed Rule 152(a).[55]

iii. Provisions Applying the General Principle (Rules 152(a)(1) and 152(a)(2))

Commenters requested clarification and suggested modifications concerning the guidance on the general principle of integration provided in proposed Rule 152(a)(1)(i) and proposed Rule 152(a)(1)(ii).[56] Some of these commenters asked the Commission to revise new 17 CFR 230.152(a)(1)(i) (''Rule 152(a)(1)(i)'') and 17 CFR 230.152(a)(1)(ii) (''Rule 152(a)(1)(ii)'') to address an application of the general principle for concurrent exempt offerings where general solicitation is prohibited for one or more, but not all, such offerings.[57] Commenters also stated their concerns that an issuer could identify investors through a general solicitation and then sell to such investors in a subsequent private offering, and sought clarification of the application of proposed Rule 152(a)(1)(i) and (ii) to exempt offerings prohibiting general solicitation.[58] Another commenter recommended that the application of proposed Rule 152(a)(1)(i) and (ii) be tied to the particular purchaser, rather than ''purchasers.'' [59] One commenter requested that the Commission clarify the application of proposed Rule 152(a)(1) to whether an offering permitting general solicitation would be integrated with an investor's secondary offering in reliance on Section 4(a)(7) of the Securities Act.[60] Another commenter suggested that a ''certification from the investor that the investor did not become aware of a potential Rule 506(b) investment through a general solicitation'' should satisfy an issuer's obligation under Rule 152(a)(1) to have, based on the facts and circumstances, a reasonable belief that the investor in the Rule 506(b) offering was not solicited through the use of general solicitation.[61] In contrast, some commenters suggested that the prohibition on general solicitation in exempt offerings should be eliminated.[62]

Other commenters requested clarifications and modifications with respect to proposed Rule 152(a)(2), concerning an exempt offering permitting general solicitation that includes information about the material terms of a concurrent offering under another exemption also permitting general solicitation. One commenter recommended revising the rule to clarify whether the requirement in proposed Rule 152(a)(2) that the offering materials mentioning the terms of the other concurrent offering must comply with ''the requirements of each exemption'' refers solely to the offering materials, or to the offering in general.[63] This commenter also expressed concern that this aspect of the proposal may contradict the general principle that each exempt offering should be analyzed individually for compliance only with its claimed exemption.[64] Another commenter stated its specific concerns about potential difficulties issuers may have in complying with Rule 152(a)(2) in connection with concurrent Regulation A and Regulation Crowdfunding offerings.[65]

c. Final Amendments

After considering the comments, we are adopting a new comprehensive integration framework, in new Rule 152,[66] substantially as proposed, but with modifications in response to comments received. In addition to introductory anti-evasion language, new Rule 152(a) sets forth a general principle of integration, and applies the general principle to two specific fact patterns, if the four safe harbors set forth in new Rule 152(b) do not apply.

i. Introductory Language

We are adopting the introductory language of Rule 152 substantially as proposed to describe what is provided in the rule and caution issuers that Rule 152 may not be used as part of a plan or scheme to evade the registration requirements of the Securities Act. As suggested by a commenter, we have revised the introductory language to encompass all of the provisions of the rule, not just the provisions of the safe harbors. Therefore, the provisions of

registration requirements and is separated by at least 30 days).

[54] *See* Md. St. Bar Assoc. Letter.

[55] *See id* (questioning the need for the reference to ''facts and circumstances'').

[56] *See, e.g.,* Md. St. Bar Assoc. Letter; Fried Frank Letter; IPA Letter; ABA Letter; CFA Letter; Invesco Letter; and CrowdCheck Letter.

[57] *See* Md. St. Bar Assoc. Letter (requesting clarification as to whether Rule 152(a)(1), as proposed, would codify Commission guidance first issued in 2007, involving one offering where general solicitation is permitted and a private offering where general solicitation is not permitted); Fried Frank Letter (stating that ''[t]he Commission should revise Rule 152(a)(1) to clarify that, so long as its conditions are satisfied, an issuer may concurrently engage in an offering in reliance on Rule 506(b) and another offering in reliance on Rule 506(c).''); IPA Letter (recommending that the requirement not be applicable to ''each exempt offering'' but to ''each exempt offering that prohibits the use of general solicitation''); and ABA Letter (recommending revisions to paragraphs (i) and (ii) of Rule 152(a)(1), as proposed, ''[s]ince these Rule 152(a)(l) tests are intended to apply only to exempt offerings for which general solicitation is not permitted, but may be used in the context of concurrent or successive offerings with one exempt offering permitting general solicitation (such as Rule 506(c)) and the other prohibiting general solicitation (such as Rule 506(b))''). *See also* 2016 Forum Report; 2017 Forum Report; and 2018 Forum Report (all three forums recommending that the Commission clarify the relationship of exempt offerings in which general solicitation is not permitted with Rule 506(c) offerings involving general solicitation).

[58] *See e.g.,* CFA Letter; and Md. St. Bar Assoc. Letter.

[59] *See* ABA Letter (''An issuer should be able to rely on Rule 152(a)(l) if the issuer has a reasonable belief, based on the facts and circumstances, that each purchaser (rather than 'purchasers') in such exempt offering (rather than 'each exempt offering') either (i) was not solicited through the use of general solicitation in connection with the offerings not permitting general solicitation that are being analyzed or (ii) established a substantive relationship with the issuer before the offer was made (rather than 'commenced') to that purchaser.'').

[60] *See* Fried Frank Letter.

[61] *See* IPA Letter.

[62] *See* Invesco Letter (suggesting eliminating the prohibition on general solicitation ''or combining the safe harbors laid out in Rules 506(b) and (c) to permit open communications about an offering when targeted at a limited group of purchasers at a higher eligibility level than the minimums provided for in the 'accredited investor' definition.''); and IPA Letter (stating that the prohibition on general solicitation in an exempt offering is archaic, and there are a variety of ways that investor protections can be built into securities offerings ''without regulating how the investor became aware of the offering.'').

[63] *See* Md. St. Bar Assoc. Letter.

[64] *See id.*

[65] *See* CrowdCheck Letter (stating that when a Form C discusses the material terms of a concurrent Regulation A offering that has been qualified, it is problematic for the issuer to file on EDGAR a Form C with a live active hyperlink to the Regulation A offering circular in order to satisfy the issuer's delivery obligation under Regulation A, and also noting that a Form 1–A filed with the Commission that discusses the material terms of a Regulation Crowdfunding offering would not comply with the limitations on advertising in Rule 204 of Regulation Crowdfunding).

[66] Revised Rule 152 as adopted will replace current Rules 152 and 155 concerning the integration of non-public and public offerings and references to Rule 152 will replace the integration provisions of Regulation D, Regulation A, Regulation Crowdfunding, and Rules 147 and 147A. Consistent with current Rule 155, new Rule 152 specifies that the provisions of the rule are not available to any issuer for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act. As a result of the amendments, Rule 155 will be removed and reserved.

Rule 152 will not have the effect of avoiding integration for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act. We believe this change adds important clarity about the availability of Rule 152 as a basis for concluding that two or more offerings will not be integrated in certain situations by making it clear that, although it may be possible to structure two or more offerings such that they appear to technically comply with the terms of applicable exemptions, if that structuring is part of a plan or scheme to evade the registration requirements of the Securities Act, the offerings would still be subject to integration.

ii. Integration Framework and General Principle

The general principle of integration we are adopting in Rule 152(a) looks to the particular facts and circumstances of each offering.[67] Specifically, the general principle provides that, for all offerings not covered by a safe harbor in Rule 152(b), offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or that an exemption from registration is available for the particular offering.

We continue to believe that providing additional clarity on how securities offerings interrelate, including the relationship between exempt and registered offerings, and when two or more securities offerings will be considered integrated as one offering, will reduce perceived risk among issuers when considering and planning possible capital raising alternatives, while preserving investor protections built into the respective offering exemptions. We are not persuaded by commenters who raised concerns that our proposed integration framework may promote greater reliance on exempt offerings and thereby reduce the need or incentive for issuers to undertake registered public offerings.[68] Rather, we are of the view that the greater clarity that the integration framework will provide on how securities offerings interrelate: (1) Will facilitate capital-raising in exempt markets when using the public markets is not practical, and (2) will provide issuers the flexibility to choose between types of offerings, which may encourage more issuers to raise more capital in our securities markets, including in both exempt and registered offerings.[69] Because the amended framework will provide certainty to an issuer conducting exempt and registered offerings close in time, it may ultimately result in more issuers undertaking the risks, time, and expense of conducting a registered public offering. It may also facilitate some small issuers in raising enough external financing to develop their business model and scale up to a point where they may become viable candidates for a registered public offering, thereby providing Main Street investors with more registered investment options, as well as all the benefits that flow from registration.

The final rules replace the five-factor test with the Commission's more recent approach to integration adopted in rulemakings involving Regulation A, Regulation Crowdfunding, and Rules 147 and 147A. We agree with commenters who indicated that the amendments provide a clearer framework for determining whether two offerings occurring close in time may be considered as integrated than the five-factor test.[70] As noted above, we believe that our new integration framework will facilitate both exempt and registered offerings, by providing greater clarity and flexibility to issuers in choosing capital raising options to grow their businesses without compromising investor protections.

iii. Integration With Exempt Offerings Prohibiting General Solicitation (Rule 152(a)(1))

We are adopting Rule 152(a)(1) substantially as proposed, with clarifying changes in response to commenters' concerns. Accordingly, for an issuer considering the application of the general principle to an exempt offering prohibiting general solicitation and one or more other offerings, new Rule 152(a)(1) requires that the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either:

• Did not solicit such purchaser through the use of general solicitation; or

• Established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

New Rule 152(a)(1) has been revised from the proposal in several ways. First, as suggested by several commenters, the language of Rule 152(a)(1) has been revised to clarify that the restrictions on the use of general solicitation only apply to the exempt offering prohibiting general solicitation that is being analyzed under the general principle, and not to ''each exempt offering.'' We have also revised Rule 152(a)(1) to clarify that in exempt offerings prohibiting general solicitation, it is the obligation of the issuer, or any person acting on the issuer's behalf, to refrain from the use of general solicitation to solicit a purchaser.

New Rule 152(a)(1) codifies and expands on guidance the Commission first issued in 2007, and updated through 2016, which sets forth a framework for analyzing how an issuer can conduct simultaneous registered and private offerings.[71] Since the adoption of Rule 506(c) by the Commission in 2013, commenters have requested that the Commission's 2007 guidance on concurrent registered and

[67] Consistent with the discussion in the Proposing Release and to provide further clarification, we note that the focus of this rulemaking effort is capital-raising offerings. However, the new rules that we adopt in this release, especially new Rule 152, apply equally to a series of transactions, whether registered or exempt from Securities Act registration, that involve one or more business combination transactions and/or capital-raising transactions that occur concurrently or close in time. The new rules that we adopt in this release do not otherwise alter or affect the current regulatory scheme that governs communications made in connection with business combination transactions, such as 17 CFR 230.162, 17 CFR 230.165, and 17 CFR 230.166, which were adopted in recognition of the special nature of business combination transactions (such as mergers, recapitalizations, and acquisitions). *See* Regulation of Takeovers and Security Holder Communications, Release No. 33–7760 (Oct. 22, 1999) [64 FR 61408 (Nov. 10, 1999)].

[68] *See* CFA Letter; and R. Rutkowski Letter. *See also* Md. St. Bar Assoc. Letter.

[69] *See, e.g.,* Netcapital Letter (suggesting that clarification and modernization of the existing integration standards is an important objective that will reduce unnecessary complexities and reduce uncertainties and risks for issuers when planning and carrying out capital raising activities). Further, based on data compiled by the Division of Economic and Risk Analysis on Regulation D issuer and offering characteristics from 2009 through 2019, extracted from Forms D filed with the Commission, we note that a registered offering likely would not be appropriate for the typical Regulation D issuer, based on the following: The median amount sold (if reported) was $1.50 million; the median offer size (if reported) was $2.25 million; the median years of a Regulation D issuer since incorporation was two years; the median issuer size (if reported) of Non-Fund Issuers (Revenue) was $1 million to $5 million; only 20% of all Regulation D offerings used an intermediary; and the average number of investors in an offering (if reported) was 10 investors. *See* Report to Congress on Regulation A/Regulation D Performance: As Directed by the House Committee on Appropriations in H.R. Rept. No. 116–122 (Aug. 25, 2020), *available at https://www.sec.gov/files/report-congress-regulation-a-d.pdf* (''Report to Congress on Regulation A/Regulation D Performance'') at Table 2. *See also infra* note 596 and Table 7.

[70] *See, e.g.,* J. Clarke Letter; CrowdCheck Letter; Geraci Letter; and W. Hubbard Letter.

[71] *See supra* text accompanying notes 28–32.

private offerings be extended to concurrent Rule 506(c) and Rule 506(b) offerings.[72] Under the new integration principle in Rule 152(a), issuers may conduct concurrent Rule 506(c) and Rule 506(b) offerings, or any other combination of concurrent offerings, involving an offering prohibiting general solicitation and another offering permitting general solicitation, without integration concerns, so long as the provisions of Rule 152(a)(1) and all other conditions of the applicable exemptions are satisfied.[73]

In response to commenters who raised concerns that the proposed language of Rule 152(a)(1) could enable an issuer to identify investors through a general solicitation and then sell to such investors in a subsequent exempt offering prohibiting general solicitation,[74] we note the introductory language, discussed above, which clarifies that Rule 152 may not be used as part of a plan or scheme to evade the registration requirements of the Securities Act, as well as the requirement in new Rule 152(a)(1) itself, which would not allow an issuer to avoid integration of such offerings. For example, an issuer could not engage in general solicitation in an offering made in reliance on Rule 506(c) and then sell to investors in an offering made in reliance on Rule 506(b), unless either the issuer did not solicit the purchaser in the Rule 506(b) offering through the use of the general solicitation used in the Rule 506(c) offering, or the issuer established a substantive relationship with such purchaser prior to the commencement of the Rule 506(b) offering.[75]

New Rule 152(a)(1)(ii) codifies and expands the Commission's 2007 guidance that the existence of a pre-existing substantive relationship between the issuer, or its agent, and a prospective investor may be one means by which an investor may become interested in, or become aware of, a private placement conducted while a registration statement for a public offering is on file with the Commission that may be consistent with Section 4(a)(2). In response to a commenter that questioned the application of this guidance,[76] we also confirm that the existence of such a relationship prior to the commencement of an offering is one means, but not the exclusive means, of demonstrating the absence of a general solicitation in a Regulation D offering.[77] Accordingly, an offer of the issuer's securities to a person with whom the issuer, or a person acting on its behalf, has a pre-existing substantive relationship would not constitute a general solicitation, so long as the relationship was established prior to the commencement of the offering.

We reiterate the guidance provided in the Proposing Release that we generally view a ''pre-existing'' relationship as one that the issuer has formed with an offeree prior to the commencement of the offering or, alternatively, that was established through another person (for example, a registered broker-dealer or investment adviser) prior to that person's participation in the offering.[78] A ''substantive'' relationship is one in which the issuer (or a person acting on its behalf, such as a registered broker-dealer or investment adviser) has sufficient information to evaluate, and does, in fact, evaluate, an offeree's financial circumstances and sophistication, in determining his or her status as an accredited or sophisticated investor.[79]

Investors with whom the issuer has a pre-existing substantive relationship may include the issuer's existing or prior investors, investors in prior deals of the issuer's management, or friends or family of the issuer's control persons. Similarly, such investors may also include customers of a registered broker-dealer or investment adviser with whom the broker-dealer or investment adviser established a substantive relationship prior to the participation in the exempt offering by the broker-dealer or investment adviser.[80]

We are not providing guidance, as requested by a commenter, with respect to the relevant facts and circumstances to be considered in applying Rule 152(a)(1). We believe it is incumbent on the issuer and its agents to consider all relevant facts and circumstances when analyzing whether the offering satisfies the requirements of Rule 152.

iv. Integration With Exempt Offerings Permitting General Solicitation (Rule 152(a)(2))

We are adopting new Rule 152(a)(2), substantially as proposed, with certain clarifying revisions in response to commenters' concerns. In the context of two or more concurrent offerings each relying on a Securities Act exemption permitting general solicitation,[81] new

[72] *See* Fried Frank Letter; and Md. St. Bar Assoc. Letter. *See also* 2016 Forum Report; 2017 Forum Report; and 2018 Forum Report (all three forums recommended that the Commission clarify the relationship of exempt offerings in which general solicitation is not permitted with Rule 506(c) offerings involving general solicitation).

[73] We caution issuers, however, that a general solicitation permitted in connection with one offering that mentions the material terms of a concurrent or subsequent exempt offering prohibiting general solicitation may constitute an offer for the concurrent or subsequent exempt offering prohibiting general solicitation and thereby violate the prohibition on general solicitation with respect to that concurrent or subsequent offering prohibiting general solicitation. *See* Interpretive Release on Regulation D, Release No. 33–6455 (Mar. 3, 1983) [48 FR 10045 (Mar. 10, 1983)] at Section III(c).

[74] *See supra* notes 57–58.

[75] An issuer may not conduct a Rule 506(c) general solicitation in order to identify potential investors for the Rule 506(b) offering. In that instance, such Rule 506(b) offering may be deemed to be commenced at the time of such solicitation under new Rule 152(c).

[76] *See* Md. St. Bar Assoc. Letter.

[77] *See* Regulation D; Accredited Investor and Filing Requirements, Release No. 33–6825 (Mar. 15, 1989) [54 FR 11369 (Mar. 20, 1989)], at note 12.

[78] Certain offerings by private funds that rely on the exclusions from the definition of ''investment company'' set forth in Investment Company Act Sections 3(c)(1) (15 U.S.C. 80a–3(c)(1) and 3(c)(7) (15 U.S.C. 80a–3(c)(7) posted on a website or platform may be able to rely on a limited staff accommodation with respect to the timing of the formation of a relationship. *See* Division of Investment Management no-action letter to Lamp Technologies, Inc. (May 29, 1997).

[79] We do not believe that self-certification alone (by checking a box) without any other knowledge of a person's financial circumstances or sophistication would be sufficient to form a ''substantive'' relationship for these purposes. Persons other than registered broker-dealers and investment advisers may form a pre-existing, substantive relationship with an offeree as a means of establishing that a general solicitation is not involved in a Regulation D offering. Generally, whether a ''pre-existing, substantive relationship'' exists turns on procedures established by broker-dealers in connection with their customers. This is because traditional broker-dealer relationships require that a broker-dealer deal fairly with, and make suitable recommendations to, customers, and, thus, implies that a substantive relationship exists between the broker-dealer and its customers. We have long stated, however, that the presence or absence of a general solicitation is always dependent on the facts and circumstances of each particular case. Thus, there may be facts and circumstances in which a third party, other than a registered broker-dealer, could establish a ''pre-existing, substantive relationship'' sufficient to avoid a ''general solicitation.'' *See, e.g.,* Use of Electronic Media, Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)] (''Use of Electronic Media Release''). We also recognize there may be particular instances where issuers may develop pre-existing, substantive relationships with offerees. However, in the absence of a prior business relationship or a recognized legal duty to offerees, it is likely more difficult for an issuer to establish a pre-existing, substantive relationship, especially when contemplating or engaged in an offering over the internet. Issuers would have to consider not only whether they have sufficient information about particular offerees, but also whether they in fact use that information appropriately to evaluate the financial circumstances and sophistication of the offerees prior to commencing the offering.

[80] Certain investment advisers that rely on an exemption from registration under the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 *et seq.* (''Advisers Act'') may be registered under an appropriate State authority.

[81] For example, Rule 506(c), Regulation A, and Regulation Crowdfunding. Concurrent offerings permitting general solicitation may also include intrastate or regional offerings relying on Rules 147 and 147A or 17 CFR 230.504(b)(1)(i) (''Rule

Continued

Rule 152(a)(2) clarifies that an issuer's general solicitation offering materials for one offering that includes information about the material terms of a concurrent offering under another exemption may constitute an "offer" of the securities in such other offering, and therefore the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any necessary legends or communications restrictions.[82]

New Rule 152(a)(2) builds on the Commission guidance in its 2015 Regulation A and Regulation Crowdfunding rulemakings and in its 2016 Rule 147 and Rule 147A rulemaking to provide issuers with greater flexibility and the ability to rely on existing Securities Act exemptions more effectively without compromising the investor protections of each exemption.[83]

For example, under new Rule 152(a)(2), an issuer may undertake an offering in reliance on Rule 506(c), so long as the issuer meets all of the conditions of that exemption, including taking reasonable steps to verify that all purchasers in the Rule 506(c) offering are accredited investors, while conducting a concurrent offering in reliance on Regulation A, so long as the concurrent offering complies with all the requirements of Regulation A. If this issuer were to discuss in its Rule 506(c) general solicitation materials the material terms of the Regulation A offering, new Rule 152(a)(2) would require the Rule 506(c) general solicitation to comply with all the requirements for offers under Regulation A, including all necessary legends and comply with any restrictions on the use of general solicitation imposed on issuers making offers under Regulation A.[84] Similarly, an issuer undertaking a Rule 506(c) offering concurrently with a Regulation Crowdfunding offering must make sure that any general solicitation materials used in connection with the Rule 506(c) offering that mention the material terms of the Regulation Crowdfunding offering comply with the off-portal offering limitations in Rule 204 of Regulation Crowdfunding.[85]

2. Integration Safe Harbors

The Commission proposed new Rule 152(b) which would provide four non-exclusive safe harbors from integration. For offers and sales meeting the conditions of these safe harbors, the issuer would not need to conduct any further integration analysis. A number of commenters supported the proposed safe harbors,[86] indicating that the safe harbors would provide clarity and bright line rules to simplify compliance.[87] Some commenters recommended expanding on the proposed safe harbors.[88]

Several commenters, however, opposed one or more of the proposed safe harbors.[89] Some of these commenters expressed particular concern that the revisions could lead to more frequent offerings involving non-accredited investors.[90] One commenter expressed concern that a 30-day integration safe harbor could render the integration doctrine a nullity.[91]

Some commenters expressed concern with the proposed approach to expanding the integration framework or offered alternatives for how to expand the integration framework.[92] One commenter recommended use of a single integration safe harbor that would permit issuers intending to conduct distinct offerings under different Securities Act rules to treat them as separate so long as those offerings are reasonably conducted commensurate with the requirements of such rules.[93]

a. 30-Day Integration Safe Harbor (Rule 152(b)(1))

Current Securities Act integration safe harbors generally provide for a six-month safe harbor time period, outside of which other offerings will not be integrated or considered as part of the same offering.[94]

i. Proposed Amendments

The Commission proposed Rule 152(b)(1) to shorten the six-month time period to 30 days and harmonize current Securities Act exemptions by providing the same 30-day safe harbor time period throughout the Securities Act's integration provisions. The proposed safe harbor would apply to both offerings for which a registration

504(b)(1)(i)''), 17 CFR 230.504(b)(1)(ii) ("Rule 504(b)(1)(ii)''), or 17 CFR 230.504(b)(1)(iii) ("Rule 504(b)(1)(iii)''), all of which permit general solicitation but also require compliance with State registration requirements or exemptions to State registration under State securities laws. However, an issuer would not be able to describe the terms of a Rule 147 offering using any form of general solicitation viewable by out-of-state residents, as this would constitute an offer by the issuer to residents residing out of the State in which the issuer has its principal place of business, which is prohibited by the Rule 147 safe harbor for a valid Section 3(a)(11) exempt offering. Two or more exempt offerings permitting general solicitation occurring close in time, but not concurrent, may be eligible for the safe harbor in new Rule 152(b)(4).

[82] For example, the limitations on advertising the terms of an offering pursuant to Rule 204 of Regulation Crowdfunding would limit the issuer's ability to reference the terms of that offering in a general solicitation in connection with a concurrent offering made pursuant to Regulation A, Rule 506(c), or Rule 147A. *See* Concept Release, at note 483. *See infra* Section II.B.3 for a discussion of revisions we are making to Rule 204 of Regulation Crowdfunding.

[83] *See* 2015 Regulation A Release, at Section II.B.5; Crowdfunding Adopting Release, at Section II.A.1.c; and Intrastate and Regional Offerings Release, at Section II.B.5.

[84] Rule 255 of Regulation A requires certain statements in any communications constituting offers made in reliance on Regulation A. Any such legends or statements need not be included in the issuer's Rule 506(c) general solicitation materials if such materials do not mention the material terms of the other concurrent offering.

[85] *See infra* Section II.B.3 for a discussion of revisions adopted to Rule 204 of Regulation Crowdfunding.

[86] *See* Fried Frank Letter; Geraci Law Letter; W. Hubbard Letter; Letter from Raise Green Inc., and New Haven Community Solar, LLC dated June 1, 2020 ("Raise Green & New Haven Comm. Solar Letter''); D. Burton Letter; and Shearman & Sterling Letter.

[87] *See, e.g.,* ABA Letter (supporting harmonization of the rules for both exempt and registered offerings and simplifying the integration analysis); Geraci Law Letter; and Raise Green & New Haven Comm. Solar Letter.

[88] *See* Fried Frank Letter (recommending an additional safe harbor providing that any offering commenced in reliance on an exemption that does not permit general solicitation can be continued in reliance on an exemption that does permit general solicitation); and Shearman & Sterling Letter (recommending revisions to the proposed safe harbors to cover shelf registration statements and the exercise of outstanding warrants or the conversion of convertible or exchangeable securities).

[89] *See, e.g.,* NASAA Letter; CFA Letter; Better Markets Letter; Md. St. Bar Assoc. Letter; and CII Letter.

[90] *See, e.g.,* CII Letter; and NASAA Letter.

[91] *See* NASAA Letter.

[92] *See, e.g.,* CrowdCheck Letter (expressing concern that the focus on the safe harbors may lead to issuers relying on the safe harbors instead of the general principles); Invesco Letter; W. Hubbard Letter (recommending a safe harbor for all offers or sales to investors with whom the issuer has a pre-existing substantive relationship, but opposing a safe harbor for all offerings limited to qualified institutional buyers and accredited investors that would exclude non-accredited investors); and J. Clarke Letter (recommending a safe harbor for issuers that comply with a new recommended disclosure that integrates Form D, Form C, and an issuer's offering statements).

[93] *See* Invesco Letter.

[94] *See* Rule 502(a), 17 CFR 230.251(c) ("Rule 251(c)''), 17 CFR 230.147(g) ("Rule 147(g)''), and 17 CFR 230.147A(g) ("Rule 147A(g)''). These rules rely on a six-month time period, but include exceptions for certain offers and sales under specific exemptions or circumstances. For example, Rule 502(a) excludes offers or sales of securities under an employee benefit plan as defined in 17 CFR 230.405 ("Rule 405''). In addition, Rules 251(c), 147(g), and 147A(g) all exclude from integration all prior offers and sales of securities without regard to a time period so long as the prior offers and sales have terminated. Under Rules 147, 147A, and 251, subsequent offers and sales will not be integrated with offers and sales that are registered under the Securities Act, exempt from registration under Rule 701, Regulation A, Regulation S, or Section 4(a)(6) of the Securities Act, or made pursuant to an employee benefit plan. Further, generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offers and sales of securities being made outside the United States in compliance with Regulation S. *See, e.g.,* 17 CFR 230.500(g) ("Rule 500(g)'') and Note to Rule 502(a).

statement has been filed under the Securities Act and exempt offerings.[95] Specifically, the proposed safe harbor in Rule 152(b)(1) would provide that any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, will not be integrated with the other offering, provided that for an exempt offering for which general solicitation is not permitted, the proposed safe harbor would require either: (i) That the purchasers were not solicited through the use of general solicitation, or (ii) that the issuer established a substantive relationship with the purchasers prior to the commencement of the offering.

In conjunction with this safe harbor, the Commission also proposed to amend 17 CFR 230.506(b)(2)(i) (''Rule 506(b)(2)(i)'') to address the concern that a 30-day safe harbor could result in some issuers seeking to undertake serial Rule 506(b) offerings each month, selling to up to 35 unique non-accredited investors in each offering, potentially resulting in unregistered sales of securities to hundreds of non-accredited investors in a year. As proposed, where an issuer conducts more than one offering under Rule 506(b), the number of non-accredited investors purchasing in all such offerings within 90 calendar days of each other would be limited to 35.[96]

In addition, because proposed Rule 152(b)(1) would generally supersede the specific requirements in Rule 155 relating to the integration of abandoned offerings with subsequent offerings, the Commission proposed to remove and reserve Rule 155.[97]

ii. Comments

Some commenters supported,[98] and others opposed,[99] proposed Rule 152(b)(1). Some commenters supporting the 30-day safe harbor expressed their belief that 30 days was sufficient to mitigate concerns that an exempt offering may condition the market for a subsequent offering or undermine the protections of a subsequent exempt offering.[100] Another commenter stated that a 30-day time period is consistent with market practice in registered offerings to address gun-jumping concerns.[101] One supportive commenter suggested that the Commission clarify that ''the 30-day period before and the 30-day period after each offering—have to be free of offers in all cases.''[102] Commenters opposed to the proposed 30-day safe harbor expressed concern that the 30 day time period was too short.[103] Many of these commenters recommended a 90-day safe harbor.[104]

Commenters addressing the proposal to revise Rule 506(b) to limit the total number of non-accredited investors purchasing in such offerings to 35 persons within 90 calendar days were divided in their support for,[105] or opposition to,[106] the proposed amendments. One commenter stated that limiting sales to non-accredited investors to no more than 35 in any 90-day period will encourage issuers seeking capital from non-accredited investors to use Regulation Crowdfunding and Regulation A.[107] Another commenter suggested shortening the time period or increasing the number of non-accredited investors in the proposal.[108]

Commenters were also divided in their support for,[109] or opposition to,[110] conditioning the availability of the 30-day safe harbor on the requirement that, for an exempt offering for which general solicitation is not permitted, the issuer did not solicit the purchasers in such offering through the use of general solicitation or that the issuer established a substantive relationship with the purchaser prior to commencement of the offering for which general solicitation is not permitted. One commenter opposed to these requirements suggested that the effects of any offers made more than 30 days prior to or after the commencement of another offering would be sufficiently diluted by intervening market developments so as to render an integration analysis unnecessary.[111] This commenter further stated that an issuer should be able to rely on the general principle without having to wait 30 calendar days from the termination of the prior offering if the issuer has a reasonable belief, based on the facts and circumstances, that purchasers in an

[95] Both this proposed safe harbor and the safe harbor in proposed Rule 152(b)(3)(iii) would apply to a registered offering made more than 30 calendar days after the termination or completion of any other offering.

[96] Proposed Rule 506(b)(2)(i) provides that there are no more than, or the issuer reasonably believes that there are no more than, 35 purchasers of securities from the issuer in offerings under this section in any 90 calendar day period. Under 17 CFR 230.501(e), only non-accredited investors are included in computing the number of ''purchasers.''

[97] 17 CFR 230.155(b) (''Rule 155(b)'') and 17 CFR 230.155(c) (''Rule 155(c)'') provide safe harbors for integration of abandoned offerings. Specifically, Rule 155(b) provides that an abandoned private offering of securities will not be considered part of an offering for which the issuer later files a registration statement if the offering meets certain enumerated conditions, including that the issuer does not file the registration statement until at least 30 calendar days after termination of all offering activity in the private offering, unless the issuer and any person acting on its behalf offered securities in the private offering only to persons who were (or who the issuer reasonably believes were) accredited investors or who satisfy the knowledge and experience standard of Rule 506(b)(2)(ii). Rule 155(c) provides a similar safe harbor for a registered offering followed by a private offering of securities subject to a similar set of enumerated conditions, including that neither the issuer nor any person acting on the issuer's behalf commences the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement.

[98] *See, e.g.,* J. Clarke Letter; Republic Letter; Letter from Securities Industry and Financial Markets Association dated June 1, 2020 (''SIFMA Letter''); W. Hubbard Letter; D. Burton Letter; CrowdCheck Letter; and Shearman & Sterling Letter.

[99] *See, e.g.,* Letter from Silicon Prairie Holdings, Inc. dated May 31, 2020 (''Silicon Prairie Letter''); NASAA Letter; Md. St. Bar Assoc. Letter; Letter from Americans for Financial Reform Education Fund dated June 1, 2020 (''AFREF Letter''); CFA Letter; R. Campbell Letter; and R. Rutkowski Letter.

[100] *See, e.g.,* Shearman & Sterling Letter; and SIFMA Letter (suggesting a 30-day cooling off period is appropriate given changes to markets, technologies and the securities laws since the six-month time frame was adopted).

[101] *See* CrowdCheck Letter.

[102] *See* ABA Letter (suggesting clarification that the 30-day separation period be ''applied separately to *each* other offering potentially subject to integration, on an individualized basis, with a 30-day separation required between each pair of offerings relying on this provision.'').

[103] *See, e.g.,* Silicon Prairie Letter; NASAA Letter; Md. St. Bar Assoc. Letter; AFREF Letter; CFA Letter; and R. Rutkowski Letter.

[104] *See* Silicon Prairie Letter (suggesting that 30 days is not enough time to assess an offering); NASAA Letter (expressing concern that the 30-day safe harbor would render integration a nullity); Md. St. Bar Assoc. Letter (suggesting that 90 days would more effectively impede issuers from improperly avoiding registration by artificially dividing a single offering into multiple offerings); CFA Letter (citing to the Regulation D 2007 Proposing Release, at note 135, and noting that for issuers that provide quarterly reports, the 90-day requirement would provide transparency and time for investors and the market to take into account the offering and its results); AFREF Letter; CFA Letter; and R. Rutkowski Letter.

[105] *See, e.g.,* Md. St. Bar Assoc. Letter (supporting the proposal but acknowledging a preference for a 90-day, safe harbor); and CFA Letter (contending that the speed with which information is disseminated for a small, private company has not increased in the way it has for public companies and that while the markets have changed a great deal since the 1980s, today's markets do not look all that different than they did in 2007, when the Commission rejected a 30-day cooling off period for Regulation D offerings).

[106] *See, e.g.,* Ketsal Letter (recommending eliminating the limit on sales to non-accredited investors); and Letter from Darshun N. Kendrick dated May 14, 2020 (suggesting the proposed amendment would not help with clarifying or streamlining the rules).

[107] *See* Republic Letter.

[108] *See* W. Hubbard Letter.

[109] *See, e.g.,* CrowdCheck Letter; J. Clarke Letter; and W. Hubbard Letter (recommending allowing a limited number of investors to be solicited through general solicitation in a twelve month period).

[110] *See, e.g.,* Fried Frank Letter (recommending not integrating offerings after 30 days regardless of whether the purchasers may have been solicited using general solicitation); Shearman & Sterling Letter; and IPA Letter (suggesting that the proposed amendment would address the integration concern, but not the general solicitation concern).

[111] *See* Shearman & Sterling Letter.

exempt offering for which general solicitation is not permitted were either not solicited through general solicitation or had a pre-existing relationship with the issuer or person acting on its behalf.[112] Another commenter expressed concern that an issuer relying on the exemptions provided by Section 4(a)(2), Rule 504, and Rule 506(b) would not likely be able to satisfy the conditions to the availability of the 30-day safe harbor as proposed.[113]

Some commenters also recommended that the Commission harmonize the provisions in the general principle of integration in proposed Rule 152(a)(1) with the similar provision in the safe harbor in proposed Rule 152(b)(1), or provide an explanation of how they differ.[114] These commenters stated their belief that, although paragraph (a)(1) and the proviso in paragraph (b)(1) of proposed Rule 152 have an almost identical standard, unlike the general principle of integration in proposed Rule 152(a)(1), the 30-day safe harbor in paragraph (b)(1) omits the ''reasonable belief'' standard, as well as the provision allowing a ''person acting on the issuer's behalf,'' to establish a pre-existing substantive relationship with the purchaser.[115]

Some commenters recommended alternative approaches to the proposal, such as: Eliminating the prohibition on general solicitation in Rule 506(b), or combining the exemptions laid out in Rules 506(b) and (c) to permit open communications to a more limited group of purchasers at a higher eligibility level; [116] or permitting serial offerings pursuant to a new reporting form for exempt offerings.[117]

iii. Final Amendments

After considering the comments received, we are adopting the 30-day non-exclusive safe harbor in Rule 152(b)(1) with modifications consistent with certain commenters' suggestions. We are also harmonizing current Securities Act exemptions by replacing their existing integration provisions with a reference to Rule 152. This safe harbor will apply to both offerings for which a registration statement has been filed under the Securities Act and exempt offerings.[118]

Several commenters stated that a 90-day safe harbor may be more effective at preventing issuers from attempting to improperly avoid Securities Act registration by artificially dividing a single offering into multiple offerings such that Securities Act exemptions would apply to the multiple offerings that would not be available for the combined offering. However, we believe that a 30-day time frame is sufficient to mitigate concerns that an exempt offering may condition the market for a subsequent registered offering or undermine the protections of a subsequent exempt offering. In light of the changes in technology, the markets, and the securities laws since the adoption of Regulation D in 1982, we believe that a 30-day safe harbor time period will enhance an issuer's flexibility and expand the capital-raising options available to issuers under the Securities Act to access capital when needed, while still providing a sufficient length of time to impede what integration seeks to prevent: Improperly avoiding registration by artificially dividing a single offering into multiple offerings.

We are also not persuaded by commenters that suggested that a 90-day time frame is preferable because it would allow needed time for investors and the market to assess an offering, in light of the accelerating speed and consumption of electronically disseminated information in today's financial marketplace, and especially the rapidly evolving informational environment since the adoption of a six-month safe harbor in Regulation D in 1982.[119] Because of this informational access, we also think it likely that the effects of any offers made more than 30 days prior to or after commencement of another offering would be sufficiently diluted by intervening market developments so as to render an integration analysis unnecessary.

Further, as proposed, we are shortening the current six-month time frame in Rules 502(a), 251(c), 147(g), and 147A(g) to 30 days by replacing these existing integration provisions with references to Rule 152.[120] We believe that the 30-day safe harbor time period we are adopting in Rule 152(b)(1) is appropriate throughout the exemptions under the Securities Act. We note that a 30-day safe harbor time period is consistent with several current integration provisions that also require 30-day minimum waiting periods between offerings. For example, in conjunction with certain other requirements, existing Rule 155 requires an issuer to wait at least 30 days between an abandoned private offering and a subsequent registered offering,[121] or an abandoned registered offering followed by a subsequent private offering.[122] Similarly, 17 CFR 230.255(e) (''Rule 255(e)''), 17 CFR 230.147(h) (''Rule 147(h)'') and 17 CFR 230.147A(h) (''Rule 147A(h)'') currently provide safe harbors from integration, if an issuer waits at least 30 days between the last solicitation of interest in a subsequently abandoned Regulation A offering, or the last offer made pursuant to Rule 147 or Rule 147A, and the filing of a registration statement for a subsequent offering.

One commenter stated that a comparison with the 30-day safe harbors set forth in Rule 155, Rule 147(h), Rule 147A(h) and Rule 255(e) was not an appropriate justification for decreasing all integration safe harbors to 30 days, but we believe that in light of the changes in technology, the markets, and the securities laws over time, the existing safe harbor time periods need to be shortened and updated to account for the increasing speed and consumption of electronically disseminated information in today's financial marketplace. As a result, we believe that the current six-month safe harbor time period in Rules 502(a), 251(c), 147(g), and 147A(g) is longer than necessary to protect investors and could inhibit issuers, particularly smaller issuers, from meeting their capital raising needs.[123]

[112] *See id. See also* ABA Letter (recommending that both Rule 152(a)(1) and Rule 152(b)(1) ''be tied to the particular purchaser,'' rather than ''purchasers'').

[113] *See* R. Campbell Letter (stating amending proposed Rule 152 ''to provide clear and complete two-way safe harbor integration protection for all exemptions . . . is especially important for the exemptions used by small businesses, including the exemptions provided by Section 4(a)(2), Rule 504 and Rule 506(b)'').

[114] *See, e.g.,* Md. St. Bar Assoc. Letter; and Shearman & Sterling Letter (suggesting that as proposed, the non-solicitation and pre-existing relationship conditions to the availability of the 30-day safe harbor are stricter than the corresponding requirements in the general principle of integration).

[115] *Id.*

[116] *See* Invesco Letter.

[117] *See* J. Clarke Letter.

[118] Both this safe harbor and the safe harbor in 17 CFR 230.152(b)(3)(iii) (''Rule 152(b)(3)(iii)'') may apply to a registered offering made more than 30 calendar days after the termination or completion of any other offering.

[119] *See* Regulation D Adopting Release, at text accompanying note 18. *See also* Proposed Revisions of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Release No. 33–6339 (Aug. 7, 1981) [46 FR 41791 (Aug. 18, 1981)], at Section V.C.1 (referring to uniform six month safe harbor provisions in now rescinded 17 CFR 230.146(b)(1) and 17 CFR 230.242(b)).

[120] *See infra* Section II.A.4.

[121] *See* Rule 155(b). As discussed below, new Rule 152(b)(1) supersedes existing Rule 155, which is being removed and reserved.

[122] *See* Rule 155(c).

[123] Smaller issuers may face capital raising challenges because they are seeking relatively small amounts of capital. *See, e.g.,* Transcript of SEC Small Business Capital Formation Advisory Committee (Nov. 12, 2019), *available at https://*

As proposed, we are also removing and reserving Rule 155. The new safe harbors in Rule 152(b) will apply when determining whether integration of abandoned offerings with subsequent offerings is required, superseding the current requirements of Rule 155. Specifically, for an abandoned private offering followed by a registered offering that would currently be covered by Rule 155(b), an issuer could look to the safe harbors in new Rule 152(b)(1) or Rule 152(b)(3). For an abandoned registered offering followed by a private offering that would currently be covered by Rule 155(c), an issuer could look to the safe harbors in new Rule 152(b)(1) or Rule 152(b)(4). As a result, we believe the lists of conditions in Rules 155(b) and (c) are no longer warranted and may be eliminated without compromising investor protections for the same reasons that support our determination to reduce the integration safe harbors from six months to 30 days.

In addition, we are adopting as proposed an amendment to Rule 506(b) to limit the number of non-accredited investors purchasing in Rule 506(b) offerings to no more than 35 within a 90 calendar day period. As we stated in the Proposing Release, we are mindful that a shortened integration time frame could allow issuers to undertake serial Rule 506(b) exempt offerings each month to up to 35 non-accredited investors in reliance on a 30-day safe harbor, resulting in unregistered sales to a significant number of non-accredited investors in a year.[124] Several commenters echoed this concern.[125] As the Commission stated in 2007, we believe that improper reliance on exemptions from registration harms investors by depriving them of the benefits of full and fair disclosure and the civil remedies that flow from registration.[126] While recent data suggests that shortening the safe harbor to 30-days is not likely to result in a large increase in the number of non-accredited investors participating in Rule 506(b) offerings,[127] we have determined that the rule change will prevent issuers from using the new 30-day safe harbor to effectively conduct a public distribution of securities to non-accredited investors.

Finally, in a change from the proposal, we are replacing the conditions set forth in proposed Rule 152(b)(1), which were similar, but not identical, to the conditions in proposed Rule 152(a)(1) with language clarifying that for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of Rule 152(a)(1) shall apply. This means that such an issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either did not solicit such purchaser through the use of general solicitation, or established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

We also stress that this safe harbor may not be used as a means to circumvent the prohibition on general solicitation in an exempt offering to which such prohibition applies. That is, regardless of whether an issuer meets the requirements of the 30-day safe harbor from integration, an issuer conducting an offering of securities under an exemption prohibiting general solicitation, such as Rule 506(b), must still ensure that it has not engaged in a general solicitation, and meets the other terms and conditions of the relevant offering exemption. We are not persuaded by commenters who recommended that such conditions to the availability of the 30-day safe harbor are not necessary, given the requirements of the specific exemptions relied on.[128]

We also note that if an issuer waits less than 30 days after terminating or completing an offering before commencing a subsequent offering, and therefore cannot rely on the safe harbor in Rule 152(b)(1), it may still avoid integration if it meets the terms and conditions of the general principle of integration in Rule 152(a).

b. Rule 701, Employee Benefit Plans and Regulation S (Rule 152(b)(2))

Certain Commission rules currently provide that offers and sales of securities made pursuant to Rule 701 and other employee benefit plans will not be integrated with certain other offerings.[129] Similarly, the Commission has stated that offshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.[130]

i. Proposed Amendments

The Commission proposed Rule 152(b)(2) to provide a non-exclusive safe harbor for all offers and sales made in compliance with Rule 701,[131] pursuant to an employee benefit plan, or made in compliance with Regulation S,[132]

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*www.sec.gov/info/smallbus/acsec/sbcfac-transcript-111219.pdf,* at 15–62 (discussing the fact that transaction costs make raising amounts under $750,000 ''not worth it''); and Transcript of SEC Small and Emerging Companies Advisory Committee (Feb. 15, 2017), *available at https://www.sec.gov/info/smallbus/acsec/acsec-transcript-021517.pdf,* at 144–145 (indicating that it is easier for issuers to access $100 million of capital than amounts under $10 million).

[124] *See* Proposing Release, at text accompanying note 93. *See also* Regulation D 2007 Proposing Release, at Section II.C.1.

[125] *See* Better Markets Letter; CFA Letter; CFA Institute Letter; CII Letter; R. Rutkowski Letter; and Md. St. Bar Assoc. Letter.

[126] *See* Regulation D 2007 Proposing Release, at Section II.C.1.

[127] Based on the analysis of Form D data on initial Form D filings, we estimate that, in 2019 among all Rule 506(b) offerings by issuers other than pooled investment funds, between approximately 4.45 percent and 9 percent of offerings included non-accredited purchasers. This estimated range is based on Division of Economic and Risk Analysis staff analysis of data in initial Form D filings, excluding pooled investment funds. In particular, the 4.45 percent estimate is based on offerings that report that at least one non-accredited investor already has invested in the offering as of the Form D filing and may represent a lower bound because it relies on available Form D filings, and because a final Form D upon the conclusion of an offering is not required to be filed. If we also include Rule 506(b) offerings on Form D that accept non-accredited investors but reported having zero non-accredited investors in the initial filing, the estimated percentage of offerings involving accredited investors during 2019 is approximately 9 percent, which may be viewed as an upper bound estimate.

[128] *See* Shearman & Sterling Letter (stating that an issuer should not have to comply with the conditions to the 30-day safe harbor, because ''an issuer would still need to comply with the exemption relied upon in connection with the subsequent offering, but not as part of the integration analysis.'').

[129] The safe harbor integration provisions in current Rule 251(c), Rules 147(g), and 147A(g) for these offers or sales do not cover offers or sales concurrent with another offering. *See also* 17 CFR 230.701(f) (''Rule 701(f)''). However, the six-month safe harbor in Rule 502(a) provides an exception to the required six-month separation between offerings for offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D that occur during the six-month time periods under an employee benefit plan, as defined in Rule 405 under the Securities Act.

[130] *See* Offshore Offers and Sales, Release No. 33–6863 (Apr. 24, 1990) [55 FR 18306 (May 2, 1990)] (''Offshore Offers and Sales Release'') at Section III.C.1.

[131] The Rule 701 exemption is only available to issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act. *See* 17 CFR 230.701(b). The proposed safe harbor is in accord with Rule 701(f), which provides that an offering under Rule 701 will not be integrated with any other offering, as offers and sales exempt under Rule 701 are deemed to be a part of a single, discrete offering and are not subject to integration with any other offers or sales, whether registered under the Securities Act or otherwise exempt from the registration requirements of the Securities Act.

[132] Proposed Rule 152(b)(2) would codify the position that ''[o]ffshore transactions made in

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regardless of when these offerings occur, including offers and sales made concurrently with other offerings.[133]

In conjunction with the proposed safe harbor, the Commission proposed to amend the definition of ''directed selling efforts'' in 17 CFR 230.902 (''Rule 902'' of Regulation S) in order to address concerns raised by market participants about whether it is possible to conduct concurrent Regulation S and Rule 506(c) offerings, particularly when the offerings are conducted using the internet, and if so, how to comply with the requirement that separate offering materials be used in each offering. Under the proposal, an issuer that engages in general solicitation activity under an exemption that allows general solicitation would not be considered to have engaged in ''directed selling efforts'' in connection with an offering under Regulation S, if the general solicitation activity is not undertaken for the purpose of conditioning the market in the United States for any of the securities being offered in reliance on Regulation S. This would be a narrowing of the current definition of ''directed selling efforts,'' which covers any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for the Regulation S securities.[134]

The Commission also proposed Rule 906 of Regulation S, applicable to securities offered and sold in a transaction subject to the conditions of 17 CFR 230.901 or 903, that would require an issuer that engages in general solicitation activity covered by the proposed exclusion from the definition of ''directed selling efforts'' to prohibit resales to U.S. persons (or for the account or benefit of a U.S. person) of the Regulation S securities for a period of six months from the date of sale, except for sales to QIBs or IAIs. The proposed six-month limitation on resales would apply regardless of the Regulation S category applicable to the securities, and notwithstanding, and in addition to, any applicable distribution compliance period.

ii. Comments

Commenters that addressed the proposal supported adopting the integration safe harbor for all offerings made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S, as proposed in Rule 152(b)(2).[135] No commenters opposed these proposed amendments. Several commenters asked the Commission to specifically reference Rule 701 in Rule 152(b)(2).[136]

Several commenters supported codifying an explicit integration safe harbor for offers and sales made in compliance with Regulation S.[137] One of these commenters stated that including this safe harbor in proposed Rule 152 would enhance legal certainty and promote more efficient capital raising.[138]

Some commenters, however, opposed the proposed revisions to the definition of ''directed selling efforts'' in Regulation S to exclude activities that are ''reasonably expected'' to condition the U.S. market for the Regulation S securities.[139] One of these commenters questioned the feasibility of determining what activities would condition the market, and what problems preventing such activities would avoid.[140] Another of these commenters raised concerns that the proposed changes would restrict the current market practice of concurrently making Regulation S and 17 CFR 230.144A (''Rule 144A'') offers.[141] This commenter also raised concerns about the discussion in the Proposing Release with respect to widely accessible internet or similar communications in connection with concurrent Regulation S and Rule 506(c) offerings, noting that the conclusion that such communications would be deemed directed selling efforts would effectively preclude combining an exempt offering that permits general solicitation with a contemporaneous offshore offering under Regulation S.[142]

One commenter expressed support for an amendment to Rule 902 as a means to address uncertainty among market participants regarding whether it is possible to conduct concurrent Regulation S and Rule 506(c) offerings, but recommended that the rule expressly provide that the prohibition on directed selling efforts is not applicable when the Regulation S offering is made concurrently with an offering in reliance on an exemption that permits general solicitation, so long as the issuer does not engage in such general solicitation for the purpose of conditioning the market in the United States for any securities being offered in reliance on Regulation S or registered under the Securities Act.[143] Other commenters stated that they had not experienced significant uncertainty in determining the absence or presence of directed selling efforts in connection with exempt offerings permitting general solicitation.[144]

Commenters were divided in their support for,[145] or opposition to,[146] the proposed Rule 906 resale restrictions. Some commenters opposing the proposed amendment expressed concern that it would be difficult to implement or add unnecessary complexity to Regulation S.[147] Commenters also noted that the existing distribution compliance period in Regulation S already protects against the

compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.'' *See* Offshore Offers and Sales Release, at Section III.C.1.

[133] The safe harbor integration provisions in current Rule 251(c), Rules 147(g) and 147A(g) for these offers or sales do not cover offers or sales concurrent with another offering.

[134] *See* 17 CFR 230.902(c)(1).

[135] *See, e.g.,* J. Clarke Letter; Md. St. Bar Assoc. Letter (noting that the rationale for exempting offers and sales under Rule 701 is also applicable to offers and sales under employee benefit plans generally); W. Hubbard Letter; D. Burton Letter; CrowdCheck Letter; Shearman & Sterling Letter; and NASAA Letter.

[136] *See, e.g.,* W. Hubbard Letter; D. Burton Letter (suggesting that referencing Rule 701 clarifies the Commission's intent with respect to the application of the integration doctrine to offerings under that rule); and CrowdCheck Letter.

[137] *See, e.g.,* SIFMA Letter; Shearman & Sterling Letter; Md. St. Bar Assoc. Letter; and ABA Letter (supporting the codification, in proposed Rule 152(b)(2), of the Commission's guidance in the 1990 Regulation S Adopting Release that ''[o]ff shore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.'') (*citing* Offshore Offers and Sales Release, at Section III.C.1).

[138] *See* Shearman & Sterling Letter.

[139] *See* Shearman & Sterling Letter; ABA Letter; and CrowdCheck Letter.

[140] *See* CrowdCheck Letter.

[141] *See* Shearman & Sterling Letter (expressing concern that if communications that may be considered general solicitation in Rule 144A offerings are presumed to constitute directed selling efforts that trigger a six-month distribution compliance period, issuers would in many cases have to forgo the concurrent offshore offering because imposing a distribution compliance period is often not practicable).

[142] *See id.*

[143] *See* Fried Frank Letter (recommending that the Commission clarify that the issuer is not required to provide evidence for its intent, and also recommending that the Commission state that concurrent Rule 506(c) and Regulation S offerings will not be integrated even if the issuer uses the same (or substantially identical) offering materials).

[144] *See* Shearman & Sterling Letter; and CrowdCheck Letter.

[145] *See* Md. St. Bar Assoc. Letter (expressing support for the proposal to codify a safe harbor for offers and sales made in compliance with Regulation S and noting with favor proposed Rule 906 as a means to prevent flowback of securities to the United States); and Republic Letter (supporting the proposal as a whole with respect to Regulation S offerings).

[146] *See* J. Clarke Letter; SIFMA Letter; Fried Frank Letter; CrowdCheck Letter; and Shearman & Sterling Letter.

[147] *See, e.g.,* ABA Letter; SIFMA Letter (expressing concern that issuers and other offering participants would find the requirements of proposed Rule 906 burdensome and difficult to implement, and would simply avoid relying on exemptions that allow for general solicitation); and CrowdCheck Letter.

risk of flowback of Regulation S securities to the United States.[148] Another commenter opposing the proposed rule recommended that the resale limitation should limit resales in the first year to QIBs and IAIs to align the rule with Regulation Crowdfunding.[149]

iii. Final Amendments

After considering the comments, we are adopting new Rule 152(b)(2), to provide a non-exclusive safe harbor for all offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S, regardless of when these offerings occur, including offers and sales made concurrently with other offerings. For the reasons discussed below, we have decided not to adopt the proposed changes to Regulation S itself.

Offers and sales pursuant to Rule 701 and employee benefit plans are limited to investors, such as employees, consultants, and advisors, with whom the issuer has written compensation plans or agreements. We continue to believe, given the relationship between these investors and the issuer, that these offers and sales do not raise the same level of investor protection concerns as offerings to other investors.

With respect to Regulation S offerings, Rule 152(b)(2) codifies the long-standing Commission position that ''[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.'' [150] Therefore, as noted in the Proposing Release, concurrent offshore offerings that are conducted in compliance with Regulation S are not currently, and will not be, integrated with registered domestic offerings or domestic offerings that are conducted in compliance with any exemption.[151] When determining the availability of this safe harbor, it will still be necessary to assess each transaction separately for compliance with the applicable exemption.

In light of certain perceived concerns about the ability of an issuer to conduct concurrent Regulation S and Rule 506(c) offerings, particularly when the offerings are conducted using the internet, we proposed an amendment to the definition of ''directed selling efforts'' in Rule 902, and related proposed Rule 906, which would have applied to issuers relying on the amended definition. After considering the comments received, we have determined not to adopt the proposed amendments to Regulation S. We are persuaded by commenters who asserted that the existing regulatory framework appropriately addresses concerns relating to the risk of flowback of Regulation S securities to the United States or the use of general solicitation in an exempt offering to condition the market in the United States for the Regulation S securities and acknowledge commenters who expressed concern that the proposal may disrupt existing market practices.

In light of the concerns expressed by commenters about the implications of the proposed amendments and the related discussion in the Proposing Release, we are also clarifying that we do not believe that general solicitation activity for exempt domestic offerings would preclude reliance on Regulation S for concurrent offshore offerings, and reaffirm our existing guidance with respect to concurrent Regulation S and domestic offerings.[152]

We are aware that issuers have conducted domestic exempt or registered offerings concurrently with a Regulation S offering under our existing guidance. Compliance with the terms of both Regulation S and another applicable exemption, such as Rule 506(c), will depend on the facts and circumstances of a particular situation. For example, the use of the same website to solicit U.S. investors under Rule 506(c) and offshore investors under Regulation S could raise concerns about the issuer's compliance with the prohibition on directed selling efforts in Regulation S because the offering material on the website could be deemed to have the effect of conditioning the market in the United States. In such situations, we believe an issuer can take certain steps to distinguish the Regulation S and domestic offering materials, as the Commission has previously discussed.[153]

c. Subsequent Registered Offerings (Rule 152(b)(3))

Existing Rule 152 provides that the phrase ''transactions by an issuer not involving any public offering'' in Section 4(a)(2) shall be deemed to apply to transactions that did not involve any public offering at the time of the unregistered offering even if the issuer decides subsequently to make a public offering and/or files a registration statement. In 2007, the Commission clarified that an issuer's contemplation of filing a Securities Act registration statement at the same time that it is conducting an unregistered offering under Section 4(a)(2) would not cause the Section 4(a)(2) exemption to be unavailable for that unregistered offering.[154] So long as all of the applicable requirements of the exemption prohibiting general solicitation were met for offers and sales that occurred prior to the use of general solicitation in connection with the registered public offering, the offers and sales of the exempt offering prohibiting general solicitation would not be integrated with the subsequent registered offering.[155] Once the public offering is commenced or the registration statement is filed, the safe harbor in existing Rule 152 is no longer available for any concurrent or subsequent offers or sales made in connection with an exempt offering prohibiting general solicitation.

i. Proposed Amendments

The Commission proposed Rule 152(b)(3) to provide a non-exclusive safe harbor for certain offerings made prior to the commencement of an offering for which a Securities Act registration statement has been filed, thus

[148] *See* SIFMA Letter (stating its belief that proposed Rule 906 is unnecessary and inconsistent with prior Commission guidance on Regulation S, and that Regulation S already applies a distribution compliance period to protect against flowback that is calibrated, in duration and certain other respects, based on the likelihood of flowback); CrowdCheck Letter (questioning whether flowback was likely to occur given the resale restrictions); and ABA Letter.

[149] *See* J. Clarke Letter.

[150] *See* Offshore Offers and Sales Release, at Section III.C.1.

[151] In addressing the offshore transaction component of the Regulation S safe harbor, the Commission stated, ''Offers made in the United States in connection with contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors.'' *Id.* at note 36. Likewise, in addressing directed selling efforts, the Commission stated, ''Offering activities in contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors.'' *Id.* at note 47. *See also* Rule 500(g) of Regulation D (formerly Preliminary Note No. 7 to Regulation D) (''Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States.''); and Note to Rule 502(a) (''Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S.'').

[152] *See id.*

[153] *See* Statement of the Commission Regarding Use of internet websites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore, Release No. 33–7516 (Mar. 23, 1998) [63 FR 14806 (Mar. 27, 1998)].

[154] *See* Regulation D 2007 Proposing Release, at text accompanying note 124. *See also* Concept Release, at text accompanying note 499.

[155] In these circumstances, companies should be careful to avoid any pre-filing communications regarding the contemplated public offering that could render the Section 4(a)(2) exemption unavailable for what would be an otherwise exempt private placement. *See* Regulation D 2007 Proposing Release, at note 124.

permitting companies to conduct certain offerings shortly before the filing of a Securities Act registration statement without concern that the two offerings would be integrated. Proposed Rule 152(b)(3)(i) would provide that an offering for which a Securities Act registration statement has been filed will not be integrated with terminated or completed offerings for which general solicitation is not permitted. Proposed Rule 152(b)(3)(ii) would provide that an offering for which a Securities Act registration statement has been filed will not be integrated with a terminated or completed offering for which general solicitation is permitted made only to QIBs and IAIs. Finally, proposed Rule 152(b)(3)(iii) would make clear that an offering for which a registration statement has been filed will not be integrated with any offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the registered offering.

ii. Comments

No commenters opposed the safe harbor in proposed Rule 152(b)(3), and several commenters supported adopting proposed Rule 152(b)(3)(i).[156] In support, one commenter noted that the proposed safe harbor ''appears to be generally consistent with existing Rule 152, updated mainly to account for the fact that general solicitation is now permitted for offerings conducted under Rule 506(c).'' [157] Another commenter asked the Commission not to include the 30-day cooling-off period contemplated as a condition for use of proposed Rule 152(b)(3)(iii), because the commenter believed it undercuts the objective of the rules to ''encourage use of registration to the maximum extent possible.'' [158] Alternatively, the commenter suggested that proposed Rule 152(b)(3)(ii) should be revised to refer to a terminated or completed offering for which general solicitation is permitted *in which sales are made* only to the specified institutional investors.[159]

iii. Final Amendments

After considering these comments, we are adopting new Rule 152(b)(3), as proposed, providing a non-exclusive safe harbor for certain offerings made prior to the commencement of an offering for which a Securities Act registration statement has been filed. New 17 CFR 230.152(b)(3)(i) (''Rule 152(b)(3)(i)'') provides that an offering for which a Securities Act registration statement has been filed will not be integrated with terminated or completed offerings for which general solicitation is not permitted.[160] New 17 CFR 230.152(b)(3)(ii) (''Rule 152(b)(3)(ii)'') provides that an offering for which a Securities Act registration statement has been filed will not be integrated with a terminated or completed offering for which general solicitation is permitted made only to QIBs and IAIs.[161] Finally, new Rule 152(b)(3)(iii) provides that an offering for which a registration statement under the Securities Act has been filed will not be integrated with any offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the registered offering.[162]

We continue to believe that capital raising around the time of a public offering, in particular an initial public offering, including immediately before the filing of a registration statement, is often critical if issuers are to have sufficient funds to continue to operate while the public offering process is ongoing.[163] We believe that Rule 152 as currently written is unnecessarily restrictive, given the changing financial requirements and circumstances of issuers, particularly smaller issuers, immediately prior to a registered public offering and may be revised without compromising investor protections. A lengthy waiting period prior to a registered offering combined with a potentially uncertain registration process are particular concerns for smaller issuers contemplating a registered public offering, whose financing needs are often erratic and unpredictable, due in part to limited amounts of working capital, cash reserves, and access to credit.[164] However, we are not persuaded by a commenter's suggestion that we eliminate the 30-day period applicable to an offering for which a registration statement under the Securities Act has been filed subsequent to a terminated or completed offering for which general solicitation is permitted. New Rule 152(b)(3)(iii) does not impose an additional requirement beyond that set forth in the 30-day safe harbor of new Rule 152(b)(1), but rather is meant to clarify the application of that provision to subsequent registered offerings. As discussed above, we believe a 30-day time frame is sufficient to mitigate concerns that an exempt offering may condition the market for a subsequent registered offering. For this reason, we are adopting new Rule 152(b)(3) as proposed to permit issuers to conduct offerings shortly before the filing of a Securities Act registration statement without concern that the two offerings would be integrated.[165]

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[156] *See, e.g.,* Md. St. Bar Assoc. Letter; W. Hubbard Letter; and NASAA Letter (not objecting to the proposed safe harbor).

[157] *See* Md. St. Bar Assoc. Letter.

[158] *See* ABA Letter (stating that the 30-day cooling-off period serves ''no real practical purpose,'' noting that ''[i]n these situations, investors in the registered offering will have the benefit of the liability provisions set forth in Section 11 and 12(a)(2) of the Securities Act.'').

[159] *See id.*

[160] New Rule 152(b)(3)(i) builds on the Commission's prior integration guidance relating to offerings for which general solicitation is not permitted. Offers and sales preceding registered offerings that do not involve general solicitation are generally not the type of offerings that, when taken together, appear to be susceptible to concerns relating to the prior offers and sales conditioning the market for the registered offering.

[161] New Rule 152(b)(3)(ii) builds on current Rule 255(e) of Regulation A, and current Rules 147(h) and 147A(h), which provide that offerings limited to QIBs and IAIs are not integrated with a subsequently filed registered offering. Similarly, where an issuer has solicited interest in a contemplated, but subsequently abandoned Regulation A offering only to QIBs or IAIs, the abandoned Regulation A offering would not be subject to integration with a subsequently filed registered offering. We do not believe it is appropriate, as suggested by a commenter, that we revise this provision to refer only to offerings in which sales are made to QIBs and IAIs, as to do so would expand the scope of this safe harbor to effectively permit broad use of general solicitation at any time, including immediately prior to commencement of a registered offering, so long as the issuer limits sales in the exempt offerings to the specified institutional investors, thereby raising concerns about the prior offers conditioning the market for the registered offering.

[162] New Rule 152(b)(3)(iii) will work in coordination with new Rule 152(b)(1) to clarify the application of the 30-day safe harbor to subsequent registered offerings. As discussed with respect to the non-exclusive safe harbor in new Rule 152(b)(1) in Section II.A.2, if an issuer files a registration statement under the Securities Act less than 30 calendar days after a terminated or completed offering for which general solicitation is permitted, although new Rule 152(b)(3)(iii) would not be available, integration would depend on the availability of the general principle of integration in Rule 152(a).

[163] *See* Regulation D 2007 Proposing Release, at Section II.C.

[164] *See, e.g.,* Final Report of the Advisory Committee on Smaller Public Companies to the U.S. Securities and Exchange Commission (Apr. 23, 2006), *available at https://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf,* at 96. *See also* Regulation D 2007 Proposing Release, at note 116 and accompanying text.

[165] We note that, as discussed above, the plan or scheme to evade restrictions in the introductory language to Rule 152 apply to all the provisions of new Rule 152, including the safe harbors in Rule 152(b), as well as the general principle of integration in new Rule 152(a) when the safe harbors in new Rule 152(b) are not available. In this regard, none of the provisions of new Rule 152 may be used as a means to circumvent the communication restrictions prior to a registered offering, for example, for communications occurring within 30 days of a registered offering. Section 5(c) of the Securities Act prohibits any written or oral offers prior to the filing of a registration statement. Generally, written and oral offers prior to filing a registration statement are prohibited, absent an exemption. Rule 163B, for example, provides an exemption to issuers, and those authorized to act on their behalf, to gauge market interest in a

d. Offers or Sales Preceding Exempt Offerings Permitting General Solicitation (Rule 152(b)(4))

Rule 251(c) of Regulation A, and the intrastate offering safe harbor and exemption in Rule 147(g) and Rule 147A(g), respectively, currently provide that offers and sales made pursuant to these exemptive provisions and safe harbors that permit general solicitation will not be integrated with terminated or completed offers and sales made prior to the commencement of these exempt offerings.[166]

i. Proposed Amendments

The Commission proposed Rule 152(b)(4) to provide a safe harbor for all offers and sales made in reliance on an exemption for which general solicitation is permitted that follow any other terminated or completed offering. The proposed safe harbor would expand the current integration safe harbors in Regulation A and Rules 147 and 147A to include offerings relying on: Regulation Crowdfunding; Rules 504(b)(1)(i), (ii), or (iii) that, depending on State registration requirements, permit general solicitation; and Rule 506(c).

ii. Comments

Several commenters supported the safe harbor in proposed Rule 152(b)(4) that would apply to any offering in reliance on an exemption for which general solicitation is permitted made subsequent to an offering that has been terminated or completed,[167] while others opposed the proposed safe harbor.[168]

One commenter supporting the proposal recommended that the integration safe harbor should be the same whether the new or terminated offering involves general solicitation or not.[169] Another commenter recommended an additional safe harbor providing that any offering commenced in reliance on an exemption that does not permit general solicitation may be continued in reliance on an exemption that does permit general solicitation.[170] According to this commenter, such a safe harbor would be particularly beneficial to issuers commencing an offering in reliance on Rule 506(b) and desiring to continue it in reliance on Rule 506(c) and would permit the issuer to use the same or substantially identical materials to continue the offering in reliance on Rule 506(c).[171] In contrast, one commenter opposing the safe harbor in proposed Rule 152(b)(4) suggested that permitting a Rule 506(c) offering to commence immediately following the completion of a Rule 506(b) offering for the same securities at the same price is essentially like permitting general solicitation in a Rule 506(b) offering conducted in two phases.[172] One commenter questioned the Commission's basis for claiming that the exemptions allowing general solicitation are sufficiently protective.[173]

iii. Final Amendments

After considering comments, we are adopting new Rule 152(b)(4), as proposed, to provide a non-exclusive safe harbor for all offers and sales made in reliance on an exemption for which general solicitation is permitted that follow any other terminated or completed offering. This new safe harbor expands on the current integration safe harbors in Regulation A and Rules 147 and 147A to include offerings relying on: Regulation Crowdfunding; Rules 504(b)(1)(i), (ii), or (iii) that, depending on State registration requirements, permit general solicitation; and Rule 506(c). The following table summarizes the types of offerings that will not be integrated under this new safe harbor:

TABLE 3—SUMMARY OF TYPES OF OFFERINGS NOT INTEGRATED UNDER THE SAFE HARBOR

| Offering 1 | Offering 2 |
|---|---|
| Any offering, which includes:<br>Exempt offering permitting general solicitation, including:<br>• Regulation A.<br>• Regulation Crowdfunding.<br>• Rule 147 or 147A.<br>• Rules 504(b)(1)(i), (ii), or (iii).<br>• Rule 506(c).<br>Exempt offering prohibiting general solicitation, including:<br>• 17 CFR 230.504(b)(1).<br>• Rule 506(b).<br>• Section 4(a)(2).<br>Securities Act registered offering. | Exempt offering permitting general solicitation, including:<br>• Regulation A.<br>• Regulation Crowdfunding.<br>• Rule 147 or 147A.<br>• Rules 504(b)(1)(i), (ii), or (iii).<br>• Rule 506(c). |

Exempt offerings that permit general solicitation and follow other offers and sales are generally not the type of offerings that appear to be susceptible to concerns about the prior offers and sales conditioning the market for the subsequent exempt offering. We do not believe integrating any type of offers or sales with a subsequent exempt offering permitting general solicitation, such as an offering pursuant to Regulation A, Rule 147, Rule 147A, Rules 504(b)(1)(i), (ii), or (iii), Rule 506(c), or Regulation Crowdfunding, is necessary to further investor protection.

possible initial public offering or other registered securities offering through discussions with certain institutional investors prior to, or following, the filing of a registration statement.

[166] These integration provisions also provide that offers and sales subsequent to these exempt offerings will not be integrated if they are: (1) Registered under the Securities Act; (2) exempt from registration under Rule 701; (3) made pursuant to an employee benefit plan; (4) exempt from registration under Regulation S; (5) exempt from registration under Section 4(a)(6) of the Securities Act; (6) made more than six months after completion of the offering; or (7) limited to QIBS and IAIs. *See* Rule 251(c); Rule 255(e); Rule 147(g) and (h); and Rule 147A(g) and (h).

[167] *See* W. Hubbard Letter; D. Burton Letter; CrowdCheck Letter (expressing concern about issuer compliance with disclosure requirements of Regulation Crowdfunding); and NASAA Letter (not objecting to the proposed safe harbor).

[168] *See* Md. St. Bar Assoc Letter; and CFA Letter.

[169] *See* D. Burton Letter.

[170] *See* Fried Frank Letter (stating that this additional safe harbor would be consistent with the Commission's guidance in its 2013 release adopting Rule 506(c)) (*citing* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33–9415 (July 10, 2013) [78 FR 44771 (July 24, 2013)] (''Rule 506(c) Adopting Release'')).

[171] *See id.*

[172] *See* Md. St. Bar Assoc. Letter.

[173] *See* CFA Letter (additionally expressing concern over fraud in the Regulation A market and non-compliance in the Regulation Crowdfunding market). *See also* CrowdCheck Letter.

In response to a commenter's request,[174] we are providing guidance with respect to an issuer's ability to rely on Rule 152(b)(4) with respect to an offering that was commenced in reliance on an exemption that does not permit general solicitation, but that the issuer wishes to continue in reliance on an exemption that does permit general solicitation. We are of the view that an issuer may rely on the safe harbor in new Rule 152(b)(4) if, for example, the issuer commences an offering under Rule 506(b) and thereafter engages in general solicitation in reliance on Rule 506(c) so long as once the issuer engages in general solicitation, it relies on Rule 506(c) for all subsequent sales, thereby effectively terminating the Rule 506(b) offering, including by selling exclusively to accredited investors and taking reasonable steps to verify the accredited investor status of each purchaser.[175] The use of general solicitation in reliance on Rule 506(c) will not affect the exempt status of prior offers and sales of securities made in reliance on Rule 506(b).[176] It is also not necessary for an issuer to use different offering materials for offerings that rely on different exemptions, so long as the issuer satisfies the disclosure and other requirements of each applicable exemption.

3. Commencement, Termination, and Completion of Offerings (Rules 152(c) and 152(d))

Existing rules under the Securities Act do not clearly define commencement or completion with respect to exempt and registered offerings, although several rules state when exempt offerings under Regulation A[177] and Regulation Crowdfunding terminate under certain circumstances,[178] as well as when registered offerings terminate.[179]

a. Proposed Amendments

To provide greater certainty to issuers as to the availability of the safe harbors under proposed Rule 152(b) that require the prior offering to be ''terminated or completed,''[180] the Commission proposed Rule 152(c) to define ''terminated or completed'' in the context of Rule 152 as follows:

• Offerings of securities made under Section 4(a)(2), Regulation D, Rule 147 or 147A would be considered ''terminated or completed,'' on the later of: (i) The date the issuer entered into a binding commitment to sell securities under the offering (subject only to conditions outside of the investor's control); or (ii) the date the issuer and its agents ceased efforts to make further offers to sell the issuer's securities.[181]

• Offerings under Regulation A would be considered ''terminated or completed'': (i) Upon the withdrawal of an offering statement under 17 CFR 230.259(a) (''Rule 259(a)'' of Regulation A); (ii) upon the filing of 17 CFR 239.94 (''Form 1–Z'') with respect to that offering; (iii) upon the declaration by the Commission that the offering statement has been abandoned under Rule 259(b) of Regulation A; or (iv) on the third anniversary of the initial qualification date of the offering statement, in the case of continuous or delayed offerings.

• Offerings under Regulation Crowdfunding would be considered ''terminated or completed'' on the deadline of the offering identified in the offering materials pursuant to Rule 201(g) of Regulation Crowdfunding, or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under Rule 304(b) of Regulation Crowdfunding.

• Offerings for which a Securities Act registration statement has been filed would be considered, ''terminated or completed,'' for purposes of the proposed safe harbors: (i) Upon the withdrawal of the registration statement after the Commission grants such application under Rule 477; (ii) upon the filing of an amendment or supplement to the registration statement indicating that the registered offering has been terminated or completed and the deregistering of any unsold securities if required by 17 CFR 229.512(a)(3); (iii) the entry of an order by the Commission declaring that the registration statement has been abandoned under Rule 479; or (iv) as set forth in Rule 415(a)(5).

b. Comments

Commenters provided various recommendations on how to provide greater certainty to issuers as to the availability of the proposed safe harbors that require a determination as to when an offering should be considered ''terminated or completed.''[182] While one commenter supported our proposed definitions of ''terminated or completed,''[183] another commenter recommended that the Commission provide guidance for determining when offerings might be considered ''terminated or completed'' instead of defining the terms, as ''the definitions might not catch all possible circumstances.''[184] In order to facilitate an issuer terminating an offering of securities in reliance on one exemption, for example, such as Rule 506(b) that prohibits general solicitation, and simultaneously commencing an offering of securities in reliance on another exemption, for example, such as Rule 506(c) that permits general solicitation, one commenter recommended revising the proposed definition of ''terminated or completed'' in 17 CFR 230.152(c)(1)(ii) to clarify that the requirement to cease selling efforts is limited only to a particular offering, as opposed to the more general language ''to make further offers to sell the issuer's securities,'' as proposed.[185]

[174] *See* Fried Frank Letter.

[175] We do not believe that this approach will permit general solicitation in a Rule 506(b) offering conducted in two phases, in light of the significant investor protections of Rule 506(c) that become applicable as soon as the issuer commences general solicitation activity.

[176] This guidance is consistent with the Commission's 2013 guidance in implementing Rule 506(c). *See* Rule 506(c) Adopting Release, at Section II.A.3.

[177] *See, e.g.,* 17 CFR 230.257(a) (''Rule 257(a)'') (requiring filing of ''an exit report on [17 CFR 239.94 (''Form 1–Z'')] not later than 30 calendar days after the termination or completion of [a Regulation A/Tier I] offering.''); 17 CFR 230.259(b) (''Rule 259(b)'') (declaration by the Commission that the offering statement has been abandoned); and 17 CFR 230.251(d)(3)(i)(F) (''Rule 251(d)(3)(i)(F)'') (required termination of the offering by the third anniversary of the initial qualification date of the offering statement).

[178] *See, e.g.,* 17 CFR 230.201(g) (''Rule 201(g)'') (disclosure required of the ''target offering amount and the deadline to reach the target offering amount''); and 17 CFR 227.304(b) (''Rule 304(b)'') (notice provided by the Regulation Crowdfunding intermediary of the early completion of an offering).

[179] *See, e.g.,* 17 CFR 230.477 (''Rule 477'') (withdrawal of the registration statement after application granted by the Commission); 17 CFR 230.479 (''Rule 479'') (order by the Commission that the registration statement has been abandoned); and 17 CFR 230.415(a)(5) (''Rule 415(a)(5)'') (on the third anniversary of the initial effective date of the registration statement).

[180] *See* proposed Rules 152(b)(1), (b)(3), and (b)(4).

[181] Efforts to sell securities through the offering include, but are not limited to, the distribution of any offering materials. For purposes of exemptions permitting the use of general solicitation, the cessation of selling efforts would require the removal of any publicly available general solicitation materials, to the extent possible.

[182] One comment letter supported the definitions as proposed. *See* W. Hubbard Letter. Several other commenters either opposed or suggested alternative definitions or approaches. *See, e.g.,* Shearman & Sterling Letter; CrowdCheck Letter; and J. Clarke Letter.

[183] *See* W. Hubbard Letter (stating that under other alternatives too many ''complications otherwise would arise.'').

[184] *See* CrowdCheck Letter.

[185] *See* Fried Frank Letter (stating that this may occur because the issuer initially believes that it can raise capital without engaging in general solicitation, but subsequently determines that it is unable to raise the capital without engaging in

Several commenters provided further recommendations with regard to specific sections of the definitions on when an offering is considered terminated or completed.[186] In regard to continuous Regulation A Tier 2 offerings that have not been withdrawn or abandoned, one of these commenters noted that under the proposed definition the offering would be deemed completed on the third anniversary of qualification, which would present a problem for purposes of the safe harbors, if the offering by its own terms indicated that it will terminate earlier, for example, one year after qualification.[187]

Some commenters asked the Commission to provide guidance on when an offering is considered to be ''commenced,'' [188] including one commenter who stated that such guidance would be useful, especially in the context of testing the waters or seeking indications of interest in a contemplated securities offering.[189]

Another commenter raised concerns with respect to termination and commencement in the context of shelf registration statements, and noted that if a registered offering is deemed commenced with the filing of the registration statement, the 30-day safe harbor may be effectively unavailable for shelf registration statements.[190] Accordingly, this commenter suggested that in the case of shelf registration statements on 17 CFR 239.13 (''Form S–3'') or 17 CFR 239.33 (''Form F–3''), the relevant commencement date should be the commencement of public efforts to sell the issuer's securities, rather than the filing or existence of a shelf registration statement, and that a particular delayed registered offering, commonly referred to as a take-down (or off the shelf) from an effective shelf registration statement, should be deemed terminated or completed when the distribution of the registered securities has been completed or public efforts to sell the issuer's securities in the proposed registered offering have been abandoned.[191] This commenter also suggested that the completion of the distribution in a registered offering could be determined, for example, by reference to the completion of the distribution within the meaning of 17 CFR 242.100 through 105 (''Regulation M'') under the Exchange Act.[192]

c. Final Amendments

We agree with many of the commenters' suggestions, and, as adopted, we have modified Rule 152 accordingly. We are adopting the provisions of proposed Rule 152(c) regarding when an offering is terminated or completed as new 17 CFR 230.152(d) (''Rule 152(d)''). We also are adopting provisions for determining when an offering has commenced as new Rule 152(c). In addition, we have structured new Rules 152(c) and 152(d) as factors to consider, rather than definitions. We share the concern expressed by a commenter that definitions might not catch all possible circumstances so, consistent with this commenter's suggestion, the rule includes factors to consider, instead of definitions.[193] We believe that this will provide more flexibility to issuers applying the safe harbors to various offering scenarios and, should make both the rule's general principle of integration and the safe harbors more workable.

New Rule 152(c) provides a non-exclusive list of factors to consider in determining when an offering will be deemed to be commenced for purposes of both the general principle of integration in Rule 152(a) and the safe harbors in Rule 152(b). Specifically, regardless of the type of offering, new Rule 152(c) states that an offering of securities will be deemed to be commenced for purposes of Rule 152 at the time of the first offer of securities in the offering by the issuer or its agents, and includes a non-exclusive list of factors that should be considered in determining when an offering is deemed to be commenced. The list of factors covers registered and exempt offerings, noting that an issuer or its agents may commence an offering in reliance on:

- Rule 241, on the date the issuer first made a generic offer soliciting interest in a contemplated securities offering for which the issuer has not yet determined the exemption under the Securities Act under which the offering of securities would be conducted;
- Section 4(a)(2), Regulation D, or Rule 147 or 147A, on the date the issuer first made an offer of its securities in reliance on these exemptions;
- Regulation A, on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on Rule 255, or the public filing of a Form 1–A offering statement;
- Regulation Crowdfunding, on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on new Rule 206, or the public filing of a Form C offering statement; and
- A registration statement filed under the Securities Act for:
  - A continuous offering that will commence promptly on the date of initial effectiveness, on the date the issuer first filed its registration statement for the offering with the Commission, or
  - A delayed offering, on the earliest date on which the issuer or its agents commenced public efforts to offer and sell the securities, which could be evidenced by the earlier of the first filing of a prospectus supplement with the Commission describing the delayed offering, or the issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

Due to their non-public nature, communications between an issuer, or its agents and underwriters, and QIBs and IAIs, including those that would qualify for the safe harbor in 17 CFR 230.163B (''Rule 163B''), will not be considered as the commencement of a registered public offering for purposes of new Rule 152. In contrast, the commencement of private communications between an issuer, or its agents, including private placement agents, and prospective investors in an exempt offering in which general solicitation is prohibited, such as under Rule 506(b) or Section 4(a)(2), may be considered as the commencement of the non-public exempt offering for purposes of new Rule 152, if such private communication involves an offer of securities.

We believe that the safe harbors in new Rule 152(b)(1) and (3) should accommodate and facilitate seasoned

general solicitation and that the issuer should be able to seamlessly, using the same (or substantially identical) offering materials continue the offering in reliance on an exemption permitting general solicitation, such as Rule 506(c)).

[186] *See* Shearman & Sterling Letter; and CrowdCheck Letter (suggesting that the definition with regard to Section 4(a)(2), Regulation D, or Rules 147 and 147A should reference ''conditions outside the issuer's control'' instead of ''outside the investor's control'').

[187] *See* CrowdCheck Letter.

[188] *See* CrowdCheck Letter; Shearman & Sterling Letter; and ABA Letter (expressing concern that it is unclear how the ''commencement'' of an offering would be applied to continuous offerings).

[189] *See* CrowdCheck Letter. *See also* ABA Letter (stating that determining the meaning of ''commencement'' of an offering can cause uncertainty).

[190] *See* Shearman & Sterling Letter (stating that requiring issuers to wait 30 days after the termination of a shelf registration statement before commencing an exempt offering prohibiting general solicitation, or requiring issuers that are engaged in an exempt offering to postpone filing a new shelf registration statement for 30 days after the termination of the exempt offering in order for the safe harbor to be available, would be burdensome for issuers and would not provide incremental protections for investors).

[191] *See id.*

[192] *See id.*

[193] *See* CrowdCheck Letter.

issuers filing shelf registration statements with the Commission. Accordingly, consistent with one commenter's recommendation,[194] for a continuous registered offering that will commence promptly on the date of initial effectiveness,[195] we have included guidance that the commencement of such an offering is likely to occur on the date the issuer first filed its registration statement for the offering with the Commission.[196] However, in the case of a delayed registered offering, we agree that the mere filing or existence of a shelf registration statement, without any actual selling effort or description of the securities to be offered and sold, is unlikely to meaningfully condition the market for a subsequent exempt offering. Therefore, based on the facts and circumstances, the initial public filing of a shelf registration statement with the Commission will not necessarily be deemed to be the commencement of the offering. Rather, commencement of such an offering is likely to occur upon commencement of the public efforts by the issuer, or its agents and underwriters, to offer and sell the securities in the particular delayed registered offering, including the issuance of a widely disseminated public disclosure, such as a press release, or the public filing of a prospectus supplement with the Commission.

We are adopting new Rule 152(d) to provide a non-exclusive list of factors to consider in determining when an offering is deemed to be ''terminated or completed,'' substantially as proposed, but with modifications consistent with commenters' recommendations. Instead of definitions, new Rule 152(d) provides a list of factors to consider in determining when an offering will be deemed to be ''terminated or completed.'' Regardless of the type of offering, Rule 152(d) states that termination or completion of an offering is likely to occur when the issuer and its agents cease efforts to make further offers to sell the issuer's securities under such offering. The rule includes a non-exclusive list of factors that should be considered in determining when an offering is deemed to be terminated or completed, including for offerings made in reliance on:

- Section 4(a)(2), Regulation D, or Rule 147 or 147A, on the later of the date:
  - The issuer entered into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the investor's control)[197]; or
  - The issuer and its agents ceased efforts to make further offers to sell the issuer's securities under such offering;
- Regulation A, on:
  - The withdrawal of an offering statement under Rule 259(a);
  - The filing of a Form 1–Z with respect to a Tier I offering under Rule 257(a);
  - The declaration by the Commission that the offering statement has been abandoned under Rule 259(b); or
  - The date, after the third anniversary of the date the offering statement was initially qualified, on which Rule 251(d)(3)(i)(F) prohibits the issuer from continuing to sell securities using the offering statement, or any earlier date on which the offering terminates by its terms;
- Regulation Crowdfunding, on the deadline of the offering identified in the offering materials pursuant to Rule 201(g), or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under Rule 304(b); or
- A registration statement filed under the Securities Act, on:
  - The withdrawal of the registration statement after an application is granted or deemed granted under Rule 477;
  - The filing of a prospectus supplement or amendment to the registration statement indicating that the offering, or particular delayed offering in the case of a shelf registration statement, has been terminated or completed;
  - The entry of an order of the Commission declaring that the registration statement has been abandoned under Rule 479;
  - The date, after the third anniversary of the initial effective date of the registration statement, on which Rule 415(a)(5) prohibits the issuer from continuing to sell securities using the registration statement, or any earlier date on which the offering terminates by its terms; or
  - Any other factors that indicate that the issuer has abandoned or ceased its public selling efforts in furtherance of the offering, or particular delayed offering in the case of a shelf registration statement, which could be evidenced by:
    - The filing of a Current Report on Form 8–K; or
    - The issuance of a widely disseminated public disclosure by the issuer, or its agents, informing the market that the offering, or particular delayed offering, in the case of a shelf registration statement, has been terminated or completed.

In response to a commenter's suggestion to facilitate reliance on the proposed rule by issuers wishing to terminate an offering of securities in reliance on one exemption and simultaneously commence an offering of the same securities in reliance on another exemption that may not be able to say that the issuer has ''ceased efforts to make further offers to sell'' its securities,[198] we are clarifying in new 17 CFR 230.152(d)(1)(ii) that an issuer and its agents must cease efforts to make further offers to sell the issuer's securities under a particular exempt offering.

In new 17 CFR 230.152(d)(2)(iv) (''Rule 152(d)(2)(iv)''), we have also clarified that the date after the third anniversary of the date a Regulation A offering statement was qualified may constitute the termination or completion of an offering for Rule 152 purposes, due to the operation of Rule 251(d)(3)(i)(F). In addition, in response to a commenter's suggestion,[199] we have also further clarified that a Regulation A offering may terminate on any earlier date on which the offering terminates by its terms.

With respect to a registration statement filed under the Securities Act, in accord with suggestions by another commenter to facilitate issuers undertaking shelf offerings, we have provided that the abandonment or cessation of public selling efforts may be evidenced by the filing of a current report on Form 8–K, or the issuance of a widely disseminated public disclosure by the issuer or its agents, informing the market about the termination of a registered offering, or in the case of a shelf registration statement, a particular

[194] *See* Shearman & Sterling Letter (''In the past three years, 3,697 Form S–3 registration statements were filed by domestic issuers and 405 Form F–3 registration statements by foreign private issuers.''). In this regard, we note the critical importance of shelf registration statements to capital formation. Based on staff analysis of EDGAR filings, during calendar year 2019, we estimate that there were 816 filings on Form S–3 and 273 filings on Form F–3. In addition, we estimate that during this period there were 2,126 domestic automated shelf registration filings (S–3ASR) and 61 foreign automated shelf registration filings (F–3ASR).

[195] *See, e.g.,* 17 CFR 230.415(a)(1)(ix).

[196] Confidentially submitted registration statements and related materials would not be considered as filed for purposes of these rules until they are publicly filed on the Commission's EDGAR system.

[197] By limiting the conditions to those outside the investor's control, an issuer may take the position that an offering is terminated or completed at a point in time prior to the actual closing of the transaction, so long as the only remaining conditions are solely within the issuer's control.

[198] *See* Fried Frank Letter.

[199] *See* CrowdCheck Letter.

delayed offering.[200] We note that a particular delayed offering may be deemed terminated or completed, even though the issuer's shelf registration statement may still have unused capacity, or an aggregate amount of securities available to offer and sell in a later delayed registered offering.

4. Conforming Amendments to Securities Act Exemptions

a. Proposed Amendments

The Commission proposed to replace the integration provisions of several Securities Act exemptions with references to proposed Rule 152. Specifically, the Commission proposed to amend current Rules 502(a), 251(c), 147(g), and 147A(g) to provide cross-references to the new Rule 152. Although Regulation Crowdfunding has no codified integration provision, in the 2015 adopting release, the Commission provided guidance on integration using the same facts-and-circumstances analysis set forth in the Commission's 2015 amendments to Regulation A and 2016 amendments to Rule 147 and adoption of new Rule 147A.[201] The Commission proposed to amend Rule 100 of Regulation Crowdfunding to cross-reference proposed Rule 152(b), which would codify the Commission's existing guidance on integration.

The Commission additionally proposed to eliminate Rules 255(e), 147(h), and 147A(h) as the relief provided by these rules would be provided by proposed Rule 152(b)(3).

b. Comments

Commenters that addressed the proposal generally preferred our proposed approach to replace the current integration provisions in each Securities Act exemption with a cross-reference to proposed Rule 152, instead of revising each exemption's current integration provisions to reflect the provisions of proposed Rule 152.[202]

Commenters also supported codifying in Rule 100 of Regulation Crowdfunding, as proposed, the Commission's existing integration guidance providing that offers and sales made in reliance on Regulation Crowdfunding will not be integrated with other exempt offerings made by the issuer, provided that each offering complies with the requirements of the applicable exemption that is being relied on for the particular offering.[203] One commenter, however, stated that this change was unnecessary if proposed Rule 152 is adopted.[204] Due to the requirements in proposed Rule 152(a)(1) and (b)(1), another commenter stated its belief that applying proposed Rule 152 to Regulation Crowdfunding offerings would be an incomplete solution to Regulation Crowdfunding issuers' concerns.[205] Another commenter asked the Commission to conform existing Rule 500(g) to clarify that the rule applies in addition to, and is not a concept separate from, the general integration rules in Rule 152, such as by cross-referencing Rule 152(b)(2) in Rule 500(g).[206]

c. Final Amendments

We are replacing the integration provisions of several Securities Act exemptions with references to Rule 152, as proposed. Specifically, we are amending Rule 502(a), Rule 251(c), Rule 147(g), and Rule 147A(g) to provide cross-references to the new general principle of integration and safe harbors for integration in Rule 152.We are also similarly amending current Rule 500(g), consistent with a commenter's suggestion. Although we did not propose amending Rule 500(g), we believe a cross-reference to the safe harbor for offers and sales made in compliance with Regulation S in new Rule 152(b)(2) is appropriate to avoid any potential confusion about the intersection between those provisions. This amendment will make it clear that Rule 500(g) provides specific guidance in addition to, and not separate from, the general integration rules in new Rule 152.

We are additionally eliminating Rule 255(e), Rule 147(h), and Rule 147A(h) as the relief provided by these rules is provided by new Rule 152(b)(3). All of these existing integration provisions currently refer to a facts-and-circumstances analysis when their enumerated safe harbors do not apply, and the new Rule 152(b) safe harbors are generally consistent with the current safe harbors in the individual rules.

As proposed, we are also codifying the Commission's guidance on integration of Regulation Crowdfunding offerings by adding a cross-reference to new Rule 152 in a new provision in Rule 100 of Regulation Crowdfunding, which we believe will provide greater certainty to issuers contemplating a Regulation Crowdfunding offering who also may be considering other offerings under the Securities Act. Codification of this guidance should provide issuers that may wish to conduct a Regulation Crowdfunding offering concurrent with a Rule 506(c) offering with certainty and flexibility to help them meet their capital needs.

*B. General Solicitation and Offering Communications*

The Securities Act defines, and the Commission historically has interpreted, the term ''offer'' broadly.[207] The Commission has explained that ''the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer.'' [208] Although the terms ''general solicitation'' and ''general advertising'' are not defined in Regulation D, 17 CFR 230.502(c) (''Rule 502(c)'') does provide examples of general solicitation and general advertising, including advertisements published in newspapers and magazines, communications broadcast over television and radio, and seminars where attendees have been invited by general solicitation or general

[200] *See* Shearman & Sterling Letter. We have not, however, adopted this commenter's suggestion that the completion of distribution in a registered offering could be determined by reference to the completion of the distribution within the meaning of Regulation M under the Exchange Act. We believe including such language in the list of factors to be considered would add an unnecessary layer of complexity to new Rule 152(d), and may also cause unnecessary confusion with respect to the proper scope and application of Regulation M (*e.g.,* market participants may assume incorrectly that Regulation M applies only to registered public offerings, which is not the case).

[201] Securities Act Section 4A(g) states that ''[n]othing in the exemption shall be construed as preventing an issuer from raising capital through means other than [S]ection 4(a)(6).'' Given this statutory language, the Commission provided guidance in the Crowdfunding Adopting Release that an offering made in reliance on Section 4(a)(6) is not required to be integrated with another exempt offering made by the issuer to the extent that each offering complies with the requirements of the applicable exemption that is being relied on for that particular offering. *See* Crowdfunding Adopting Release, at text accompanying notes 1343–1344.

[202] *See* W. Hubbard Letter; D. Burton Letter; and CrowdCheck Letter.

[203] *See* J. Clarke Letter; Netcapital Letter; W. Hubbard Letter; R. Campbell Letter; and D. Burton Letter.

[204] *See* CrowdCheck Letter.

[205] *See* R. Campbell Letter (explaining that due to the requirements in proposed Rule 152(a)(1) and (b)(1), ''[a]n issuer combining a crowdfunding offering with, for example, an offering under Section 4(a)(2) would not be entitled to the integration protection of proposed Rule 152.'').

[206] *See* ABA Letter.

[207] *See* Securities Offering Reform, Release No. 33–8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] (''Securities Offering Reform Release''), at note 88 (''The term 'offer' has been interpreted broadly and goes beyond the common law concept of an offer.'') (*citing Diskin* v. *Lomasney & Co.,* 452 F.2d 871 (2d. Cir. 1971) and *SEC* v. *Cavanaugh,* 1 F. Supp. 2d 337 (S.D.N.Y. 1998)). *See also* Section 2(a)(3) of the Securities Act (noting that an offer includes every attempt to dispose of a security or interest in a security, for value; or any solicitation of an offer to buy a security or interest in a security).

[208] *See* Securities Offering Reform Release, at note 88.

advertising.[209] The Commission has stated that other uses of publicly available media, such as unrestricted websites, also constitute general solicitation and general advertising.[210]

Whether a transaction is one not involving any public offering [211] is essentially a question of fact and necessitates a consideration of the surrounding circumstances, including factors such as the relationship between the offerees and the issuer, and the nature, scope, size, type, and manner of the offering. The Commission adopted Rule 506 of Regulation D in 1982 as a non-exclusive safe harbor under Section 4(a)(2), providing objective standards on which an issuer could rely to meet the requirements of the Section 4(a)(2) exemption, including a prohibition on the use of general solicitation to market the securities.[212]

1. Exemption From General Solicitation for ''Demo Days'' and Similar Events

''Demo days'' and similar events are generally organized by a group or entity (such as a university, angel investors, an accelerator, or an incubator) that invites issuers to present their businesses to potential investors, with the aim of securing investment. As the Commission stated in the Proposing Release, if the issuer's presentation at a ''demo day'' or similar event constitutes an offer of securities, the issuer would not be deemed to have engaged in general solicitation if the organizer of the event has limited participation in the event to individuals or groups of individuals with whom the issuer or the organizer has a pre-existing substantive relationship or that have been contacted through an informal, personal network of experienced, financially sophisticated individuals, such as angel investors.[213] However, we understand that in many cases it may not be practical for the organizer of the event to limit participation in such a manner.

a. Proposed Amendments

The Commission proposed new Rule 148 to provide that certain ''demo day'' communications would not be deemed general solicitation or general advertising.[214] Specifically, as proposed, an issuer would not be deemed to have engaged in general solicitation if the communications are made in connection with a seminar or meeting sponsored by a college, university, or other institution of higher education, a local government, a nonprofit organization, or an angel investor group,[215] incubator, or accelerator.

With respect to the organization and conduct of the event, proposed Rule 148 stated that a sponsor would not be permitted to:

- Make investment recommendations or provide investment advice to attendees of the event;
- Engage in any investment negotiations between the issuer and investors attending the event;
- Charge attendees of the event any fees, other than reasonable administrative fees;
- Receive any compensation for making introductions between attendees and issuers, or for investment negotiations between the parties;
- Receive any compensation with respect to the event that would require it to register as a broker or dealer under the Exchange Act or as an investment adviser under the Advisers Act.

In addition, proposed Rule 148 specified that the advertising for the event may not reference any specific offering of securities by the issuer and that the information conveyed at the event regarding the offering of securities by or on behalf of the issuer would be limited to:

- Notification that the issuer is in the process of offering or planning to offer securities;
- The type and amount of securities being offered; and
- The intended use of the proceeds of the offering.

b. Comments

The comments we received on the proposed exemption from general solicitation for ''demo days'' and similar events were mixed. Many commenters expressed support for the proposal.[216] Some of the commenters generally supported an exemption, but recommended fewer limitations on the exemption.[217] Commenters provided various views on the limitations for entities organizing the events, with some supporting the proposed limits [218] and others recommending targeted expansions, such as including State governments, or broad expansions of the entities permitted to rely on the exemption.[219] One commenter also recommended limiting the pool of investors who may attend the events, noting that the sponsors are likely to attract many non-accredited investors who will be ineligible for many of the exempt offerings that may be presented at an event.[220] Some of the commenters supporting the proposal recommended further clarification of the language used in proposed Rule 148.[221]

[209] *See* Rule 502(c).

[210] *See* Use of Electronic Media for Delivery Purposes, Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)], at Section II.A.D; and Use of Electronic Media Release, at Section II.C.2.

[211] Section 4(a)(2) of the Securities Act exempts from the registration requirements ''transactions by an issuer not involving any public offering,'' but does not define the phrase. 15 U.S.C. 77d(a)(2).

[212] *See* Regulation D Adopting Release, at Section III.C.

[213] *See* Proposing Release, at Section II.B.1.

[214] Because communications that comply with proposed Rule 148 would not be deemed a general solicitation or general advertising, the limitations on the manner of offering in Rule 502(c) of Regulation D would not apply.

[215] A proposed instruction to Rule 148 provided that for purposes of the rules the term ''angel investor group'' means a group: (A) Of accredited investors; (B) that holds regular meetings and has written processes and procedures for making investment decisions, either individually or among the membership of the group as a whole; and (C) is neither associated nor affiliated with brokers, dealers, or investment advisers.

[216] *See, e.g.,* ABA Letter; Letter from Brandon Andrews, et al. dated May 1, 2020 (''B. Andrews, et al. Letter''); Letter from Angel Capital Association dated May 26, 2020 (''ACA Letter''); SEC SBCFAC Letter; Geraci Law Letter; Md. St. Bar Assoc. Letter; Letter from NextSeed Securities LLC dated June 1, 2020 (''NextSeed Letter''); Sō.Capital Letter; W. Hubbard Letter; Letter from Shareholder Advocacy Forum dated June 1, 2020 (''SAF Letter''); Letter from Investment Adviser Association dated June 1, 2020 (''IAA Letter''); Letter from SSTI dated June 1, 2020 (''SSTI Letter''); Invesco Letter; D. Burton Letter; Letter from Morningstar, Inc. dated June 1, 2020 (''Morningstar Letter''); Letter from Crowdwise, LLC dated June 8, 2020 (''Crowdwise Letter''); CrowdCheck Letter; Ketsal Letter; and Letter from Pat Toomey, U.S. Senator dated July 1, 2020 (''Sen. Toomey Letter'').

[217] *See, e.g.,* CrowdCheck Letter (stating concern that the proposed limits on issuer communications would render issuers unable to answer any of the common questions posed by potential investors and recommending only limitations on types of entities permitted to sponsor events); IAA Letter (recommending permitting disclosure of the unsubscribed amount in the offering); ACA Letter (recommending that the Commission permit organizations other than those listed in the proposal to sponsor events, revise the definition of angel investor group, and permit disclosure of the unsubscribed amount in an offering); and Ketsal Letter (recommending fewer limitations on the scope of information conveyed).

[218] *See, e.g.,* CrowdCheck Letter; and Geraci Law Letter.

[219] *See, e.g.,* IAA Letter (recommending broadening the exemption to permit SEC-registered investment advisers that are sponsors of private funds to be included as an entity that may sponsor an event); SSTI Letter (recommending adding ''state governments'' and ''instrumentalities of state and local governments''); ACA Letter (recommending permitting groups of any type, including those associated or affiliated with investment advisers, venture forums, venture capital associations, trade associations, and professional organizations); and D. Burton Letter (recommending including any business or organization other than a broker-dealer or investment adviser).

[220] *See* Geraci Law Letter. *See also* CFA Letter; and NASAA Letter.

[221] *See* ABA Letter (recommending the rule be expressly framed as a non-exclusive ''safe harbor'' such that the issuer may rely on other existing Commission guidance, and that the term ''information regarding an offering'' be clarified to provide that content limitations in the rule do not relate to or prevent communication of factual

In contrast, a number of commenters opposed the proposed exemption, expressing concerns about insufficient investor protections.[222] One of these commenters recommended limiting the exemption by prohibiting any form of control or affiliation with the issuer or group of issuers, prohibiting entities whose sole or primary purpose is to attract investors to private issuers, and limiting an issuer's discussion to factual business information and prohibiting discussion of any potential securities offering.[223]

c. Final Amendments

We are adopting Rule 148 substantially as proposed, with certain modifications in response to commenter feedback. For the reasons discussed in the Proposing Release and below, we believe that exempting certain ''demo day'' communications from the registration requirements of the Securities Act will further the public interest while being consistent with the protection of investors.

As discussed above, the Commission proposed to include local governments in the list of entities permitted to rely on the exemption. In response to comments, we are expanding the types of entities that may sponsor an event to include State governments and instrumentalities of State and local governments. We are also revising the definition of ''angel investor group'' to specify that such a group must have ''defined'' processes and procedures for making investment decisions, but that such processes and procedures do not necessarily need to be written. In addition, to address concerns raised by commenters with respect to the possibility of offering-related communications being made broadly to non-accredited investors, we are adopting certain limitations on the types of investors that may attend virtual events as a condition to the availability of Rule 148. In a change from the proposal, we have also added a requirement that more than one issuer participate in the seminar or meeting in order for new Rule 148 to apply.

As adopted, an issuer will not be deemed to have engaged in general solicitation if the communications are made in connection with a seminar or meeting sponsored by a college, university, or other institution of higher education, a State or local government or instrumentality of a State or local government, a nonprofit organization, or an angel investor group, incubator, or accelerator. We believe it is appropriate to add State governments and instrumentalities of State or local governments to the list of eligible sponsors, because, as mentioned by commenters, State as well as local governments, and special entities created by such governments, may conduct significant economic development activities. Due to their similarities, we do not believe it is necessary to differentiate between State and local governments for this purpose.

With respect to the definition of angel investor groups, we are persuaded by commenters who recommended that such groups be required to have ''defined processes and procedures'' for investment decisions rather than requiring written processes and procedures. We understand from such commenters that there are established angel investor groups that have well-settled and defined, but not necessarily written, processes and procedures for investment decisions. Therefore, this change from the proposal will reflect the way that many angel groups are organized and administered, and will not disrupt existing angel investor group practices by requiring them to formally memorialize their established processes and procedures.

We do not believe it is appropriate to further expand the list of eligible sponsors, as suggested by some commenters, to include entities such as sponsors of private funds, venture forums, venture capital associations, trade associations, and professional organizations. In addition, we do not believe it is appropriate to expand the proposed definition of angel investor groups to include groups associated or affiliated with brokers, dealers, or investment advisers, and therefore are adopting the proposed instruction to Rule 148 that excludes such groups from the definition.[224] We note that some of these organizations may be able to qualify as eligible sponsors under the proposed categories, for example, if they are organized as non-profit organizations. We also do not agree with commenters who recommended that we exclude from the scope of the exemption any sponsors that control or are affiliated with the issuer or group of issuers, in light of the limits on the sponsors' activities. We believe the tailored list of organizations eligible to act as event sponsors and the exclusion of brokers, dealers and investment advisers from the scope of the exemption will help to limit the application of Rule 148 to events sponsored by organizations less likely to have a profit motive for their involvement in the event or whose sole or primary purpose is to attract investors to private issuers. In order to address commenters' concerns about the potential misuse of the exemption and clarify the nature of the events covered by new Rule 148, we have also added a requirement that more than one issuer participate in the seminar or meeting. This requirement will help to prevent an organization from attempting to hold an event that is, in essence, a sales pitch for the securities of one issuer, while characterizing the event as a ''demo day.''

As proposed, under the final rule the sponsor will not be permitted to:

- Make investment recommendations or provide investment advice to attendees of the event;
- Engage in any investment negotiations between the issuer and investors attending the event;
- Charge attendees of the event any fees, other than reasonable administrative fees;
- Receive any compensation for making introductions between event attendees and issuers, or for investment negotiations between the parties; or
- Receive any compensation with respect to the event that would require it to register as a broker or dealer under the Exchange Act, or as an investment adviser under the Advisers Act.

In addition, as proposed, the advertising for the event may not reference any specific offering of securities by the issuer.

We believe that these limitations on the sponsors' activities provide

business information); ACA Letter (recommending use of ''defined processes and procedures'' instead of ''written processes and procedures'' in the definition of ''angel investor group'' to better provide for how angel groups work); Morningstar Letter (recommending that information provided to third parties conducting independent analysis not constitute an offering); Sō.Capital Letter (seeking clarification that traditional events, such as a university-sponsored prominent speaker series, for which a fee is typically charged, which may be supplemented by the sponsor to include a ''demo day''-type event at no charge, would not be prohibited); and SSTI Letter (recommending clarification of the duration of the prohibition on investment negotiations, whether the sponsor may negotiate with issuers or investors separately, and the difference between providing advice and investment negotiations). *See also* IAA Letter (recommending that the Commission provide guidance that communications not intended for public consumption do not constitute general solicitation).

[222] *See, e.g.,* NASAA Letter; AFREF Letter; Better Markets Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter.

[223] *See* NASAA Letter.

[224] We acknowledge that members of angel investor groups may include individuals who are employed as brokers, dealers, or investment advisers. Such an individual's membership in the group will not, by itself, result in the angel investor group being deemed to be associated or affiliated with brokers, dealers, or investment advisers for the purpose of new Rule 148.

important investor protections by limiting the potential for a sponsor to profit from its involvement or to have a potential conflict of interest due to its relationships with either the issuer or investors attending the event and that it is not necessary to adopt additional restrictions on the relationship between sponsors and the issuers involved in the event. Similarly, although some commenters sought clarification, we are not providing bright-line rules as to whether the administrative fees charged by the sponsor are reasonable, but emphasize that the limitation on fees should be construed consistent with our goal of limiting the potential for a sponsor to profit from its involvement. We note that the limitation on fees charged to attendees of an event is not intended to limit a sponsoring organization's ability to collect membership dues or similar fees from individuals.

As noted above, some commenters raised concerns about these events allowing for broad offering-related communications to non-accredited investors. We share this concern, particularly in light of the increasing prevalence of virtual ''demo days'' that are more accessible and widely attended by the general public. In light of these concerns, we are persuaded that an incremental approach to relaxing ''demo day'' communication restrictions is warranted with respect to events that are conducted, in whole or in part, in a virtual format. Accordingly, we are narrowing the scope of the proposed exemption so that online participation in the event is limited to: (a) Individuals who are members of, or otherwise associated with the sponsor organization (for example, members of an angel investor group or students, faculty, or alumni of a college or university); (b) individuals that the sponsor reasonably believes are accredited investors; or (c) individuals who have been invited to the event by the sponsor based on industry or investment-related experience reasonably selected by the sponsor in good faith and disclosed in the public communications about the event.

In contrast to an online event, the number of potential investors who can attend an in-person ''demo day'' event is limited by factors such as venue size, administrative capacity, and distance from the event. The limitations we are adopting will help prevent broad offering communications over the internet to unlimited numbers of non-accredited investors by requiring the sponsor to limit participation to a population of potential investors related to the sponsor or about whose qualifications the sponsor has some knowledge, but at the same time will provide sponsors with ample flexibility to continue to conduct such events.

We are adopting the limitations on the information conveyed at the event regarding the offering of securities by or on behalf of the issuer as proposed, with one expansion in response to comment. As adopted the issuer is allowed to convey only:

- Notification that the issuer is in the process of offering or planning to offer securities;
- The type and amount of securities being offered;
- The intended use of the proceeds of the offering; and
- The unsubscribed amount in an offering.

We believe that permitting an issuer to disclose the unsubscribed amount in an offering will provide investors with useful information, but is unlikely to affect investor protection in light of the limits on the overall information about the offering that may be conveyed, and the fact that potential investors will be able to seek additional disclosure about the investment opportunity outside of the event setting. We do not agree with commenters who suggested other expansion of the information that issuers may convey about an offering of securities. The exemption provided by new Rule 148 is not intended to provide for broad communication about a securities offering at a ''demo day'' event. Rather, the rule is intended to allow issuers, in discussing their business plans with potential investors at these events, the flexibility to note that they are seeking capital without uncertainty as to whether they have jeopardized their ability to rely on a certain exemption from registration.[225]

Overall, we believe that expanding the information permitted to be conveyed beyond the limits in the final rules may undermine the prohibition on general solicitation that is an important condition of certain exemptions. The limited scope of the offering-related communications permitted under the exemption, along with the limitations on online participation and a sponsor's ability to profit from the event, should help to address commenters' concerns about the potential for increased risk of fraud or misconduct. Moreover, issuers may continue to rely on our previously issued guidance, and not be subject to the conditions of Rule 148, including the limit on communications, if the organizer of the event has limited participation in the event to individuals or groups of individuals with whom the issuer or the organizer has a pre-existing substantive relationship or that have been contacted through an informal, personal network of experienced, financially sophisticated individuals.[226]

2. Solicitations of Interest

As discussed in the Proposing Release, we believe that it is helpful for issuers to be able to gauge interest in a securities offering prior to incurring the expense of preparing and conducting an offering. Securities Act Rule 163B permits issuers and those authorized to act on their behalf to gauge market interest in a registered securities offering through discussions with QIBs and IAIs prior to, or following, the filing of a registration statement.[227] Regulation A also permits issuers to test the waters with, or solicit interest in a potential offering from, the general public either before or after the filing of the offering statement.[228] These solicitations of interest are deemed to be offers of a security for sale for purposes of the antifraud provisions of the Federal securities laws.[229]

a. Generic Solicitation of Interest Exemption

i. Proposed Amendments

The Commission proposed new Rule 241 to permit an issuer to use generic solicitation of interest materials for an offer of securities prior to a making a determination as to the exemption under which the offering may be conducted.[230] As proposed, Rule 241 would not permit an issuer to identify the specific exemption from registration on which it intends to rely for a subsequent offer and sale of the securities. Proposed Rule 241(b) would

[225] We understand that small businesses may face challenges in accessing capital when they are not able to note that they are seeking capital when pitching their business to potential investors. *See, e.g.,* Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf,* at 70 (''Entrepreneurs, when they leave out this vital information, they are pitching with one arm behind their back, and this is a deterrent to accessing the capital from professional sources that help these companies scale, create jobs and grow the U.S. economy.'').

[226] *See* Proposing Release, at Section II.B.1.

[227] *See* Solicitations of Interest Prior to a Registered Public Offering, Release No. 33–10699 (Sep. 25, 2019) [84 FR 53011 (Oct. 4, 2019)] (''Solicitations of Interest Release''). Securities Act Section 5(d) [15 U.S.C. 77e(d)] statutorily provides these accommodations to emerging growth companies. Securities Act Rule 163B extends these accommodations to all issuers, including fund issuers.

[228] *See* 17 CFR 230.255.

[229] *See* Solicitations of Interest Release; and 17 CFR 230.255(a).

[230] Proposed Rule 241 was substantially based on Rule 255 of Regulation A.

require the generic testing-the-waters materials to provide specific disclosures notifying potential investors about the limitations of the generic solicitation of interest.

As proposed, these solicitations would be deemed to be offers of a security for sale for purposes of the antifraud provisions of the Federal securities laws.[231] Furthermore, depending on the method of dissemination of the information, such offers may be considered a general solicitation. Proposed Rule 241 would provide an exemption from registration only with respect to the generic solicitation of interest, not for a subsequent offer or sale. Should the issuer move forward with an exempt offering following the generic solicitation of interest, the issuer would need to comply with an available exemption for the subsequent offering, and investors would have the benefit of the investor protections encompassed in such exemption.

In the event that the issuer commences an offering under Regulation A or Regulation Crowdfunding within 30 days of the generic solicitation, in addition to the information currently required to be disclosed under Regulation A and Regulation Crowdfunding, the Commission proposed to require that the generic solicitation materials be made publicly available as an exhibit to the offering materials filed with the Commission.[232] The Commission also proposed to require an issuer that sells securities under Rule 506(b) to any purchaser that is not an accredited investor within 30 days of the generic solicitation of interest to provide such purchaser with any written communication used under proposed Rule 241.

ii. Comments

Commenters' views were mixed. Many commenters expressed support for the proposal.[233] Some commenters that supported the proposal recommended that the Commission permit use of the exemption even if an issuer has identified the exemption on which it intends to rely.[234] One of these commenters stated that determining when an issuer has decided to proceed with a specific exemption is difficult and could work counter to thoughtful exploration of which exemption to use.[235] This commenter recommended permitting issuers to use Rule 241 so long as an offering statement under Regulation A or Regulation C has not been filed. Some commenters that were generally supportive of the proposal recommended that the exemption permit a generic public solicitation followed by a private offering.[236]

A number of commenters opposed the proposal.[237] Some of these expressed concern that expanding the testing-the-waters provisions would weaken investor protection.[238] One of these commenters suggested that a generic testing-the-waters provision that provides information without indicating what kind of offering is to follow blurs the line between what is acceptable for a Rule 506(b) offering and what constitutes general solicitation.[239] One commenter expressed concern that the proposed rule would permit an issuer to engage in testing-the-waters communications with all types of investors prior to a registered offering.[240]

Commenters generally supported the proposed requirements to file generic solicitation materials when followed by a Regulation A or Regulation Crowdfunding offering[241] and to provide those materials to non-accredited investors in a Rule 506(b) exempt offering within 30 days of the generic solicitation.[242] However, one commenter expressly opposed requiring the filing of generic solicitation materials.[243] Several commenters also recommended that the Commission preempt State securities law registration and qualification requirements for offers made under proposed Rule 241.[244]

iii. Final Amendments

We are adopting the proposed amendments substantially as proposed, using our exemptive authority under Section 28 of the Securities Act to create a new offering exemption. New Rule 241 exempts the class of persons who are issuers and use generic solicitation of interest materials pursuant to the conditions of the rule from the prohibitions on offers prior to filing a registration statement in Section 5(c) of the Securities Act.[245] As discussed in the Proposing Release and below, we believe that the proposed amendments include appropriate investor protections and further the public interest by allowing issuers to gauge market interest, tailor the size and other terms

[231] Proposed Rule 241(a).

[232] *See* proposed Rule 201(z); and proposed paragraph 13 of Form 1–A, Part III, Item 17. Currently, an issuer that solicits indications of interest in reliance on Rule 255 of Regulation A is required to submit or file solicitation materials to the Commission as an exhibit when the offering statement is either submitted for non-public review or filed (and update for substantive changes in such material after the initial nonpublic submission or filing).

[233] *See, e.g.,* ABA Letter; B. Andrews, et al. Letter; Letter from Crowdfunding Professional Association dated May 22, 2020 (''CfPA Letter''); SEC SBCFAC Letter; J. Clarke Letter; Republic Letter; Sō.Capital Letter; Letter from Michael H. Shuman, Esq. dated June 1, 2020 (''M. Shuman Letter''); W. Hubbard Letter; SAF Letter; IAA Letter; Invesco Letter; D. Burton Letter; R. Campbell Letter; and CrowdCheck Letter.

[234] *See, e.g.,* ABA Letter; SIFMA Letter; and Invesco Letter.

[235] *See* ABA Letter.

[236] *See, e.g.,* ABA Letter (recommending permitting an issuer to conduct an offering for which general solicitation is not permitted 20 days following termination of the generic solicitation or, in the alternative, another specific period of time such as 90 days as provided in proposed Rule 506(b)(2)(i)); CfPA Letter (recommending a 90-day safe harbor after which a private offering could be made following a generic public solicitation); SIFMA Letter (recommending permitting a private offering to QIBs and IAIs after a generic public solicitation); R. Campbell Letter (recommending eliminating the requirements in proposed Rule 152(a)(1) and (b)(1), so that issuers may rely on proposed Rule 152 for integration protection, if the offering following the generic solicitation was made pursuant to an exemption provided by Section 4(a)(2), Rule 504 or Rule 506(b)); and M. Shuman Letter (recommending permitting private offerings after the generic solicitation).

[237] *See, e.g.,* NASAA Letter; AFREF Letter; Better Markets Letter (questioning the Commission's authority to adopt the rule); CFA Letter; R. Rutkowski Letter; CFA Institute Letter; and IPA Letter.

[238] *See, e.g.,* NASAA Letter (suggesting the rules would be evaded and exploited); and CFA Letter.

[239] *See* IPA Letter.

[240] *See* Better Markets Letter.

[241] *See, e.g.,* J. Clarke Letter; W. Hubbard Letter; CrowdCheck Letter (recommending not requiring the filing of materials used more than 30 days prior to the offering); and Ketsal Letter.

[242] *See, e.g.,* Geraci Law Letter; J. Clarke Letter (recommending filing all solicitation materials); W. Hubbard Letter; and CrowdCheck Letter (supporting providing the materials to investors, but not filing with the Commission).

[243] *See* NextSeed Letter (acknowledging, however, the potential benefit of requiring the filing of materials that occurred immediately prior to the offering).

[244] *See, e.g.,* D. Burton Letter; W. Hubbard Letter; CrowdCheck Letter (suggesting lack of preemption would affect utility); R. Campbell Letter (suggesting lack of preemption could subject the issuer to civil and criminal liabilities under State securities laws and legal counsel to risks relating to professional ethical rules); and Ketsal Letter (suggesting there is no practical reason to distinguish between communications made pursuant to any of Rule 506, Rule 255, or proposed Rule 206, all of which preempt, or will preempt, State securities law requirements, and proposed Rule 241).

[245] As noted above, one commenter questioned the Commission's authority to adopt Rule 241. *See* Better Markets Letter. Section 28 of the Securities Act gives the Commission broad authority to ''conditionally or unconditionally exempt any person . . . or any class or classes of persons . . . from any provision or provisions of'' the Securities Act and rules or regulations issued thereunder ''to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.'' 15 U.S.C. 77z–3. Notwithstanding the commenter's suggestion, nothing in the JOBS Act indicates that Congress sought to limit the Commission's ability to extend the accommodations currently available to emerging growth companies to other issuers, nor does Section 28 include any such limitation. The final rule's use of exemptive authority is thus consistent with the plain language of Section 28.

of the offering (possibly with input from potential investors), and reduce the costs of conducting an exempt offering.[246]

As noted above, commenters that addressed the proposal were generally supportive of the proposed changes. We are not persuaded by commenters who recommended that we revise the rule to permit an issuer to conduct a general solicitation of interest after the issuer has identified the specific exemption on which it intends to rely. We believe that limiting generic solicitations of interest to solicitations prior to the issuer's determination of which exemption to use appropriately and adequately differentiates these testing-the-waters communications, which are meant to gauge preliminary market interest, from offers that occur closer to the time of sale. Because the determination of which exemption will be used is within the issuer's control, we believe that issuers and their advisers should be able to apply the new rule to their specific circumstances. We disagree with the suggestion from a commenter that an issuer should be permitted to rely on new Rule 241 after determining to conduct a Regulation Crowdfunding or Regulation A offering, so long as the issuer has not filed a Form C for a Regulation Crowdfunding offering or a Form 1–A for a Regulation A offering. To do so would undermine the utility of the existing Regulation A testing-the-waters provision and the new Regulation Crowdfunding testing-the-waters provision we are adopting in this release, and may lead to potential confusion for issuers and investors over which rule applies once an issuer has determined the exemption on which it will rely.

Under new Rule 241, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated offering of securities exempt from registration under the Securities Act.[247] The rule provides an exemption from registration only with respect to the generic solicitation of interest and the solicitation will be deemed to be an offer of a security for sale for purposes of the antifraud provisions of the Federal securities laws. In addition, no solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the issuer makes a determination as to the exemption on which it will rely and commences the offering in compliance with the exemption.

If the issuer moves forward with an exempt offering following the generic solicitation of interest, it will be required to comply with an applicable exemption for the subsequent offering, and investors will have the benefit of the investor protections included in such exemption. We are not persuaded by commenters that recommended expanding the generic solicitation of interest rules to permit private offerings immediately following public solicitations of interest or to provide a safe harbor that would permit private offerings after a prescribed period of time following a public solicitation of interest. Similarly, we do not believe it is necessary to provide, as suggested by a commenter, that testing-the-waters activity limited to QIBs and IAIs would not result in the Rule 241 offer being integrated with a subsequent private placement that does not permit general solicitation. We believe, as the commenter noted, that an issuer may reasonably conclude on its own that testing-the-waters activity so limited would not constitute general solicitation, depending on the facts and circumstances.

As discussed in the Proposing Release, if the generic solicitation is done in a manner that would constitute general solicitation, and the issuer ultimately decides to conduct an unregistered offering under an exemption that does not permit general solicitation, the issuer will need to analyze whether that solicitation and the subsequent private offering will be integrated, thereby making unavailable an exemption that does not permit general solicitation. Under the new integration rules adopted in this release, an issuer will not be able to follow a generic solicitation of interest that constituted a general solicitation with an offering pursuant to an exemption that does not permit general solicitation, such as Rule 506(b), unless the issuer has a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either did not solicit such purchaser through the use of general solicitation or established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.[248]

Rule 241 further requires the generic testing-the-waters materials to provide specified disclosures notifying potential investors about the limitations of the generic solicitation. The issuer's communications must state that:

(1) The issuer is considering an offering of securities exempt from registration under the Act, but has not determined a specific exemption from registration the issuer intends to rely on for the subsequent offer and sale of the securities;

(2) No money or other consideration is being solicited, and if sent in response, will not be accepted;

(3) No offer to buy the securities can be accepted and no part of the purchase price can be received until the issuer determines the exemption under which the offering is intended to be conducted and, where applicable, the filing, disclosure, or qualification requirements of such exemption are met; and

(4) A person's indication of interest involves no obligation or commitment of any kind. The rule additionally provides that the communication may include a means for a person to indicate interest in a potential offering and an issuer may require such indication to include the person's name, address, telephone number, and/or email address. We are adopting these provisions as proposed as commenters were generally supportive of this aspect of Rule 241, providing no recommendation to further revise these requirements.

In addition, we are adopting amendments to Regulation A and Regulation Crowdfunding as proposed to require that the Rule 241 generic solicitation materials be made publicly available as an exhibit to the offering materials filed with the Commission if the Regulation A or Regulation Crowdfunding offering is commenced within 30 days of the generic solicitation.[249] As discussed above, commenters generally supported this aspect of the proposed rules. Although some commenters expressed the view that such a requirement would be unnecessary, we believe that issuers should be accountable for the content of solicitation materials and that the

[246] *See, e.g.,* Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf,* at 70 (''Startups and young companies, by their nature, are capital constrained. Expanding that test-the-waters rule provides them flexibility to explore the optimal avenue for raising capital before spending multiple thousands of dollars on legal fees.'').

[247] To avoid any confusion with respect to the scope of the exemption, we have revised Rule 241 from the proposal to make it clear that it applies only to solicitations of interest relating to contemplated offerings of securities exempt from registration under the Securities Act.

[248] *See* new Rules 152(a)(1) and 152(b)(1); and *supra* Sections II.A.1 and II.A.2.

[249] *See* new Rule 201(z) and paragraph 13 of Form 1–A, Part III, Item 17. In connection with this amendment to Rule 201, we are also renumbering current paragraph (z), which is a temporary provision, as paragraph (aa).

requirement will help ensure that issuers use solicitation materials with appropriate caution. We are requiring issuers to file these materials only during the 30-day time period because once 30 days elapses following a terminated or completed generic solicitation, that offer would not be subject to integration with a subsequent Regulation Crowdfunding offering in accordance with new Rule 152(b)(1).

We are also adopting, as proposed, the requirement that an issuer provide purchasers with any written generic solicitation of interest materials used under new Rule 241 if the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation of interest to any purchaser that is not an accredited investor. This provision, which we believe is appropriate for the same reasons as discussed above with respect to Regulation A and Regulation Crowdfunding, will apply whether or not the issuer engaged in general solicitation through its communications under new Rule 241 and whether or not the generic solicitation would be subject to integration with the Rule 506(b) offering. Consistent with Rule 255 of Regulation A, these amendments to Regulation A, Regulation Crowdfunding, and 17 CFR 230.502(b) (''Rule 502(b)'' of Regulation D) require issuers to provide any written communications or broadcast scripts used under new Rule 241.

While some commenters recommended that we preempt State blue sky laws for these offers, we are not doing so at this time. We acknowledge the concerns raised by commenters about the possibility that the lack of preemption will affect the utility of the new rule and potentially subject issuers to civil and criminal liabilities under State blue sky laws. However, in light of the novel nature of this new exemption and the concerns expressed by other commenters about potential misuse of the exemption, we believe a more measured approach is warranted.[250] We believe that generic solicitation of interest can still be useful to issuers and investors without such preemption and that issuers and their advisers will be able to navigate applicable State law requirements as they have done in connection with other Federal exemptions from registration that do not provide for preemption. Although we are not preempting State securities law registration and qualification requirements at this time, the Commission will have the opportunity to receive feedback on how State regulation may be affecting the use of generic solicitations of interest through its Small Business Capital Formation Advisory Committee and annual Small Business Forum, and that feedback may help inform future determinations about whether State law preemption is warranted.

b. Regulation Crowdfunding

Rule 255 of Regulation A permits an issuer to test the waters prior to filing the offering statement with the Commission. In contrast to Regulation A, an issuer conducting an offer pursuant to Regulation Crowdfunding currently may not solicit interest or make offers or sales under Regulation Crowdfunding prior to filing a Form C with the Commission.[251]

i. Proposed Amendments

The Commission proposed to permit Regulation Crowdfunding issuers to test the waters orally or in writing prior to filing a Form C with the Commission under proposed Rule 206, which is based on existing Rule 255 of Regulation A.[252] As proposed, Rule 206 would permit issuers to test the waters with potential investors, and such testing-the-waters materials would be considered offers subject to the antifraud provisions of the Federal securities laws. Similar to Rule 255, proposed Rule 206 would require issuers to include legends providing that:

- No money or other consideration is being solicited, and if sent, will not be accepted;
- No sales will be made or commitments to purchase accepted until the Form C offering statement is filed with the Commission and only through an intermediary's platform; and
- Prospective purchaser's indications of interest are non-binding.

In addition, pursuant to proposed Rule 201(z), issuers would be required to include any Rule 206 solicitation materials with the Form C that is filed with the Commission. Unlike Rule 255 of Regulation A, which permits issuers to use testing-the-waters materials both before and after the filing of the offering statement with the Commission, proposed Rule 206 would only permit testing the waters before the Form C is filed. Once the Form C is filed, any offering communications would be required to comply with the terms of Regulation Crowdfunding, including the Rule 204 advertising restrictions.

ii. Comments

Commenters addressing the proposal generally supported permitting testing-the-waters communications in Regulation Crowdfunding offerings.[253] Some of these commenters recommended permitting broad testing the waters with few limits,[254] while others recommended only permitting testing the waters through the use of or after engaging an intermediary.[255] Some of these commenters additionally suggested that permitting testing the waters in Regulation Crowdfunding will improve the offering process for issuers[256] and be a benefit to potential investors.[257] In contrast, one commenter expressed concern that relaxing the restrictions on testing-the-waters communications in the crowdfunding market could put investors at risk.[258]

iii. Final Amendments

We are adopting the amendments as proposed to permit Regulation Crowdfunding issuers to test the waters orally or in writing prior to filing a Form

[250] As we noted in the Proposing Release, in connection with the 2015 amendments to Regulation A, the Commission did not provide for preemption of State securities law registration and qualification requirements for Tier 1 offerings in light of concerns raised by State regulators about the testing-the-waters provisions applicable to Regulation A, as well as what the Commission anticipated would be the generally more local nature of Tier 1 offerings.

[251] *See* Section 4A(b) of the Securities Act.

[252] The Commission also proposed an amendment to Rule 204 to permit issuers to engage in communications under proposed Rule 206.

[253] *See, e.g.,* Letter from Andrew A. Schwartz dated May 21, 2020 (''A. Schwartz Letter''); Letter from Wefunder dated May 28, 2020 (''Wefunder Letter''); SEC SBCFAC Letter; J. Clarke Letter; Silicon Prairie Letter; Republic Letter; NextSeed Letter; Sõ.Capital Letter; W. Hubbard Letter; SAF Letter; Letter from Engine Advocacy dated June 1, 2020 (''Engine Letter''); D. Burton Letter; Letter from InnaMed, Inc., et al. dated June 1, 2020 (''InnaMed, et al. Letter''); Letter from SeedInvest dated June 4, 2020 (''SeedInvest Letter''); Crowdwise Letter; CrowdCheck Letter; Letter from Honeycomb Credit Inc. dated June 17, 2020 (''Honeycomb Letter''); R. Campbell Letter; and Ketsal Letter. *See also* Letter from Association of Online Investment Platforms, dated September 1, 2020 (''AOIP Letter'') (suggesting the Commission immediately allow Regulation Crowdfunding issuers to test the waters prior to the filing of a Form C in response to the COVID–19 pandemic).

[254] *See, e.g.,* A. Schwartz Letter (recommending permitting advertising and general solicitations); and InnaMed, et al. Letter. *See also* D. Burton Letter; and W. Hubbard Letter (each suggesting that additional restrictions on the manner of communication are unnecessary).

[255] *See, e.g.,* NextSeed Letter; and CrowdCheck Letter. *See also* CFA Letter (expressing opposition to the proposal and supporting restricting crowdfunding communications to communications through intermediary platforms, both before and after a Form C is filed with the Commission).

[256] *See, e.g.,* SeedInvest Letter; and Honeycomb Letter.

[257] *See, e.g.,* Wefunder Letter (suggesting investors may be able to set more reasonable terms); and Engine Letter (suggesting investors will be able to avoid committing equity to campaigns not likely to be successful).

[258] *See* CFA Letter (expressing concern about the proposal due to the poor record of issuer compliance with Regulation Crowdfunding rules).

C with the Commission under Rule 206, which is based on existing Rule 255 of Regulation A.[259] For the reasons discussed below, we believe that permitting Regulation Crowdfunding issuers to engage in such communications will further the public interest while being consistent with the protection of investors.

As adopted, new Rule 206 permits issuers to test the waters with all potential investors. Like Rule 255, Rule 206 requires issuers to include legends in the testing-the-waters materials. Specifically, Rule 206 requires issuers to state that: (1) No money or other consideration is being solicited, and if sent, will not be accepted; (2) no offer to buy the securities can be accepted and no part of the purchase price can be received until the offering statement is filed and only through an intermediary's platform;[260] and (3) a prospective purchaser's indication of interest is non-binding. These testing-the-waters materials would be considered offers that are subject to the antifraud provisions of the Federal securities laws. We are additionally amending 17 CFR 227.201(z) (''Rule 201(z)'') as proposed to require issuers to include any Rule 206 solicitation materials with the Form C that is filed with the Commission. We believe that making the solicitation materials publicly available will promote accountability for the content of those materials and help to ensure that they are consistent with the information contained in the Regulation Crowdfunding offering materials.

Unlike Rule 255 of Regulation A, which permits issuers to use testing-the-waters materials both before and after the filing of the offering statement with the Commission, Rule 206 will only permit issuers to use testing-the-waters materials before the Form C is filed. Once the Form C is filed, any offering communications are required to comply with the terms of Regulation Crowdfunding, including the Rule 204 advertising restrictions. We believe this is appropriate because, while sales under Regulation A may not occur until after the offering statement is qualified, a Regulation Crowdfunding intermediary may accept investment commitments from the time of filing the Form C.

Although some commenters suggested that we require testing the waters to be conducted only through intermediary platforms, we believe that such a requirement would unnecessarily limit the flexibility provided by the new rule by effectively requiring an issuer to enter into a formal relationship with an intermediary prior to determining whether it will proceed with an offering under Regulation Crowdfunding. Nevertheless, we believe issuers may choose to engage an intermediary before testing the waters so that they have a readily available means to receive feedback and questions from prospective investors.

We acknowledge the concern raised by some commenters about the increased communications permitted by new Rule 206—and other proposed changes to the requirements of Regulation Crowdfunding[261]—in light of questions about the extent of issuer compliance with existing Regulation Crowdfunding requirements. We remind issuers of their obligation to comply with the terms, conditions, and requirements of Regulation Crowdfunding and the serious consequences that may result from a failure to do so, such as the potential loss of the exemption and ensuing potential private rights of action for rescission for violations of Section 5 of the Securities Act and loss of preemption for State securities law registration requirements.[262] We also remind intermediaries of their obligation under 17 CFR 227.301(a) (''Rule 301(a)'') to have a reasonable basis for believing that an issuer seeking to offer and sell securities in reliance on Section 4(a)(6) through the intermediary's platform complies with the requirements in Securities Act Section 4A(b) and the related requirements in Regulation Crowdfunding.[263] Commission staff will continue to work with FINRA to assess issuer and intermediary compliance with the requirements of Regulation Crowdfunding.

In light of the foregoing, we believe that permitting issuers to test the waters orally or in writing prior to incurring the expense of filing a Form C with the Commission may greatly facilitate the use of the Regulation Crowdfunding exemption, as well as limit the costs incurred by those issuers. We further believe that the flexibility afforded by the amendment will benefit investors, who will be able to have input into the structuring of the offering and convey to the issuer the types of information about which they are most interested.[264]

### 3. Other Regulation Crowdfunding Offering Communications

An issuer may not advertise the terms of a Regulation Crowdfunding offering[265] outside of the intermediary's platform except in a notice that directs investors to the intermediary's platform and is limited to the information enumerated in Rule 204 of Regulation Crowdfunding.[266] An issuer may communicate with investors and potential investors about the terms of the offering through communication channels provided on the intermediary's platform.[267]

#### a. Proposed Amendments

The Commission proposed to amend Rule 204 to permit oral communications with prospective investors once the Form C is filed, so long as the communications comply with the requirements of Rule 204.[268] The proposed changes would align the Regulation Crowdfunding

[259] We are amending 17 CFR 227.203(a)(1) (''Rule 203(a)(1)'') to clarify that a Regulation Crowdfunding issuer may rely on new Rule 206 to offer securities prior to filing a Form C with the Commission. We are also amending Rule 204, as proposed, to permit issuers to engage in communications under new Rule 206.

[260] The Proposing Release discussed, but the proposed text of Rule 206 did not include, the phrase ''and only through an intermediary's platform.'' Rule 206 as adopted includes this language, which is consistent with 17 CFR 227.100(a)(3).

[261] *See infra* note 428.

[262] While 17 CFR 227.502(a) sets forth a safe harbor for insignificant deviations, 17 CFR 227.502(b) makes it clear that such safe harbor does not preclude the Commission from bringing an enforcement action seeking appropriate relief for an issuer's failure to comply with all applicable terms, conditions, and requirements of Regulation Crowdfunding.

[263] Rule 301(a) also permits intermediaries to reasonably rely on representations of the issuer, unless the intermediary has reason to question the reliability of those representations. As discussed in the Crowdfunding Adopting Release, in satisfying the requirements of Rule 301(a), an intermediary has a responsibility to assess whether it may reasonably rely on an issuer's representation of compliance through the course of its interactions with potential issuers. *See* Crowdfunding Adopting Release, at Section II.C.3.a.(3).

[264] *See, e.g.,* Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf,* at 72–73 (noting that when investors are involved earlier in the process, it allows more time for them to ''garner more information to make a well informed decision'' when it is time to make an investment).

[265] For purposes of Rule 204, the ''terms of [a Regulation Crowdfunding] offering'' currently means the amount of securities offered, the nature of the securities, the price of the securities and the closing date of the offering period.

[266] Rule 204 limits the information to: A statement that the issuer is conducting an offering pursuant to Section 4(a)(6) of the Securities Act, the name of the intermediary through which the offering is being conducted, and a link directing the potential investor to the intermediary's platform; the terms of the offering; and specified factual information about the legal identity and business location of the issuer.

[267] *See* 17 CFR 227.204(c).

[268] For a discussion of the proposals regarding communications prior to the filing of a Form C, *see supra* Section II.B.2.

communication rules more closely with Rule 255 of Regulation A.

b. Comments

Most commenters that addressed permitting oral communications about the offering outside of the funding portal's platform channels supported the proposal,[269] while some commenters opposed allowing such communications.[270] Some of the commenters supporting the proposal recommended that the Commission go further and expand the information that issuers are permitted to provide, such as allowing disclosure of the planned use of proceeds and progress towards meeting the issuer's funding goals.[271]

We requested comment in the Proposing Release as to whether we should consider revisions to Regulation Crowdfunding that relate to intermediaries involved in concurrent exempt offerings or provide guidance regarding issues that may arise when an intermediary seeks to host concurrent offerings. A few commenters supported permitting Regulation Crowdfunding portals to be used to sell Rule 506(c) offerings.[272] One of these commenters also expressed support for providing Commission guidance.[273] Another commenter questioned the need for guidance and stated its view that it is ''standard market practice'' for concurrent Rule 506(c) offerings to be offered and sold alongside Regulation Crowdfunding offerings on the same online platform.[274]

c. Final Amendments

We are adopting the amendments substantially as proposed to permit oral communications with prospective investors once the Form C is filed, so long as the communications comply with the requirements of Rule 204. In connection with this amendment to 17 CFR 227.204(a), we have revised 17 CFR 227.204(b)(1) (''Rule 204(b)(1)''), as proposed, to indicate that a link to the intermediary's platform is only required to be provided when the communications are in writing. In response to comment, we are also expanding the information that an issuer may provide in accordance with Rule 204 to include:

- A brief description of the planned use of proceeds of the offering; and
- Information on the issuer's progress toward meeting its funding goals.

We believe that investors will find this information useful in making an investment decision and that the incremental increase in the limited information permitted to be provided under the amendments is unlikely to affect investor protection, particularly because the investors receiving the information will continue to be directed to the intermediary's platform where they can access the disclosures necessary for them to make informed investment decisions. We also believe that these amendments to Rule 204 will improve the information available to investors and provide issuers with certainty as to the acceptable form and content of communications with potential investors.

In a further change from the proposal, in response to comments,[275] we are adding a new 17 CFR 227.204(d) to specify that an issuer may provide information about the terms of an offering under Regulation Crowdfunding in the offering materials for a concurrent offering, such as in an offering statement on Form 1–A for a concurrent Regulation A offering or a Securities Act registration statement filed with the Commission, without violating Rule 204. To do so, the information provided about the Regulation Crowdfunding offering must be in compliance with Rule 204, including the requirement to include a link directing the potential investor to the intermediary's platform as required by Rule 204(b)(1). However, in accordance with the Commission's rules with respect to the use of hyperlinks in electronic filings, such link may not be a live hyperlink.[276] We believe the change to Rule 204 will allow issuers to conduct concurrent offerings more easily under different exemptions, without sacrificing investor protection.

Further, in response to commenters who requested clarification on whether funding portals can host concurrent offerings, we note that under 17 CFR 227.401 (''Rule 401'' of Regulation Crowdfunding), a funding portal is exempt from the broker registration requirements of Section 15(a) of the Exchange Act only in connection with its activities as an intermediary in a transaction involving the offer or sale of securities for the account of others, pursuant to Section 4(a)(6) of the Securities Act. To the extent a funding portal seeks to host a concurrent offering pursuant to another offering exemption, it would need to consider whether these additional activities could cause it to lose the exemption provided by Rule 401,[277] or otherwise become subject to broker registration requirements.[278]

### *C. Rule 506(c) Verification Requirements*

Rule 506(c) permits issuers to generally solicit and advertise an offering, provided that all purchasers in the offering are accredited investors, the issuer takes reasonable steps to verify that purchasers are accredited investors, and certain other conditions in Regulation D are satisfied.[279] Rule 506(c) provides a principles-based method for verification of accredited investor status as well as a non-exclusive list of verification methods. The principles-based method of verification requires an objective

[269] *See, e.g.,* CfPA Letter; R. Campbell Letter; J. Clarke Letter (noting the importance of outside oral communications directing investors to the platform for completion of the offering); Netcapital Letter; Republic Letter; NextSeed Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; CrowdCheck Letter; and Honeycomb Letter (recommending eliminating Rule 204). Some of these commenters supported permitting information related to concurrent offerings to be disclosed in those offering materials. *See* J. Clarke Letter; and CrowdCheck Letter.

[270] *See, e.g.,* CFA Institute Letter.

[271] *See, e.g.,* CfPA Letter (recommending permitting both oral and written communications); J. Clarke Letter (recommending permitting disclosure of the use of proceeds as well as how the offering is progressing); Netcapital Letter; Republic Letter (recommending unrestricted communications); and W. Hubbard Letter.

[272] *See* Letter from Fred Pea dated Apr. 25, 2020; J. Clarke Letter; and W. Hubbard Letter.

[273] *See* W. Hubbard Letter.

[274] *See* CrowdCheck Letter (''Where the platform is not a registered broker-dealer, the Regulation [Crowdfunding] offering is intermediated by a registered funding portal, and the Rule 506(c) offering is not intermediated by the funding portal but hosted by the same technology and no commission is charged.'').

[275] *See* CrowdCheck Letter.

[276] *See* 17 CFR 232.105(b). We note that the information contained in the linked material will not be considered part of the document for determining compliance with reporting obligations, but the inclusion of the link will cause the filer to be subject to the civil liability and antifraud provisions of the Federal securities laws with reference to the information contained in the linked material. *See* 17 CFR 232.105(c).

[277] Among other things, the funding portal should consider whether it is clear that the offerings are being conducted under different exemptions from registration, including whether the funding portal has provided appropriate disclosures to avoid investor confusion.

[278] The question of whether a person is a broker within the meaning of Section 3(a)(4) turns on the facts and circumstances of the matter. Because the Exchange Act does not define what it means to be ''engaged in the business'' or ''effecting transactions,'' the Commission has looked to an array of factors in determining whether a person is a broker within the meaning of the statute. *See, e.g., SEC* v. *Helms,* No. 13–cv–01036, 2015 WL 5010298, at *17 (W.D. Tex. Aug. 21, 2015) (''In determining whether a person 'effected transactions [within the meaning of Section 3(a)(4)],' courts consider several factors, such as whether the person: (1) Solicited investors to purchase securities, (2) was involved in negotiations between the issuer and the investor, and (3) received transaction-related compensation.'') (citing cases initiated by the Commission).

[279] *See* 17 CFR 230.501 (Definitions and terms used in Regulation D); Rule 502(a) (Integration); and 17 CFR 230.502(d) (Limitations on Resales).

determination by the issuer (or those acting on its behalf) as to whether the steps taken are ''reasonable'' in the context of the particular facts and circumstances of each purchaser and transaction.[280] Rule 506(c) includes a non-exclusive list of verification methods that issuers may use, but are not required to use, when seeking to satisfy the verification requirement with respect to natural person purchasers.[281]

1. Proposed Amendments

The Commission proposed to add a new item to the non-exclusive list in Rule 506(c) that would allow an issuer to establish that an investor that the issuer previously took reasonable steps to verify as an accredited investor remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation that the investor continues to qualify as an accredited investor and the issuer is not aware of information to the contrary. In the Proposing Release, the Commission expressed the view that this new method would reduce the cost and burden of verification for issuers while alleviating privacy concerns associated with investors having to repeatedly provide financially sensitive information to the issuer and noted that the risk of investor harm would be mitigated by the pre-existing relationship between the issuer and such investor.[282] The Commission additionally reaffirmed its prior guidance that the principles-based method in Rule 506(c) was intended to provide issuers with significant flexibility in deciding the steps needed to verify a person's accredited investor status and to avoid requiring them to follow uniform verification methods that may be ill-suited or unnecessary to a particular offering or purchaser in light of the facts and circumstances.[283]

2. Comments

Commenters that addressed verification generally supported the proposal to allow an issuer to establish that an investor that the issuer previously took reasonable steps to verify as an accredited investor remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation that the investor continues to qualify as an accredited investor and the issuer is not aware of information to the contrary.[284] A number of these commenters expressed concern that the requirement to take reasonable steps to verify accredited investor status has generally affected issuers' willingness to use Rule 506(c).[285] One commenter supported eliminating the verification requirement entirely,[286] while another commenter expressed support for the existing standard.[287]

Some commenters, on the other hand, opposed the additional verification method.[288] These commenters expressed concern that permitting reliance on previous verification would not account for changes in investor financial circumstances over time and could therefore result in issuers raising money from investors that may have lost their accredited investor status.[289] Some commenters that supported permitting reliance on previous verification also supported imposing time limits on such reliance in order to alleviate this concern.[290]

A number of commenters expressed the need for additional guidance under the principles-based reasonable steps approach.[291] Several commenters also supported additional or alternative verification methods,[292] with some commenters offering specific alternatives, such as minimum investment amounts,[293] self-certification,[294] or reliance on a financial intermediary.[295]

3. Final Amendments

We are adopting the amendments substantially as proposed with some changes in response to comments. In addition, we are re-affirming the guidance in the Proposing Release. As

[280] *See* Rule 506(c) Adopting Release, at Section II.B.1.

[281] The rule does not set forth a non-exclusive list of methods for the verification of investors that are not natural persons. In the adopting release, the Commission expressed the view that the potential for uncertainty and the risk of participation by non-accredited investors is highest in offerings involving natural persons as investors. *See* Rule 506(c) Adopting Release, at Section II.B.3.

[282] *See* Proposing Release, at Section II.C.

[283] *See id. See also* Rule 506(c) Adopting Release, at Section II.B.1.

[284] *See, e.g.,* ABA Letter; Geraci Law Letter; Netcapital Letter; Md. St. Bar Assoc. Letter; NextSeed Letter; Letter from Shaver Law Group, LLC dated June 1, 2020; W. Hubbard Letter; Letter from Mark Schonberger dated June 1, 2020 (''M. Schonberger Letter''); IAA Letter; Letter from TIAA dated June 1, 2020 (''TIAA Letter''); Invesco Letter; D. Burton Letter; and IPA Letter.

[285] *See, e.g.,* Geraci Law Letter; J. Clarke Letter; NextSeed Letter; W. Hubbard Letter; TIAA Letter; and D. Burton Letter (suggesting that the income verification requirements are the primary concern); and IPA Letter. In contrast, one commenter suggested that the principal reason more issuers do not use Rule 506(c) is that they do not need it. *See* CrowdCheck Letter.

[286] *See* W. Hubbard Letter.

[287] *See* ABA Letter (supporting the existing principles-based method and clear objective standards in the accredited investor definition).

[288] *See, e.g.,* CFA Letter (noting that an investor's ability to meet the financial thresholds that determine whether they are accredited can and does change over time and suggesting that permitting issuers to rely on previous verification will result in purchasers that are not accredited investors in contravention of the condition in Rule 506(c) that all purchasers must be accredited investors); Better Markets Letter (expressing concern that permitting reliance on the prior verification could lead to issuers, especially issuers of risky investments, to design mechanisms that maximize self-certification); and R. Rutkowski Letter. *See also* CrowdCheck Letter (questioning whether additional verification procedures would be helpful to increase utilization of Rule 506(c)).

[289] *See, e.g.,* CFA Letter; and Better Markets Letter.

[290] *See, e.g.,* Md. St. Bar Assoc. Letter (suggesting that an unlimited time period could call into question the appropriateness of the method and supporting a ''reasonable time limit''); NextSeed Letter (acknowledging limits to reliance after an extended period of time has passed, such as five years); W. Hubbard Letter (supporting a three- to five-year time limit); Invesco Letter (supporting a two-year lookback on verification which would tie the standard to the two-year income test in Rule 501(a)(6). In contrast, some commenters specifically opposed any time limit. *See* M. Schonberger Letter; and Netcapital Letter.

[291] *See, e.g.,* ABA Letter (recommending confirmation that the means of verification may be relied on in making determinations under Section 12(g)); IAA Letter (recommending that the Commission provide clear assurances to issuers that they may rely on the principles-based reasonable steps approach, including confirmation that it could be reasonable under the facts and circumstances for issuers to contract with a third party to conduct the required verification); TIAA Letter (recommending clear guidance that the non-exclusive list is not prescriptive); Fried Frank Letter (recommending guidance with respect to verification of the status of a trust); NextSeed Letter (recommending additional guidance with respect to what actions would constitute ''reasonable steps'' generally and in particular with respect to verification of trusts); and IPA Letter (recommending that the Commission reaffirm and provide clarity on the Commission's prior guidance that the non-exclusive list is not prescriptive, and that a range of verification methods not enumerated in the rule may qualify as ''reasonable,'' and provide guidance with respect to verification by broker-dealers and registered investment advisers). In contrast, one commenter suggested that additional guidance is unnecessary. *See* CrowdCheck Letter.

[292] *See, e.g.,* W. Hubbard Letter; Invesco Letter (recommending verification only apply to natural persons); and IPA Letter (recommending additional means to verify status including an annual net worth certification process). In addition, some commenters generally supported additional verification methods in light of the amendments to the accredited investor definition. *See, e.g.,* Geraci Law Letter; W. Hubbard Letter; IAA Letter; and D. Burton Letter.

[293] *See, e.g.,* CrowdCheck Letter; Invesco Letter; and NextSeed Letter.

[294] *See, e.g.,* Sen. Toomey Letter; IPA Letter; and NextSeed Letter. *See also* D. Burton Letter; and J. Clarke Letter.

[295] *See, e.g.,* Fried Frank Letter (recommending not requiring further verification for investors who have been verified as accredited investors by registered broker-dealers and registered investment advisers and that a representation from an investor to a registered broker-dealer or registered investment adviser with which the investor has a substantive pre-existing relationship is sufficient verification); Letter from Macquarie Investment Management dated June 29, 2020; and TIAA Letter (recommending not requiring verification for offerings involving a registered investment adviser, broker-dealer placement agent or other such intermediary).

proposed, we are permitting an issuer to establish that an investor that the issuer previously took reasonable steps to verify as an accredited investor in accordance with Rule 506(c)(2)(ii) remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation that the investor continues to qualify as an accredited investor and the issuer is not aware of information to the contrary. In a change from the proposal, in response to commenter feedback, we are adding a time limit on the ability of an issuer to rely on the earlier verification.

We believe that permitting an issuer to rely on a prior verification of accredited investor status will reduce the cost and burden of verification for issuers that engage in more than one Rule 506(c) offering over time, and therefore may, to some extent, address commenters' concern that the requirement to take reasonable steps to verify accredited investor status has affected issuers' willingness to use Rule 506(c). We recognize, as some commenters expressed, that over an unlimited time period permitting reliance on a prior verification may not appropriately account for changes in investor financial circumstances and could result in issuers raising money from non-accredited investors. Because such concerns could call into question the appropriateness of the verification method, we are adopting a five-year time limit on the ability of issuers to rely on a prior verification. A five-year period is not so remote that the initial verification is no longer meaningful, but also provides issuers relying on the prior verification substantial cost savings. We believe the inclusion of a five-year time limit, together with the pre-existing relationship between the issuer and such investor, will appropriately balance reducing the cost and burden of verification for issuers with the mitigation of risk of investor harm caused by issuers selling to non-accredited investors.

In addition, as indicated in the Proposing Release, we are reaffirming and updating the Commission's prior guidance with respect to the principles-based method for verification, and in particular what may be considered ''reasonable steps'' to verify an investor's accredited investor status, in order to reduce concerns that an issuer's method of verification may be second guessed by regulators or other market participants without regard to the analysis performed by the issuer in making the determination and to encourage more issuers to rely on additional verification methods tailored to their specific facts and circumstances.[296] The principles-based method was intended to provide issuers with significant flexibility in deciding the steps needed to verify a person's accredited investor status and to avoid requiring them to follow uniform verification methods that may be ill-suited or unnecessary to a particular offering or purchaser in light of the facts and circumstances.[297] The Commission has previously indicated, and we continue to believe, that the following factors are among those an issuer should consider when using this principles-based method of verification:

- The nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- The amount and type of information that the issuer has about the purchaser; and
- The nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.[298]

We are of the view that, in some circumstances, the reasonable steps determination may not be substantially different from an issuer's development of a ''reasonable belief'' for Rule 506(b) purposes. For example, an issuer's receipt of a representation from an investor as to his or her accredited status could meet the ''reasonable steps'' requirement if the issuer reasonably takes into consideration a prior substantive relationship with the investor or other facts that make apparent the accredited status of the investor. That same representation from an investor may not meet the ''reasonable steps'' requirement if the issuer has no other information about the investor or has information that does not support the view that the investor was an accredited investor.[299]

We are not adopting additional amendments to the definition to expand the list of verification methods, as requested by some commenters. We appreciate that the addition of further verification methods to the non-exclusive list could provide greater certainty to issuers as to satisfaction of the rule's verification requirement, but are mindful that significant expansion of the list could further undermine the use of the principles-based method of verification. We believe that the methods suggested by commenters as possible additions to the list may be considered by an issuer under the principles-based method, depending on the particular facts and circumstances of its offering, and do not wish to limit that flexibility.

We remind issuers that they are not required to use any of the methods set forth in the non-exclusive list and can apply the reasonableness standard directly to the specific facts and circumstances presented by the offering and the investors. We do not believe additional guidance is warranted at this time. We also do not believe it is appropriate to provide guidance, as suggested by a commenter, with respect to reliance on the specified verification methods in making determinations of accredited investor status under Section 12(g). We continue to believe that requiring issuers to consider their particular facts and circumstances in establishing a reasonable basis for their determination of accredited investor status for Section 12(g) purposes provides issuers with appropriate flexibility for making the determination.[300]

### *D. Harmonization of Disclosure Requirements*

[296] Commenters that addressed the issue of Commission guidance generally supported the Commission's updated guidance. *See supra* note 291.

[297] *See* Rule 506(c) Adopting Release, at Section II.B.1.

[298] *See id.* at Section II.B.3.a.

[299] We caution issuers that we continue to believe that an issuer will not be considered to have taken reasonable steps to verify accredited investor status if it, or those acting on its behalf, require only that a person check a box in a questionnaire or sign a form, absent other information about the purchaser indicating accredited investor status.

[300] *See* Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Release No. 33–10075 (May 3, 2016) [81 FR 28689 (May 10, 2016)], at text accompanying note 71. The term ''accredited investor'' for purposes of Section 12(g)(1) is as defined in 17 CFR 230.501(a), which provides that an accredited investor is any person who comes within one or more of the categories of investors specified therein, or whom the issuer reasonably believes comes within any such category. Whether the issuer has a reasonable belief depends on the particular facts and circumstances surrounding the determination. Under 17 CFR 240.12g–1, an issuer needs to determine, based on the facts and circumstances, whether prior information provides a basis for a reasonable belief that the security holder continues to be an accredited investor as of the last day of the fiscal year. *See id.* at Section II.B.3.

Currently, the exempt offerings rules provide different financial statement information requirements for Regulation A and Regulation D. Additionally, in some areas compliance with Regulation A is more complex or difficult than for registered offerings, such as with respect to the rules regarding redaction of confidential information in material contracts and incorporation by reference. Finally, the Supreme Court's decision in *Food Marketing Institute* v. *Argus Leader Media* [301] led the Commission to review its standard for allowing redaction of information from certain exhibits.

1. Rule 502(b) of Regulation D

When non-accredited investors are participating in an offering under Rule 506(b), the issuer conducting the offering must furnish the information required by Rule 502(b),[302] including specified financial statement and non-financial information, to such non-accredited investors a reasonable time prior to the sale of the securities and must provide these investors with the opportunity to ask questions and receive answers about the offering.[303] This includes, if the issuer is not subject to the reporting requirements of Section 13 [304] or 15(d) [305] of the Exchange Act, the following financial statement information:

• *For offerings up to $2 million:* The information required in 17 CFR 210.8–01 through 8–08 (''Article 8 of Regulation S–X''), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited; [306]

• *For offerings up to $7.5 million:* The financial statement information required in 17 CFR 239.11 (''Form S–1'') for smaller reporting companies.[307]

• *For offerings over $7.5 million:* The financial statement information as would be required in a registration statement filed under the Securities Act on the form that the issuer would be entitled to use; [308] and

• *For offerings by foreign private issuers eligible to use 17 CFR 249.220f (''Form 20–F''):* The same kind of information required to be included in a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.[309]

Similarly, issuers conducting offerings pursuant to Regulation A are required to provide certain financial statement and non-financial information to investors. Table 4 summarizes the financial information issuers conducting a Regulation A offering are required to provide under Part F/S of Form 1–A.

TABLE 4—CURRENT REGULATION A FINANCIAL STATEMENT REQUIREMENTS

| Offering size | Financial statement information required | Age of financial statements | Audit required |
|---|---|---|---|
| *Up to $20 million (Tier 1)* .............. | Consolidated balance sheets of the issuer for the two previous fiscal year ends (or for such shorter time that the issuer has been in existence);.<br>Consolidated statements of comprehensive income, cash flows, and stockholders' equity of the issuer; and<br>Financial statements of guarantors and issuers of guaranteed securities, affiliates whose securities collateralize an issuance, significant acquired or to be acquired businesses and real estate operations, and pro forma information relating to significant business combinations. | Not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months. | No, unless issuer has already obtained an audit for another purpose. |
| *Up to $50 million (Tier 2)* .............. | Financial statements in compliance with Article 8 of Regulation S–X. | Not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months. | Yes (but see paragraph (c) in Part F/S of Form 1–A noting that interim financial statements need not be audited). |

a. Proposed Amendments

The Commission proposed to amend Rule 502(b)'s requirements governing the financial information that non-reporting companies must provide to non-accredited investors participating in Regulation D offerings to align with the financial information that issuers must provide investors in Regulation A

[301] 139 S.Ct. 2356 (2019) (''*Food Marketing Institute*'').

[302] *See* 17 CFR 230.502(b)(2)(i) through (vii).

[303] *See* 17 CFR 230.502(b)(2)(v). Although not expressly required by Rule 502(b), issuers and funds conducting Rule 506(b) offerings exclusively to accredited investors often provide those accredited investors with information about the issuer in view of the antifraud provisions of the Federal securities laws. *See* Note to Rule 502(b).

[304] 15 U.S.C. 78m.

[305] 15 U.S.C. 78*o*(d).

[306] *See* 17 CFR 230.502(b)(2)(i)(B)(*1*) (''Rule 502(b)(2)(i)(B)(*1*)'').

[307] *See* 17 CFR 230.502(b)(2)(i)(B)(*2*) (''Rule 502(b)(2)(i)(B)(*2*)''). *See also* 17 CFR 240.12b–2 (defining smaller reporting company).

[308] *See* 17 CFR 230.502(b)(2)(i)(B)(*3*) (''Rule 502(b)(2)(i)(B)(*3*)''). For offerings above $2 million, issuers that cannot obtain audited financial statements without unreasonable effort and expense, that are not limited partnerships, are only required to have the balance sheet, which must be dated within 120 days of the start of the offering, audited. If the issuer is a limited partnership, and it cannot obtain audited financial statements without unreasonable effort and expense it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant. *See* Rules 502(b)(2)(i)(B)(*2*) and (*3*).

[309] *See* 17 CFR 230.502(b)(2)(i)(C). The financial statements provided by foreign private issuers eligible to use Form 20–F need be certified only to the extent required by paragraph Rules 502(b)(2)(i)(B)(*1*), (*2*), or (*3*), as appropriate. *See id.*

offerings. Specifically, for Regulation D offerings of $20 million or less, proposed Rule 502(b)(2)(i)(B)(*1*) would refer such issuers to paragraph (b) of part F/S of Form 1–A, which applies to Tier 1 Regulation A offerings. For offerings of greater than $20 million, proposed Rule 502(b)(2)(i)(B)(*2*) would refer issuers to paragraph (c) of part F/S of Form 1–A, which applies to Tier 2 Regulation A offerings.[310] This proposed amendment would eliminate the current Rule 502(b) provisions that permit an issuer, other than a limited partnership, that cannot obtain audited financial statements without unreasonable effort or expense, to provide only the issuer's audited balance sheet.[311]

In addition, under the proposed amendments, a foreign private issuer that is not an Exchange Act reporting company would be required to provide financial statement disclosure consistent with the Regulation A requirements.[312] The foreign private issuer would be permitted to provide financial statements prepared in accordance with either U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board. For business combinations and exchange offers, an issuer that is not an Exchange Act reporting company would provide financial statements consistent with the Regulation A requirements.

b. Comments

Commenters were divided on the proposal. Some commenters supported aligning the financial statement information requirements in Rule 502(b) with the requirements of Regulation A,[313] while others opposed the proposal.[314] One commenter, who opposed the proposal, questioned whether the financial statement information requirements in Rule 502(b) are overly burdensome given the amounts raised under Rule 506(b) and whether the Regulation A disclosure requirements were appropriate for Regulation D, given that the Regulation A disclosures are reviewed by the Commission.[315] Another commenter who opposed the proposal expressed concern that removing the audit requirement for financial statements in Rule 506(b) offerings under $20 million would deprive investors of critical information.[316]

Several commenters addressed further aspects of the proposed harmonization of financial disclosure requirements. One commenter recommended harmonizing the Rule 502(b) disclosures with Regulation Crowdfunding.[317] Another commenter expressly opposed requiring issuers conducting Regulation D offerings above the Regulation A Tier 2 offering limit to comply with the financial information requirements applicable to smaller reporting companies under Article 8 of Regulation S–X.[318]

The 2020 Government-Business Forum on Small Business Capital Formation generally recommended that the Commission revise the disclosures required for non-accredited investors in offerings made under Rule 506(b).[319]

c. Final Amendments

We are adopting the amendments as proposed. By aligning the disclosure requirements in Rule 502(b) with those in Regulation A, additional issuers may be willing to include non-accredited investors in their offerings pursuant to Rule 506(b), which would expand investment opportunities for those investors. In addition, we continue to believe, as stated in comments received on the Concept Release, that many issuers view the current financial statement requirements of Rule 502(b) as overly burdensome.[320] We believe revising the disclosure requirements will help address those concerns, while continuing to provide investors with material information about the issuer. We acknowledge that there are differences in the terms and conditions of Regulation A and Rule 506(b) offerings involving non-accredited investors, in particular the fact that the financial statements provided pursuant to Rule 502(b) are not subject to staff review and qualification. We also note that staff review and qualification is not a guarantee that the disclosure is complete and accurate. Nevertheless, we have determined that the financial statement requirements of Regulation A provide adequate information to non-accredited investors in such offerings, and we believe that the same is true for non-accredited investors in the Rule 506(b) context.[321] Further, as noted in the Proposing Release, the information disclosed to investors will continue to be subject to the anti-fraud provisions of the Federal and State securities laws.

We are not persuaded by commenters who suggested that we harmonize the disclosure requirements in Rule 502(b) with those in Regulation Crowdfunding. We also do not believe harmonizing the disclosure requirements in Rule 502(b) with Regulation Crowdfunding for offerings below $5 million and with Regulation A for offerings above $5 million would alleviate any additional burdens on issuers. Instead, such a requirement would create additional complexity for issuers with offerings that could cross from below to above $5 million, by requiring them to

[310] As proposed, issuers need not comply with the other ongoing non-financial statement disclosure requirements in Tier 2 Regulation A offerings. Instead, the proposed requirement would be limited to harmonization of the financial statement disclosure requirements outlined in the offering circular.

[311] *See* Rules 502(b)(2)(i)(B)(*2*) and (*3*).

[312] The term ''foreign private issuer'' means any foreign issuer, other than a foreign government, except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and (ii) any of the following: (a) The majority of the executive officers or directors are United States citizens or residents; (b) more than 50 percent of the assets of the issuer are located in the United States; or (c) the business of the issuer is administered principally in the United States. *See* 17 CFR 230.405.

[313] *See* ABA Letter (suggesting that the disclosure requirements of Regulation A provide adequate information upon which a non-accredited investor can make an informed investment decision); CfPA Letter; SEC SBCFAC Letter; Geraci Law Letter; Letter from Carta, Inc. dated June 1, 2020 (''Carta Letter''); W. Hubbard Letter; CrowdCheck Letter; and IPA Letter.

[314] *See* J. Clarke Letter; NASAA Letter (opposing harmonization of the financial statement requirements with Regulation A because of the difference in the terms of the two exemptions); Better Markets Letter (expressing concern about a loss of investor protection because the proposal would allow companies, including foreign companies, to raise capital without providing audited financial statements); CFA Letter (expressing concern that the proposal would reduce transparency and weaken investor protections); and CFA Institute Letter (stating that harmonization with the Regulation A requirement is not appropriate because Rule 506(b) lacks investor protections that Regulation A Tier 1 (and Regulation Crowdfunding) provide to non-accredited investors).

[315] *See* NASAA Letter.

[316] *See* CFA Institute Letter.

[317] *See* J. Clarke Letter.

[318] *See* W. Hubbard Letter (stating that the current Reg A Tier 2 approach to financial statement disclosure requirements is understandable and straightforward and adding financial disclosure requirements for offerings above $50 million will not provide a commensurate benefit or protection to investors however will likely discourage issuers from using the exemption).

[319] *See* 2020 Forum Report.

[320] *See* Proposing Release, at text accompanying notes 195–198.

[321] Regulation A is available only to U.S. or Canadian issuers, and excludes, among others, blank check companies, registered investment companies, business development companies, and issuers of certain securities including asset-backed securities. These limitations do not apply to Regulation D; therefore, such issuers shall apply the Regulation A financial statement requirements as if they were eligible to do so under Regulation A. With respect to foreign private issuers, we are adopting as proposed a provision stating that a foreign private issuer that is not an Exchange Act reporting company would be permitted to provide financial statements prepared in accordance with U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board.

simultaneously consider the disclosure requirements of Regulation A and Regulation Crowdfunding.

2. Proposed Amendments To Simplify Compliance With Regulation A

In its review of the exempt offering framework, the Commission identified several areas where compliance with Regulation A is more complex or difficult than for registered offerings, including the rules regarding the redaction of confidential information in material contracts, making draft offering statements public on EDGAR, incorporation by reference, and the abandonment of a post-qualification amendment.

a. Redaction of Confidential Information in Certain Exhibits

In March 2019, the Commission amended several rules to permit registrants to file redacted material contracts and plans of acquisition, reorganization, arrangement, liquidation, or succession without applying for confidential treatment.[322] These rules require registrants to mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted, include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and would be competitively harmful if publicly disclosed, and indicate with brackets where the information has been omitted from the filed version of the exhibit.[323] This process for filing redacted exhibits was not extended to Regulation A offerings at that time. As a result, Regulation A issuers are still compelled to submit an application for confidential treatment in order to redact immaterial confidential information from material contracts and plans of acquisition, reorganization, arrangement, liquidation, or succession.

i. Proposed Amendments

The Commission proposed to amend Item 17 of Form 1–A to provide issuers with the option to file redacted material contracts [324] and plans of acquisition, reorganization, arrangement, liquidation, or succession,[325] consistent with the recent amendments to Regulation S–K). Issuers would still have the option to file such exhibits pursuant to the existing confidential treatment application process, which would remain unchanged.

ii. Comments

Commenters that addressed the proposed amendments supported the proposal to apply the simplified confidential treatment process to Regulation A filers.[326]

iii. Final Amendments

We are adopting the amendments as proposed to add a new instruction to Item 17 of Form 1–A that applies to paragraphs 6 and 7 of that item and includes procedures similar to Items 601(b)(2) and (b)(10) of Regulation S–K for filing redacted material contracts or plans of acquisition, reorganization, arrangement, liquidation, or succession. We are making one change to the proposed instruction, to further harmonize the procedures for redacting information under Item 17 of Form 1–A with those in 17 CFR 229.601(a)(6) (''Item 601(a)(6)'' of Regulation S–K), by allowing issuers to redact information that ''would constitute a clearly unwarranted invasion of personal privacy'' in any of the exhibits listed in Item 17 of Form 1–A. As a matter of practice, the staff generally does not object where an issuer omits sensitive personally identifiable information, such as bank account numbers, social security numbers, home addresses, and similar information (''PII'') from exhibits without also submitting a confidential treatment request. As with the adoption of Item 601(a)(6) of Regulation S–K, codifying this staff practice in Item 17 of Form 1–A will alleviate the burden from issuers of having to provide an analysis in order to redact PII from exhibits, and will also better safeguard PII by limiting its dissemination.[327]

Commission staff will continue to review Forms 1–A filed in connection with Regulation A offerings and selectively assess whether redactions from exhibits appear to be limited to information that meets the appropriate standard.[328] Upon request, issuers will be expected to promptly provide supplemental materials to the staff similar to those currently required, including an unredacted copy of the exhibit and an analysis of why the redacted information is both not material and the type of information that the issuer both customarily and actually treats as private and confidential.[329] If the issuer's supplemental materials do not support its redactions, the staff may request that the issuer file an amendment that includes some, or all, of the previously redacted information, similar to the process the staff currently follows for confidential treatment requests in connection with Regulation A offerings.[330]

b. Amendment to Form 1–A Item 17.16(a) Requirement

Issuers that are conducting Regulation A offerings are permitted to submit non-public draft offering statements and amendments for review by the Commission staff if they have not previously sold securities pursuant to (i) a qualified offering statement under Regulation A or (ii) an effective Securities Act registration statement.[331] Such issuers also may submit related non-public correspondence to the Commission staff for review confidentially. Current rules require that these non-public offering statements, amendments and correspondence be filed as an exhibit to a publicly filed offering statement at least twenty-one calendar days prior to the qualification of the offering statement.[332] Similarly, an emerging growth company may, prior to its initial public offering date, submit a draft registration statement and amendments to the Commission for non-public review by the staff.[333] However, unlike issuers submitting Regulation A offering statements for non-public review, there is no corresponding Securities Act rule or item requiring registration statements and amendments confidentially submitted by emerging growth companies to be filed as an exhibit to a publicly filed registration statement.

[322] *See* FAST Act Modernization and Simplification of Regulation S–K, Release No. 33–10618 (Mar. 20, 2019) [84 FR 12674 (Apr. 2, 2019)] (''FAST Act Modernization Release'') at text accompanying notes 45–73 (amending 17 CFR 229.601(b)(2)(ii) and 17 CFR 229.601(b)(10)(iv)).

[323] *See* 17 CFR 229.601(b)(2) (''Item 601(b)(2)'' of Regulation S–K) and 17 CFR 229.601(b)(10)(iv) (''Item 601(b)(10)(iv)'' of Regulation S–K). Redacted exhibits are subject to compliance reviews by the staff.

[324] *See* Item 17.6 of Form 1–A.

[325] *See* Item 17.7 of Form 1–A.

[326] *See* Republic Letter; W. Hubbard Letter; M. Schonberger Letter; and CrowdCheck Letter.

[327] *See* FAST Act Modernization Release, at Section II.B.5.b.ii. (adopting Item 601(a)(6) of Regulation S–K).

[328] As discussed below, we are amending the standard for redaction of information under this streamlined process, which currently requires that the redactions from exhibits be limited to information that is not material and that would cause competitive harm if publicly disclosed. The amended standard is patterned on the Supreme Court's language set out in *Food Marketing Institute*. *See supra* note 301.

[329] Pursuant to 17 CFR 200.83, companies are permitted to request confidential treatment of this supplemental information while it is in the staff's possession.

[330] After completing its review of the supplemental materials, the Commission or its staff will return or destroy them at the request of the company, as applicable.

[331] *See* 17 CFR 230.252(d).

[332] *See* Item 17, paragraph 16(a) of Form 1–A and 17 CFR 230.252(d).

[333] *See* Section 6(e)(1) of the Securities Act.

Instead issuers satisfy their public filing requirement by logging into their EDGAR account, selecting materials previously submitted non-publicly, and releasing them for public dissemination.[334]

i. Proposed Amendments

The Commission proposed to amend Item 17.16(a) of Form 1–A to harmonize the procedures for publicly filing draft Regulation A offering statements with those for draft Securities Act registration statements. Instead of requiring documents previously submitted for non-public review by the staff and related, non-public correspondence to be filed as exhibits to a publicly filed offering statement, issuers conducting offerings exempt from registration pursuant to Regulation A would be able to make such documents available to the public via EDGAR to comply with the requirements of 17 CFR 230.252(d).

ii. Comments

Commenters that addressed the proposed amendment supported the proposal to amend Item 17.16(a) of Form 1–A to allow non-public draft offering statements, amendments and related non-public correspondence to be made publicly available through the use of the EDGAR system.[335]

iii. Final Amendments

We are adopting the amendments as proposed, with two changes to renumber the exhibit paragraphs for clarity. As adopted, we are renumbering paragraph 16 of Item 17 of Form 1–A so that it will be referred to as ''99. Additional Exhibits,'' and will be the last paragraph in Item 17, and former paragraph 16 will be designated as ''reserved.'' In addition, as proposed, we are deleting sub-paragraph (a) of that paragraph so that issuers no longer will be required to file the non-public offering statements and related amendments and correspondence as exhibits. Instead, Regulation A issuers will be able to make previously non-public documents available to the public on EDGAR using the same process as issuers conducting a registered offering. We believe that this change simplifies the process of moving from a draft offering statement to a publicly filed document for issuers conducting Regulation A offerings, saving both time and money for such issuers. In addition, because all previously submitted offering statements and related amendments and correspondence will be available to the public on EDGAR, rather than attached as exhibits to a given offering statement, this change should make it easier for investors to learn about the issuer and the Regulation A offering itself, furthering their ability to make informed investment decisions.

c. Incorporation by Reference of Previously Filed Financial Statements in Form 1–A for Regulation A Offerings

The ability to incorporate financial statements by reference to Exchange Act reports filed before the effective date of a registration statement is permitted on Form S–1, subject to certain conditions.[336] Specifically, General Instruction VII of Form S–1 permits registrants that meet certain eligibility standards[337] to incorporate by reference the information required by Item 11 of Form S–1, which includes information about the registrant, such as, among other things, financial statement information meeting the requirements of 17 CFR 210.1–01 through 12–29.[338] Regulation A issuers, however, are required to include the issuer's financial statements, prepared in accordance with the applicable requirements of Tier 1 or Tier 2 of Regulation A, in their Regulation A offering circular that is distributed to investors.[339]

i. Proposed Amendments

The Commission proposed to permit issuers to incorporate previously filed financial statements by reference into a Regulation A offering circular. The Commission proposed that an issuer must satisfy criteria similar to the requirement in connection with Form S–1. Specifically, issuers that have a reporting obligation under 17 CFR 230.257 (''Rule 257'') or the Exchange Act must be current in their reporting obligations. Issuers would be required to make incorporated financial statements readily available and accessible on a website maintained by or for the issuer and to disclose in the offering statement that such financial statements will be provided upon request.[340] Issuers conducting ongoing offerings would need to continue to file post-qualification amendments to Form 1–A annually to include the financial statements that would be required to be included in a Form 1–A as of such date.[341] These financial statements could be either filed with such post-qualification amendment or incorporated by reference to a previously filed periodic or current report. In addition, issuers would remain liable for such financial statements under Section 12(a)(2) of the Securities Act[342] to the same extent as if they had been filed rather than incorporated by reference.

ii. Comments

Commenters generally supported the proposal to permit incorporation by reference of an issuer's previously filed financial statements.[343] Some commenters additionally supported permitting forward incorporation by reference in Regulation A,[344] with some of these commenters further supporting the elimination of the requirement to file annual post-qualification amendments.[345]

iii. Final Amendments

We are adopting the amendments as proposed. We believe that allowing incorporation by reference of previously filed financial statements should decrease existing filing burdens on Regulation A issuers. We are not expanding Regulation A to allow for

[334] *See* Announcement by the Division of Corporation Finance, Draft Registration Statements to Be Submitted and Filed on EDGAR (Sep. 26, 2012), *available at https://www.sec.gov/divisions/corpfin/cfannouncements/drsfilingprocedures.htm.*

[335] *See* J. Clarke Letter; Republic Letter; W. Hubbard Letter; M. Schonberger Letter; CrowdCheck Letter; and IPA Letter.

[336] *See* General Instruction VII to Form S–1.

[337] These criteria include, but are not limited to, that the registrant: (i) Is subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act, (ii) has filed all reports and other materials required to be filed by Sections 13(a), 14, or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials), (iii) has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year and (iv) is not, and during the past three years neither it nor any of its predecessors was: (a) A blank check company; (b) a shell company, other than a business combination related shell company; or (c) offering penny stock. The registrant must make its periodic and current reports filed pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 11A or Item 12 of Form S–1 readily available and accessible on a website maintained by or for the registrant and containing information about the registrant.

[338] *See* Item 12 to Form S–1.

[339] *See* General Rule (a) to Part F/S of Form 1–A.

[340] General Instruction III(b) of Form 1–A requires the inclusion of a hyperlink in the offering circular to material incorporated by reference, which would include an issuer's previously filed financial statements on EDGAR.

[341] *See* 17 CFR 230.252(f)(2)(i).

[342] 15 U.S.C. 77*l*(a)(2).

[343] *See* J. Clarke Letter; Republic Letter; W. Hubbard Letter; M. Schonberger Letter; and CrowdCheck Letter.

[344] *See* W. Hubbard Letter; M. Schonberger Letter; and CrowdCheck Letter.

[345] *See* M. Schonberger Letter; and CrowdCheck Letter (supporting elimination of post-qualification amendments where the auditor's consent was included in the 17 CFR 239.91 (''Form 1–K'')). In contrast, one commenter supported continuing to require annual post-qualification amendments to ensure that filings remain subject to ongoing staff review. *See* W. Hubbard Letter.

forward incorporation by reference as recommended by some commenters, as we believe doing so could increase investor search costs and would eliminate the benefit of staff review of post-qualification amendments prior to their qualification.

d. Amendment to Abandonment Provision of Regulation A

Regulation A permits the Commission to declare an offering statement abandoned, but does not provide the same authority for post-qualification amendments.

i. Proposed Amendments

The Commission proposed to amend the abandonment provisions of Rule 259(b) to permit the Commission to declare a post-qualification amendment to an offering statement abandoned, consistent with 17 CFR 230.479, the rule applicable to registered offerings.

ii. Comments

Commenters who addressed the proposed amendment to the abandonment provisions of Rule 259(b) supported the proposal.[346]

iii. Final Amendments

We are adopting the amendments as proposed. We continue believe there are situations where it is appropriate for the Commission to be able to declare a specific post-qualification amendment abandoned, instead of the entire offering statement. For example, Commission staff has observed some issuers attempting to use post-qualification amendments for separate classes of securities that are not otherwise being offered under the offering statement. Under the final rules, if an issuer fails to qualify a post-qualification amendment for such a separate class, but otherwise is in compliance with all of its Regulation A obligations, the Commission will be able to declare that specific post-qualification amendment abandoned so as to avoid potential investor confusion arising from the presence of the unqualified post-qualification amendment on EDGAR.

3. Confidential Information Standard

The current requirements for registrants to file material contracts as exhibits to their disclosure documents permit registrants to redact provisions or terms of exhibits required to be filed if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed.[347] The ''competitive harm'' requirement was patterned on the standard then being used by the U.S. Circuit Court of Appeals for the District of Columbia [348] to define what information is confidential under Exemption 4 of the Freedom of Information Act, which protects ''trade secrets and commercial or financial information obtained from a person [if they are] privileged or confidential.'' [349] In June 2019, the Supreme Court rejected the Circuit Court's longstanding test for determining what information was confidential under Exemption 4 and adopted a new definition of ''confidential'' that does not include a competitive harm requirement.[350] The Supreme Court stated that ''[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4.'' [351]

a. Proposed Amendments

The Commission proposed to adjust the exhibit filing requirements by removing the competitive harm requirement and replacing it with a standard more closely aligned with the Supreme Court's definition of ''confidential.'' Under the proposed amendments, information may be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential and that is also not material.[352]

b. Comments

We received no comments on the proposed amendments to revise the confidential information standard, other than one comment expressing support for the proposed revisions in the context of variable product registration statement forms.[353] This commenter also suggested that we revise Form N–6 to expand the types of exhibits to which the standard would apply to include participation agreements and administrative contracts.[354] The commenter stated that this would provide greater consistency between Form N–4, which relates to variable annuities, and Form N–6, which relates to variable life insurance contracts.[355]

c. Final Amendments

We are adopting the amendments as proposed to adjust the exhibit filing requirements by removing the competitive harm requirement and replacing it with a standard that permits information to be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential, and which is also not material.[356]

We did not propose to revise Form N–6 to modify the types of exhibits to which the confidential information standard applies and decline to do so here. Information contained in such exhibits is already disclosed to investors in other contexts and, in our staff's experience, these exhibits do not contain confidential or proprietary information. Further, as part of our adoption of updated disclosure requirements for variable annuity and variable life insurance products,[357] among other changes, the instructions to exhibits in Form N–6 and Form N–4 will be revised to eliminate discrepancies related to the categories of exhibits eligible for redaction.[358]

[346] *See* Republic Letter; and CrowdCheck Letter.

[347] *See, e.g.,* FAST Act Modernization Release, at text accompanying notes 45–73 (amending paragraphs (b)(2)(ii) and (b)(10)(iv) of Item 601 of Reg. S–K).

[348] *See National Parks and Conservation Association* v. *Morton,* 498 F.2d 765 (D.C. Cir. 1974); and *National Parks and Conservation Association* v. *Kleppe,* 547 F.2d 673 (D.C. Cir. 1976).

[349] 5 U.S.C. 552(b)(4).

[350] *See Food Marketing Institute.*

[351] *Id.* at 2366.

[352] The Commission proposed changes to the following rules and forms to update the standard: Item 601(b)(2) and (b)(10) of Regulation S–K; Form S–6; Form N–14; Form 20–F; Form 8–K; Form N–1A; Form N–2; Form N–3; Form N–4; Form N–5; Form N–6; and Form N–8B–2.

[353] *See* Letter from the Committee of Annuity Insurers dated May 6, 2020 (''Comm. of Annuity Insurers Letter'').

[354] *See id.*

[355] *See id.*

[356] We did not propose, and are not adopting, changes to 17 CFR 229.402(b) (''Item 402(b)'' of Regulation S–K). Instruction 4 to Item 402(b) and Instruction 2 to 17 CFR 229.402(e) (''Item 402(e)(1)''), which reference a competitive harm standard that is the same as would apply under the current rules when a registrant requests confidential treatment of confidential trade secrets or confidential commercial or financial information pursuant to 17 CFR 230.406 and 17 CFR 240.24b–2. The changes we are adopting to the exhibit requirements do not alter the existing standard applicable to Items 402(b) and 402(e) of Regulation S–K.

[357] *See* Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Release No. IC–33814 (May 1, 2020) [FR 24964 (May 1, 2020)] (''VASP Release''). For purposes of this release, we refer to the versions of the relevant forms adopted by the VASP Release as the ''VASP amended'' versions of Forms N–3, N–4, and N–6 (*e.g.,* ''VASP amended Form N–3''). The changes to the exhibit filing requirements that we are adopting in this release, which replace the competitive harm standard, also apply to the parallel instruction in each of Item 32 of VASP amended Form N–3, Item 27 of VASP amended Form N–4, and Item 30 of VASP amended Form N–6.

[358] *See* Instruction 3 to Item 27 of VASP amended Form N–4 (allowing for the redaction of reinsurance contracts and other material contracts); *see also* Instruction 3 to Item 30 of amended Form N–6 (allowing for the redaction of reinsurance contracts

*E. Offering and Investment Limits*

Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D contain a variety of requirements and investor protections, including limits on the amount of securities that may be offered and sold under the exemptions. Regulation A and Regulation Crowdfunding also include limits on how much an individual may invest. The Commission has estimated that approximately $2.7 trillion of new capital was raised through exempt offering channels in 2019, of which approximately $1.3 billion (0.05 percent) was raised under Regulation A, Regulation Crowdfunding, and Rule 504 combined.[359]

1. Regulation A

Regulation A establishes two tiers of offerings: Tier 1, for offerings that do not exceed $20 million in a 12-month period; and Tier 2, for offerings that do not exceed $50 million in a 12-month period. The Commission is required by Section 3(b)(5) of the Securities Act to review the $50 million Tier 2 offering limit specified in Section 3(b)(2) of the Securities Act every two years, and the statute authorizes the Commission to increase the annual offering limit if the Commission determines that it would be appropriate to do so.

Earlier this year, the Divisions of Corporation Finance and Economic and Risk Analysis conducted a Regulation A Lookback Study and Offering Limit Review Analysis (''2020 Regulation A Review'') as required by the 2015 Regulation A Release.[360] The 2020 Regulation A Review found that from June 2015 to December 2019, $2.4 billion was reported raised by 183 issuers in ongoing and closed Regulation A offerings, including $230 million in Tier 1 and $2.2 billion in Tier 2 offerings.[361]

a. Proposed Amendments

Since adoption of the 2015 amendments, the Commission has continued to receive feedback on, and has considered further enhancements to, Regulation A.[362] This feedback and consideration informed our proposal to increase the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million. Consistent with the Commission's approach to limitations on secondary sales when adopting the Regulation A amendments, the Commission also proposed to increase the maximum offering amount for secondary sales under Tier 2 of Regulation A from $15 million to $22.5 million.

b. Comments

While most commenters that addressed the proposal supported raising the Tier 2 offering limits,[363] some opposed the increase.[364] Commenters supporting the increase suggested that an increase could encourage development of the smaller initial public offering market, encouraging more issuers to conduct offerings and providing more investment opportunities for investors.[365] Some of these commenters additionally suggested that the higher offering limits would improve the economics for issuers and broker dealers to participate in the Regulation A market.[366] A number of commenters supported raising the limit further to $100 million.[367] Several commenters also specifically supported raising the limit for secondary sales.[368] We additionally received many letters urging the Commission to provide Federal preemption for secondary sales of a Tier 2 Regulation A offering.[369]

Commenters opposed to the increase suggested that there is not compelling evidence supporting a need to raise the offering limit[370] and stated that issuers raising such large amounts of capital should be subject to the full disclosure and protections provided in the Securities Act.[371] One commenter expressed concern over the negative effects of increasing the use of Regulation A for unsophisticated non-accredited retail investors due to what it perceived as the lower quality of Regulation A issuers and increased risks

and other material contracts). Registrants must comply with these rule and form amendments by January 1, 2022. *See* VASP Release, at Section II.G.

[359] *See* Concept Release, at Section II. Preliminary estimates from 2019 similarly reflect limited capital raising under the rules, with $1.042 billion raised under Regulation A, $228 million under Rule 504, and $62 million under Regulation Crowdfunding.

[360] *See* Staff of the U.S. Securities and Exchange Commission, Report to the Commission, Regulation A Lookback Study and Offering Limit Review Analysis, 2020 (Mar. 4, 2020), *available at https://www.sec.gov/smallbusiness/exemptofferings/rega/2020Report.* The report includes a review of: The amount of capital raised under the amendments; the number of issuances and amount raised by both Tier 1 and Tier 2 offerings; the number of placement agents and brokers facilitating the Regulation A offerings; the number of Federal, State, or any other actions taken against issuers, placement agents, or brokers with respect to both Tier 1 and Tier 2 offerings; and whether any additional investor protections appear necessary for either Tier 1 or Tier 2.

[361] Over this time period issuers sought $11.2 billion across 487 Regulation A offerings, of which 382 were qualified offering statements seeking up to $9.1 billion. *See* 2020 Regulation A Review.

[362] While the Commission has received feedback from market participants and commenters seeking an increase in the Tier 2 offering limit, these commenters did not seek an increase in the Tier 1 limit. *See* 2017 Forum Report; 2018 Forum Report; and A Financial System That Creates Economic Opportunities—Capital Markets (Oct. 2017), *available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf* (''2017 Treasury Report'').

[363] *See, e.g.,* ABA Letter; Letter from Bruce D. Wertz, Sr. dated Mar. 10, 2020; B. Andrews, et al. Letter; SEC SBCFAC Letter; Geraci Law Letter (suggesting the increased offering limits will attract a more seasoned pool of investors as well as institutional investors); Carta Letter; SAF Letter; M. Schonberger Letter; D. Burton Letter; InnaMed, et al. Letter; CrowdCheck Letter; IPA Letter; Republic Letter; and Sen. Toomey Letter. Some of these commenters further supported indexing additional increases for inflation. *See, e.g.,* Carta Letter; IPA Letter; and Sen. Toomey Letter. Other commenters offered further suggestions to improve the offering process and raise effective offering limits. *See, e.g.,* M. Schonberger Letter (recommending Regulation A be amended to apply the 180-day selling extension for continuous offerings to certain post-qualification amendment filings). *See also* Annual Report for Fiscal Year 2019: Office of the Advocate for Small Business Capital Formation (''2019 OASB Annual Report''), *available at https://www.sec.gov/files/2019_OASB_Annual%20Report.pdf*, at 41 (recommending that the Commission tie offering limits to expressed marketplace needs for capital and provide flexibility for future review and adjustment).

[364] *See, e.g.,* CII Letter; NASAA Letter; Md. St. Bar Assoc. Letter; AFREF Letter; Better Markets Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter.

[365] *See, e.g.,* Letter from Chamber of Digital Commerce dated June 1, 2020 (''Chamber of Digital Commerce Letter''); J. Clarke Letter; W. Hubbard Letter; CrowdCheck Letter; and Ketsal Letter.

[366] *See, e.g.,* Chamber of Digital Commerce Letter, IPA Letter; and Hubbard Letter.

[367] *See, e.g.,* J. Clarke Letter; Chamber of Digital Commerce Letter; Ketsal Letter; IPA Letter; Sen. Toomey Letter; Letter from Biotechnology Innovation Organization dated July 21, 2020; M. Schonberger Letter (suggesting higher offering limits reduce the burden on issuers by permitting them to raise more capital before having to file post qualification amendments or new offering statements); and CrowdCheck Letter. *See also* Carta Letter; and Sen. Toomey (additionally recommending indexing the limit for inflation). *But see* ABA Letter (supporting the Commission's proposed incremental approach and suggesting that precedent, prestige of the public offering process and customary use of investment bankers likely will mean that registered offerings will be more frequently used for relatively larger offerings).

[368] *See, e.g.,* Carta Letter; and IPA Letter.

[369] *See* Form Letter Type A; and Carta Letter.

[370] *See, e.g.,* CII Letter; CFA Letter; CFA Institute Letter (noting that issuers that have exhausted the Tier II offering limits have been almost exclusively real estate industry issuers, and that the real estate industry is one marked by significant volatility and risk); and Md. St. Bar Assoc. Letter (noting that the 2020 Regulation A Review found that only approximately 10% of issuers conducting Regulation A Tier 2 offerings have reached the $50 million offering limit).

[371] *See, e.g.,* Md. St. Bar Assoc. Letter; CFA Institute Letter (suggesting the expansion of exempt offerings undermines the traditional trade-off between the burdens of public disclosure and the benefits of the right to raise capital from the general public); and NASAA Letter. *See also* R. Rutkowski Letter (suggesting that the proposal would weaken private offering rules in way that would discourage public market offerings and the associated disclosure and governance protections).

of investor losses.[372] Another commenter suggested that the reason Regulation A Tier 2 is underutilized is not that the offering limits are too low, but rather that the issuers and investments involve greater risk.[373] Additionally, one commenter opposed to the increase and one commenter supporting the increase expressed concern relating to the Commission's use of its general exemptive authority under Section 28 of the Securities Act to increase the limit.[374]

Although many commenters were supportive of raising the Tier 2 offering limits, only one commenter recommended increasing the Tier 1 offering limit.[375] This commenter also recommended that the Commission reconsider whether ''covered securities'' status under Section 18 of the Securities Act should be extended to Tier 1 of Regulation A.[376] Other commenters that addressed Tier 1 offering limits, however, were generally opposed to increasing those limits.[377]

c. Final Amendments

In order to facilitate use of Tier 2 Regulation A offerings and having considered the comments on the Proposing Release, the 2020 Regulation A Review, feedback that the Commission received from the Small Business Forums [378] and in response to the Concept Release, we are increasing the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million as proposed. Section 3(b)(5) of the Securities Act expressly authorizes the Commission to review and raise the offering limit as appropriate.[379] Consistent with the Commission's approach to limitations on secondary sales when adopting the Regulation A amendments, we are also increasing the maximum offering amount for secondary sales under Tier 2 of Regulation A from $15 million to $22.5 million.[380]

While the 2015 amendments have stimulated the Regulation A offering market, aggregate Regulation A financing levels remain modest relative to traditional IPOs and the Regulation D market.[381] The 2020 Regulation A Review noted that these financing levels are likely related to a combination of factors, including: The pool of issuers and investors drawn to the market under existing conditions; the availability to issuers of attractive private placement alternatives without an offering limit; the availability to investors of attractive investment alternatives outside of Regulation A with a more diversified pool of issuers; limited intermediary participation and a lack of traditional underwriting; and a lack of secondary market liquidity.[382]

We are raising the Tier 2 offering limit in order to enhance the ability of Regulation A issuers that have exhausted existing offering limits to raise additional capital.[383] Further, public commentary since the 2015 amendments indicates that a higher offering limit may help attract a larger and potentially more seasoned pool of issuers and intermediaries or institutional investors to the Regulation A market.[384] In addition, a higher offering limit may make Regulation A offerings more attractive to more established Exchange Act reporting companies.[385] Although some commenters suggested raising the offering limit to $100 million, we believe it is more appropriate to pursue an incremental approach to increasing the threshold,[386] which will provide the Commission with a reasonable opportunity to assess the impact of the increased offering limit on the Regulation A market before considering further changes. In this regard, we note that the Commission is required by Section 3(b)(5) of the Securities Act to review and consider increasing the new $75 million Tier 2 offering limit every two years.[387] In addition, we believe that the issuer eligibility requirements, content, and filing requirements for offering statements and ongoing reporting requirements for issuers in Tier 2 Regulation A offerings continue to provide appropriate protections for investors at this higher offering limit. For these reasons, we believe that it is necessary and appropriate in the public interest and consistent with the protection of investors to raise the Tier 2 offering limit as proposed.[388]

We note that under the final amendments, Tier 2 offerings will continue to be preempted from State law registration and qualification requirements.[389] We believe this is

[372] *See* CFA Letter. *See also* CFA Institute Letter (expressing concerns with compliance by issuers in the exempt markets and its perception of the lower quality of issuers offering in the Regulation A market).

[373] *See, e.g.,* NASAA Letter (recommending strengthening corporate governance and disclosure obligations and rescinding preemption of State securities regulation to increase the regulatory oversight of these companies making them more attractive to and safer for investors).

[374] *See* Better Markets Letter (opposing the increase); and CrowdCheck Letter (supporting the increase).

[375] *See* Chamber of Digital Commerce Letter.

[376] *See id.*

[377] *See, e.g.,* CII Letter; NASAA Letter; and CrowdCheck Letter.

[378] *See* 2017 Forum Report; and 2018 Forum Report.

[379] We also believe that the Commission has general exemptive authority under Securities Act Section 28 to raise the Regulation A offering limit if it finds that raising the limit is necessary or appropriate in the public interest and consistent with the protection of investors.

[380] The Commission observed in connection with the 2014 amendments to Regulation A that selling security holder access to Regulation A has historically been an important part of the exemptive scheme. *See* Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act, Release No. 33–9497 (Dec. 18, 2013) [79 FR 3925 (Jan. 23, 2014)], at Section II.B.3; and 2015 Regulation A Adopting Release, at Section II.B.3.c. Consistent with existing and historical provisions of Regulation A, we are continuing to permit secondary sales under Regulation A up to 30 percent of the maximum offering amount permitted under the applicable tier.

[381] *See* 2020 Regulation A Review.

[382] *See id.*

[383] The 2020 Regulation A Review estimates that approximately 10 percent of issuers in Tier 2 offerings have reached the $50 million offering limit across completed and ongoing offerings. *See id.* at Table 4. As discussed in the 2020 Regulation A Review and noted by one commenter, these issuers have primarily been from the real estate industry. *See* CFA Institute Letter. While raising the offering limit will permit all issuers to raise additional capital, we believe that the disclosure requirements of Regulation A will help investors to evaluate the risk of such investments.

[384] *See, e.g.,* letter in response to the Concept Release from Committee on Securities Regulation of the Business Law Section of the New York State Bar Association dated Oct. 16, 2019.

[385] *See* 2020 Regulation A Review, at Section F.1. However, as noted in the 2020 Regulation A Review, the staff lacks data that would allow it to assess how a specific offering limit increase would affect the size and composition of the pool of prospective issuers, intermediaries, and investors in the Regulation A market. *See infra* Section IV.C.5.a.i.

[386] We note that adjusting the existing offering limit for inflation from 2015 to present would increase the Tier 2 offering limit by only $5.845 million. *See* 2020 Regulation A Review, at Table 7. Such a change likely would not attract additional institutional investors, intermediaries, or traditional underwriters to the Regulation A market.

[387] As noted above, because of the statutory obligation to review the limit every two years, we do not think it is necessary to index the offering limit for inflation, as some commenters suggested. *See* Carta Letter; and Sen. Toomey Letter.

[388] We did not propose and are not increasing the Tier 1 offering limit. While one commenter recommended an increase, we do not believe it is likely to result in the kinds of benefits discussed above that we expect may result from the increased Tier 2 offering limit, such as attracting a larger and more seasoned pool of issuers and intermediaries or institutional investors to the Regulation A market. As discussed in the 2020 Regulation A Review, while an increase in the Tier 1 offering limit could draw more issuers to Tier 1, Tier 2 may remain more attractive to issuers due to, for example, preemption of state review, an easier path to quotation on the upper tiers of the OTC market in the presence of periodic reports required by Tier 2, and the flexibility to raise more capital without having to undergo a re-qualification. *See* 2020 Regulation A Review at Section F.2. While we do not believe an increase is warranted at this time, we will continue to consider the Tier 1 offering limitation and the appropriate investor protections under Tier 1 when we conduct the Tier 2 offering limit review required by Section 3(b)(5) of the Securities Act.

[389] Many commenters recommended preempting State securities law regulation of secondary trading

appropriate because we expect that Tier 2 offerings will continue to be more national in nature. While issuers in Tier 2 offerings are required to qualify offerings with the Commission before sales can be made pursuant to Regulation A, they are not required to register or qualify their offerings with State securities regulators. Section 18 of the Securities Act generally provides for preemption of State law registration and qualification requirements for ''covered securities.'' [390] Section 18(b)(4)(D) of the Securities Act further provides that securities issued pursuant to Section 3(b)(2) of the Securities Act are covered securities if they are listed, or will be listed, on a national securities exchange or if they are offered or sold to a ''qualified purchaser,'' [391] which the Commission has defined to include any person to whom securities are offered or sold in a Tier 2 offering.[392] We are not extending ''covered securities'' status under Section 18 of the Securities Act to Tier 1, as suggested by one commenter. We continue to believe that, in light of concerns raised by state regulators and the generally more local nature of Tier 1 offerings, it is appropriate for the States to retain oversight over Tier 1 offerings.[393]

2. Rule 504

Rule 504 of Regulation D provides an exemption for eligible issuers [394] from registration under the Securities Act for the offer and sale of up to $5 million of securities in a 12-month period. In 2016, the Commission amended Rule 504 to raise the aggregate amount of securities an issuer may offer and sell in any 12-month period from $1 million to $5 million.[395] From 2009 through 2019, for issuers other than pooled investment funds, two percent of the capital raised in Regulation D offerings under $5 million was offered under Rule 504 (and under Rule 505, prior to its repeal), and 98 percent of the capital raised was offered under Rule 506.[396]

a. Proposed Amendments

The Commission proposed to use its general exemptive authority under Section 28 of the Securities Act to raise the maximum offering amount under Rule 504 from $5 million to $10 million.

b. Comments

We received mixed comments on the proposal to raise the Rule 504 maximum offering amount to $10 million with some commenters supporting [397] and others opposing [398] the proposal. Commenters who supported increasing the maximum offering amount stated that it would allow issuers to more easily raise capital,[399] make offerings more cost effective,[400] and encourage greater use of the exemption.[401] One of these commenters additionally suggested that because Rule 504 offerings will remain subject to applicable federal and state securities law requirements, including antifraud provisions, it is reasonable to expect that the increase ''will not meaningfully decrease investor protection or incentivize bad actors to enter the marketplace.'' [402] Commenters opposed to the increase stated that issuers do not use the full capacity under the existing limit and that an increase may not drive more regional multistate offerings.[403] Commenters also expressed concern that the Commission's analysis of the impact of raising the Rule 504 limit was insufficient,[404] and that increasing the limits may be detrimental to the public markets.[405] Other commenters questioned the Commission's statutory authority to increase the limit.[406]

c. Final Amendments

Based on our consideration of the available data and the feedback that we received on the Concept Release, on the Proposing Release, and from the Small Business Capital Formation Advisory Committee, and in order to facilitate use of Rule 504 for capital raising, we are amending the rules as proposed to raise the offering limit from $5 million to $10 million. We believe that increasing the offering limit in reliance on our general exemptive authority under Securities Act Section 28 [407] is appropriate in the public interest because permitting larger offerings under Rule 504 may encourage more issuers to use the exemption, could encourage more issuers to conduct regional multistate offerings and make use of State coordinated review programs, and could make the exemption a more efficient capital raising option for smaller issuers by lowering the offering costs per dollar raised. At the same time, we do not believe that raising the offering limit would expand the private markets at the expense of the public markets.[408]

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of Regulation A securities issued in Tier 2 offerings. While such preemption could further advance the development of a national securities market by easing the compliance obligations of investors that trade in the secondary markets, we believe this recommendation merits careful consideration and an opportunity for market participants to receive notice and comment on a specific proposal. Accordingly, we are not adopting any changes to preemption of State securities laws for secondary trading at this time.

[390] *See* 15 U.S.C. 77r(c).

[391] *See* 15 U.S.C. 77r(b)(4)(D).

[392] *See* 17 CFR 230.256.

[393] *See* 2015 Regulation A Release, at Section II.H.3.

[394] Issuers that are required to file reports under Exchange Act Section 13(a) or 15(d), investment companies, blank check companies, and issuers that are disqualified under Rule 504's ''bad actor'' disqualification provisions are not eligible to use Rule 504.

[395] Five million dollars is the maximum amount statutorily allowed under Securities Act Section 3(b)(1). *See* Intrastate and Regional Offerings Release. In light of the increased offering threshold under Rule 504, the Commission repealed Rule 505. Most issuers previously using Rule 505 are able to conduct an offering up to $5 million under Rule 504.

[396] *See* Proposing Release, at note 263 and accompanying text.

[397] *See, e.g.,* ABA Letter; B. Andrews, et al. Letter; SEC SBCFAC Letter; Geraci Law Letter (further recommending that securities sold pursuant to Rule 504 be considered ''covered securities''); SAF Letter; Carta Letter; and Ketsal Letter. *See also* 2019 OASB Annual Report, at 41 (suggesting that the Commission ensure that dollar amount caps used in exemptions are ''tied to expressed marketplace needs for capital and provide flexibility for future review and adjustment'').

[398] *See, e.g.,* CII Letter; NASAA Letter; AFREF Letter; Better Markets Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter. Some of these commenters suggested that increased offering limits increase investor risk by creating more opportunities for high risk issuers to sell to unsophisticated investors. *See, e.g.,* CFA Letter and CFA Institute Letter.

[399] *See* ABA Letter.

[400] *See* Carta Letter.

[401] *See* Ketsal Letter. *See also* Carta Letter (stating that the increase would make the exemption more attractive to a broader group of issuers).

[402] *See* ABA Letter.

[403] *See, e.g.,* NASAA Letter (stating its belief that raising the threshold above $5 million would require issuers to comply with Securities Act Section 3(b)(2), which carries with it obligations including mandatory filing of audited financial statements with the Commission.); CFA Letter; and CrowdCheck Letter.

[404] *See, e.g.,* CFA Letter (stating that the Commission's analysis lacks data or a methodological approach to determine the impacts of raising the offering limit); CII Letter (stating that the Commission's analysis fails to adequately consider the potential impact on long-term investors and the capital markets from expanding the exempt offering framework); AFREF Letter (stating that the Commission's analysis does not adequately analyze the negative effects of the amendments); and R. Rutkowski Letter.

[405] *See, e.g.,* AFREF Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter.

[406] *See, e.g.,* Better Markets Letter; CFA Letter; and Public Interest Comment Letter from Andrew N. Vollmer and Brian R. Knight, Mercatus Center at George Mason University dated Oct. 30, 2020 (''Mercatus Center Letter''). *See infra* note 429.

[407] Securities Act Section 3(b)(1) currently sets the maximum offering amount for small issues exempted under that section at $5 million. *See* 15 U.S.C. 77c(b)(1). As explained above, we are relying on our general exemptive authority to raise the threshold in Rule 504 to $10 million. We therefore do not agree with the commenter who stated that raising the threshold above $5 million would require compliance with Securities Act Section 3(b)(2).

[408] As discussed in Section IV.A below, Rule 504, like Regulation Crowdfunding, currently represents a small segment of the private offering market, and issuers that raise capital pursuant to the exemption tend to be at a much earlier stage of development

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Furthermore, we believe that increasing the offering limit is consistent with the protection of investors because the amendments would not alter the significant protections applicable under Rule 504, such as potential State review and prohibitions on ''bad actor'' participation.

3. Regulation Crowdfunding

Regulation Crowdfunding provides an exemption from registration for certain crowdfunding transactions including limits on the amount an issuer may raise; limits on the amount an individual may invest; and a requirement that the transactions be conducted through an intermediary that is registered as either a broker-dealer or a ''funding portal.''

The exemption from registration provided by Section 4(a)(6) is available provided that ''the aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the exemption provided under [Section 4(a)(6)] during the 12-month period preceding the date of such transaction, is not more than $1,000,000.'' Under Securities Act Section 4A(h), the Commission is required to adjust the dollar amounts in Section 4(a)(6) ''not less frequently than once every five years, by notice published in the **Federal Register**, to reflect any change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics.'' [409] The Commission adjusted the maximum offering limit to $1.07 million ($1.0 million adjusted to reflect changes in the Consumer Price Index (''CPI'')) in 2017.[410]

In addition, Regulation Crowdfunding also limits the amount individual investors are allowed to invest across all Regulation Crowdfunding offerings over the course of a 12-month period. The limitation on how much an individual can invest during that period depends on his or her net worth and annual income and may not exceed $107,000. Individual investors are limited to:

- The greater of $2,200 or five percent of the lesser of the investor's annual income or net worth, if either of an investor's annual income or net worth is less than $107,000; or
- Ten percent of the lesser of his or her annual income or net worth, if both annual income and net worth are equal to or more than $107,000.[411]

Further, the offering statement for a Regulation Crowdfunding offering must include specified information, including a discussion of the issuer's financial condition and financial statements. Regulation Crowdfunding's financial statement requirements are based on the amount offered and sold in reliance on the exemption within the preceding twelve-month period, with progressively increasing requirements and involvement of outside accountants as offering size increases.[412] On May 4, 2020, the Commission adopted temporary final rules under Regulation Crowdfunding to facilitate capital formation for small businesses impacted by COVID–19, which include, among other things, an exemption from certain financial statement review requirements for issuers offering $250,000 or less of securities in reliance on Regulation Crowdfunding within a 12-month period.[413] These temporary final rules were subsequently extended and apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and February 28, 2021.[414]

In 2019, the Commission staff undertook a study of the available information on the capital formation and investor protection impacts of Regulation Crowdfunding. The resulting report to the Commission summarized quantitative information, where it was available to the staff, as well as qualitative observations of Commission staff and FINRA staff and input from market participants regarding their experience with Regulation Crowdfunding.[415] The study found that during the considered period, the number of offerings and the total amount of funding were relatively modest, with issuers raising $108 million under Regulation Crowdfunding from May 16, 2016, through December 31, 2018.[416] The study also found that the typical offering during the considered period was small and raised less than the 12-month offering limit.[417]

a. Proposed Amendments

The Commission proposed to use its general exemptive authority under Securities Act Section 28 to raise the offering limit in Regulation Crowdfunding from $1.07 million to $5 million. The Commission also proposed to increase the investment limits for investors in Regulation Crowdfunding offerings. First, the Commission proposed to no longer apply any investment limits to accredited investors. The proposed amendments would treat accredited investors under Regulation Crowdfunding in the same manner as other exempt offerings. Second, the Commission proposed to amend the Regulation Crowdfunding calculation method for the investment limits for non-accredited investors to allow them to rely on the greater of their annual income or net worth. The proposed amendment would conform this aspect of Regulation Crowdfunding with Tier 2 of Regulation A and would apply a consistent approach to limiting the potential losses investors may incur in offerings conducted in reliance on the two exemptions.[418] The Commission did not propose to adjust the financial statement requirements in Regulation Crowdfunding, although the economic analysis in the Proposing Release considered alternatives that would amend these disclosure requirements and solicited comment on them.

b. Comments

Commenters were broadly supportive of raising the Regulation Crowdfunding offering limit to $5 million.[419] Many

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than those that conduct a traditional initial public offering.

[409] *See* 15 U.S.C. 77d(a)(6) and 15 U.S.C. 77d–1(h). *See also* 17 CFR 227.100(a)(1) (''Rule 100(a)(1)'' of Regulation Crowdfunding).

[410] *See* Inflation Adjustments and Other Technical Amendments under Titles I and III of the JOBS Act (Technical Amendments; Interpretation), Rel. No. 33–10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)].

[411] *See* 17 CFR 227.100(a)(2) (''Rule 100(a)(2)'' of Regulation Crowdfunding). Rule 100(a)(2) is based on the requirement in Section 4(a)(6).

[412] *See* 17 CFR 230.201(t).

[413] *See* Temporary Amendments to Regulation Crowdfunding, Release No. 33–10781 (May 4, 2020) [85 FR 27116 (May 7, 2020)] (''Temporary Amendments Adopting Release''). The amendments adopted in this release do not affect the application of these temporary final rules.

[414] *See* Temporary Amendments to Regulation Crowdfunding; Extension, Release No. 33–10829 (Aug. 28, 2020) [85 FR 54483 (Sept. 2, 2020)] (''Temporary Amendments Extension''). The temporary final rules expire on September 1, 2021.

[415] *See* Report to the Commission: Regulation Crowdfunding (June 18, 2019), *available at https://www.sec.gov/files/regulation-crowdfunding-2019_0.pdf* (''2019 Regulation Crowdfunding Report'').

[416] *See id.*

[417] *See id.,* at Section I.

[418] Under Regulation A accredited investors are not limited in the amount of securities they may purchase and other investors are limited to purchasing in a Tier 2 offering no more than: (a) Ten percent of the greater of annual income or net worth (for natural persons); or (b) ten percent of the greater of annual revenue or net assets at fiscal year-end (for non-natural persons). *See* 17 CFR 230.251(d)(2)(i)(C). This limit does not, however, apply to purchases of securities that will be listed on a national securities exchange upon qualification.

[419] *See, e.g.,* B. Andrews, et al. Letter; CfPA Letter; SEC SBCFAC Letter; Geraci Law Letter; Letter from Crowdfund Capital Advisors dated May 29, 2020 (''CCA Letter'') (suggesting that increasing the offering limit will reduce the cost of capital and permit larger, more stable and lower risk issuers to use the exemption); Silicon Prairie Letter; Letter from Social Enterprise Investments, Inc. dated May 31, 2020 (''SEI Letter''); Netcapital Letter; Carta Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; SAF Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; InnaMed, et al. Letter; SeedInvest Letter; Crowdwise Letter; Letter from Mark Roderick dated May 31, 2020 (''M. Roderick Letter''); Letter from Representative Patrick McHenry dated June 8, 2020

commenters recommended raising the limit in light of economic concerns raised by COVID–19.[420] Some additionally supported raising the limit beyond $5 million.[421] Some commenters supportive of an increased offering limit also supported further action by the Commission to enhance compliance with Regulation Crowdfunding.[422] In particular, some commenters supported relaxing the disclosure and financial statement requirements for smaller Regulation Crowdfunding offerings.[423] Others supported Federal preemption of State securities law registration and qualification requirements for secondary sales.[424]

Some commenters expressed concern or opposition to increasing the offering limit.[425] A number of these commenters suggested that there is not compelling evidence of the need for an increase or that more information is needed to determine whether such an increase is appropriate.[426] Some of these commenters expressed concern that the proposals would expand the private markets at the expense of the public markets.[427] Other commenters expressed concern with compliance by issuers under Regulation Crowdfunding [428] and the Commission's authority to increase the limit.[429] One commenter recommended that if the Commission raises the threshold above the statutory limit, it should make clear the basis of its authority and the status of securities issued under the increased offering limit under State securities laws, such as whether those securities are ''covered securities'' under Section 18 of the Securities Act.[430]

Commenters that addressed the issue generally supported amending the rules to remove the investment limits for accredited investors [431] and to use the greater of annual income or net worth in calculating investment limits for non-accredited investors.[432] Some commenters, however, opposed removing the investment limits for accredited investors,[433] or increasing the investment limits for non-accredited

(''Rep. McHenry Letter''); and Sen. Toomey Letter. *See also* 2019 OASB Annual Report, at 41 (suggesting that the Commission ensure that dollar amount caps used in exemptions are ''tied to expressed marketplace needs for capital and provide flexibility for future review and adjustment'') and 47 (specifically supporting an increase offering cap for Regulation Crowdfunding offerings, stating an increase ''would allow companies to raise meaningful early-stage capital using crowdfunding rather than limiting companies' options to a narrower set of exemptions''); and AOIP Letter (suggesting the Commission immediately increase the Regulation Crowdfunding limit in response to the COVID–19 pandemic).

[420] *See, e.g.,* B. Andrews, et al. Letter; Letter from Stuart Halperin dated Mar. 27, 2020; Letter from Kevin Wolf dated Mar. 27, 2020; and AOIP Letter.

[421] *See, e.g.,* CCA Letter; J. Clarke Letter; SEI Letter; Netcapital Letter; Republic Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; InnaMed, et al. Letter; and Sen. Toomey Letter. Some commenters further suggested indexing these new higher amounts for inflation. *See, e.g.,* Carta Letter; and Sen. Toomey Letter.

[422] *See, e.g.,* CfPA Letter (recommending funding portals be required to certify that they have reviewed a campaign for compliance prior to posting it on their platform); and M. Roderick Letter (recommending additional disclosure regarding target offering amounts).

[423] *See, e.g.,* Silicon Prairie Letter (recommending relaxing the financial information requirements for offerings under $1 million); CrowdCheck Letter (supporting a micro-offering tier below $25,000); Nextseed Letter (recommending a micro-offering tier below $250,000); R. Campbell Letter (recommending eliminating the burden of ongoing reporting requirements for small crowdfunding offerings); Honeycomb Letter; Letter from MainVest, Inc. dated May 7, 2020 (recommending the requirement for reviewed financials not apply for offerings under $500,000); Raise Green & New Haven Comm. Solar Letter; M. Roderick Letter (supporting raising the threshold for reviewed financial statements to at least $350,000); CfPA Letter (recommending financial disclosures are only be required to be provided to the extent that they are ''material to an understanding of the issuer, its business and the securities being offered'') and Sen. Toomey Letter (supporting tailored auditing requirements). *See also* 2019 OASB Annual Report, at 48 (recommending the Commission reevaluate Regulation Crowdfunding's disclosure obligations, and specifically suggesting that ''reporting requirements could be simplified for companies raising under $250,000''). *But see* Better Markets Letter (expressing concern about the temporary Regulation Crowdfunding relief).

[424] *See* Form Letter Type A.

[425] *See, e.g.,* Letter from Bridget Richardson dated Mar. 31, 2020 (''B. Richardson Letter''); Letter from Jeffrey Marks, Alliance Legal Partners, Inc. dated Apr. 17, 2020 (''J. Marks Letter''); CII Letter; Md. St. Bar Assoc. Letter; AFREF Letter; Morningstar Letter (noting a lack of investment advice such as from a broker or investment adviser that investors might have access to with regard to an investment in a public company); Better Markets Letter; CFA Letter; R. Rutkowski Letter; CrowdCheck Letter (noting compliance failures and recommending any increase be coupled with a robust enforcement program); and CFA Institute Letter.

[426] *See, e.g.,* CII Letter; CFA Letter; CFA Institute Letter; B. Richardson Letter; and Md. St. Bar Assoc. Letter.

[427] *See, e.g.,* Better Markets Letter; CFA Letter; CFA Institute Letter; and R. Rutkowski Letter. *See also* J. Marks Letter (suggesting that larger offerings are appropriately subject to additional Commission oversight); CFA Letter; and CFA Institute Letter (suggesting that the amendments will be detrimental to retail investors by providing them greater access to the least attractive private offerings).

[428] *See, e.g.,* ABA Letter (suggesting that the Commission should be satisfied that the crowdfunding requirements are being complied with before increasing the limits); CFA Letter (contending that the Commission has a responsibility to examine non-compliance in crowdfunding markets and remedy those deficiencies before expanding the exemption); and CrowdCheck Letter.

[429] *See, e.g.,* Better Markets Letter; and CFA Letter. *See also* Mercatus Center Letter. Although the Mercatus Center Letter in particular was received one business day before the publicly-noticed open meeting at which the Commission would consider these amendments [Pub. L. 94–409] and long after the expiration of the comment period, the issues regarding our use of exemptive authority, including the questions raised in that letter, have been carefully considered. As noted above, Section 28 of the Securities Act gives the Commission broad authority to ''conditionally or unconditionally exempt any person . . . or any class or classes of persons . . . from any provision or provisions of'' the Securities Act and rules or regulations issued thereunder ''to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.'' 15 U.S.C. 77z–3. We believe that exempting additional classes of transactions above the statutory threshold in Section 4(a)(6) is in the public interest and consistent with the protection of investors for the reasons discussed below, and is thus consistent with the plain language of Section 28. In reaching this determination, we have been informed by the staff's experience administering Regulation Crowdfunding since 2015, the 2019 Regulation Crowdfunding Report, and the feedback of numerous market participants in recent years, including in response to the Concept Release. Section 28 was intended to provide flexibility to the Commission to respond to precisely these sorts of market developments. *See* Rule 701—Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33–7645 (Feb. 25, 1999) (noting that, in enacting the National Securities Markets Improvement Act of 1996, Congress expected the Commission to use its new authority under Section 28, among other things, to raise the offering limit for Rule 701 compensatory offerings beyond the statutorily prescribed limit of $5 million). We thus view these amendments as appropriate and well within our statutory authority.

[430] *See* ABA Letter.

[431] *See, e.g.,* ABA Letter; B. Andrews, et al. Letter; SEC SBCFAC Letter; SEI Letter; Netcapital Letter; Carta Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; Morningstar Letter; InnaMed, et al. Letter; Crowdwise Letter; Rep. McHenry Letter; Honeycomb Letter; M. Roderick Letter; and Ketsal Letter. *See also* CrowdCheck Letter (supporting removing the limits if the investor protections in Regulation A are replicated in Regulation Crowdfunding); and AOIP Letter (suggesting the Commission immediately remove the investment limits for accredited investor in response to the COVID–19 pandemic). *See also* 2019 OASB Annual Report, at 48.

[432] *See, e.g.,* ABA Letter; Letter from Regulated Funding Portal Industry Association dated Mar. 6, 2020; B. Andrews, et al. Letter; SEC SBCFAC Letter; CCA Letter; Silicon Prairie Letter (recommending further simplification of the threshold and use of a ''certified investor'' designation); SEI Letter; Netcapital Letter; Carta Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter (recommending increasing the limit); InnaMed, et al. Letter.; Crowdwise Letter; CrowdCheck Letter; CfPA Letter (recommending all investors be permitted to invest $2,200 per transaction); and Ketsal Letter. Some of these commenters recommended applying the limits on a per offering basis. *See, e.g.,* Crowdwise Letter; InnaMed, et al. Letter; Silicon Prairie Letter; and Republic Letter. *See also* AOIP Letter (suggesting the Commission immediately use the greater of annual income or net worth in response to the COVID–19 pandemic, and also suggesting the limits be applicable on a per offering basis).

[433] *See, e.g.,* Letter from Jason Pampena dated May 22, 2020 (''J. Pampena Letter'') (expressing concern that removing the investment limits for accredited investors will reduce investment opportunities for non-accredited investors).

investors.[434] Some commenters supporting the amendment suggested requiring verification of accredited investor status,[435] while others were against verification standards.[436] One commenter supporting the amendments to the investment limits also expressly supported not adjusting or increasing Regulation Crowdfunding's financial statement requirements.[437]

c. Final Amendments

Based on our consideration of the available data, the staff's 2019 Regulation Crowdfunding Report, and the feedback that we received on the Concept Release, the Proposing Release and from Small Business Forums[438] and the Small Business Capital Formation Advisory Committee, and in order to facilitate use of Regulation Crowdfunding for capital raising, we are amending the rules as proposed: (1) To raise the issuer offering limits in Regulation Crowdfunding; and (2) to remove or increase the investment limits by no longer applying those limits to accredited investors and allowing investors to rely on the greater of their income or net worth in calculating their investment limit.[439] We are raising the offering limit in Regulation Crowdfunding from $1.07 million to $5 million and are adjusting the investment limits in reliance on the general exemptive authority under Securities Act Section 28.[440] We believe that reliance on Section 28 to raise the offering limit is an appropriate use of our exemptive authority because the amendments will extend the exemption under Section 4(a)(6) of the Securities Act to additional classes of transactions (*i.e.,* those that would cause the aggregate amount sold to all investors by the issuer in the 12 months preceding the transaction to be greater than $1 million,[441] but not more than $5 million, and those involving accredited investors who invest above the statutory investment limits).[442] We are also extending certain temporary rules relating to the financial statement requirements for Regulation Crowdfunding.

Currently, securities issued pursuant to the exemption under Section 4(a)(6) are deemed to be ''covered securities'' and thus the offer and sale of such securities by an issuer are not subject to State securities law registration and qualification requirements pursuant to Section 18 of the Securities Act. Nevertheless, in light of questions raised by commenters and in order to provide certainty with respect to the status of the exemption and the coverage of Section 18 of the Securities Act, we are adding new 17 CFR 227.504 to Regulation Crowdfunding to provide that for purposes of Section 18(b)(3) of the Securities Act, a ''qualified purchaser'' means any person to whom securities are offered or sold pursuant to an offering under Regulation Crowdfunding.[443] As securities offered and sold to qualified purchasers also are ''covered securities'' under Section 18 of the Securities Act, this amendment should remove any doubt that State securities law registration and qualification requirements do not apply to securities offered and sold under Regulation Crowdfunding, as amended.

While approximately 2,000 offerings were initiated pursuant to Regulation Crowdfunding in the approximately three and a half years from the time the exemption first became available through December 31, 2019, market participants have expressed concern that the vitality of the market and the number of offerings is being constrained by the $1.07 million offering limit.[444] As we noted in the Proposing Release, the current offering limits may not reflect current capital raising trends.[445] Commenters further suggested that start-ups and small businesses seeking to raise between $1 million and $5 million need to spend ''additional time and expense pursuing other exempt offering types'' in addition to Regulation Crowdfunding in order to meet their funding needs, as the existing offering limits in Regulation Crowdfunding are insufficient to meet those needs.[446] We believe that permitting larger offerings under Regulation Crowdfunding may encourage more issuers to use the exemption and could lower the offering costs per dollar raised,[447] which would make the exemption a more efficient capital raising option for smaller issuers. At the same time, we do not believe that raising the offering limit would expand the private market at the expense of the public market. As discussed in Section IV.A below, Regulation Crowdfunding represents a relatively small segment of the private offering market, and issuers that raise capital pursuant to the exemption tend to be at a much earlier stage of development than those that conduct a traditional initial public offering. Thus, we anticipate these offerings will have only a marginal impact on the number of registered offerings.

We also believe that existing Regulation Crowdfunding requirements, including the intermediary requirements and the eligibility, disclosure, and ongoing reporting requirements for issuers will continue to

[434] *See, e.g.,* CII Letter; and Morningstar Letter (recommending a cautious approach to changing the investment limit standards and expressing concern that there is limited investment advice for these investors). *See also* NASAA Letter; and CFA Letter (generally opposing the amendments).

[435] *See, e.g.,* J. Clarke Letter; and Raise Green & New Haven Comm. Solar Letter.

[436] *See, e.g.,* Honeycomb Letter (supporting self-verifications).

[437] *See* ABA Letter.

[438] *See* 2017 Forum Report; 2018 Forum Report; 2019 Forum Report; and 2020 Forum Report.

[439] We are not, as some commenters recommended, preempting State securities law regulation of secondary trading of securities issued in Regulation Crowdfunding offerings. We believe this recommendation merits careful consideration and an opportunity for market participants to receive notice and comment on a specific proposal.

[440] Securities Act Section 4(a)(6) currently sets the maximum offering limit at $1.07 million ($1.0 million adjusted to reflect changes in the CPI). *See* 15 U.S.C. 77d(a)(6) and 15 U.S.C. 77d–1(h). *See also* Rule 100(a)(1) of Regulation Crowdfunding.

[441] As adjusted for inflation pursuant to Section 4A(h) of the Securities Act [15 U.S.C. 77d–1(h)].

[442] In contrast, the change to permit non-accredited investors to base their investment limit on the ''greater of'' rather than the ''lesser of'' their income or net worth is a discretionary choice that we are making to carry out the statutory exemption. *See* Section 302(c) of the JOBS Act; Section 19(a) of the Securities Act [15 U.S.C. 77s(a)]. In the proposing and adopting releases for Regulation Crowdfunding, the Commission noted the statutory ambiguity in Section 4(a)(6)(B) of the Securities Act as to application of the investment limits. *See* Crowdfunding Adopting Release, at Section II.A.2. After considering the comments received, the Commission adopted a ''lesser of'' standard in Regulation Crowdfunding. In light of our experience with Regulation Crowdfunding since its adoption in 2015, and concerns raised that the existing limits may be hampering the utility of the exemption, however, the Commission proposed to apply a less restrictive approach by using the ''greater of'' standard instead of the ''lesser of'' standard. As discussed below, we are adopting the ''greater of'' standard.

[443] We believe it is appropriate to define ''qualified purchaser'' to include any person to whom securities are offered and sold pursuant to an offering under Regulation Crowdfunding. Defining qualified purchaser in this manner is consistent with the public interest because it would provide certainty as to the application of State securities law registration and qualification requirements. We also believe that offerings conducted pursuant to Regulation Crowdfunding, similar to Tier 2 offerings under Regulation A, are likely to be more national in nature. Furthermore, significant and appropriate investor protections would continue to apply, including intermediary requirements and the eligibility, disclosure, and ongoing reporting requirements for issuers, as discussed below. For similar reasons, we are also amending 17 CFR 240.12g–6 (''Rule 12g–6'') to provide clarity with respect to the continuing application of that rule's conditional exemption from Section 12(g) for securities issued pursuant to Regulation Crowdfunding.

[444] *See, e.g.,* InnaMed Letter; SeedInvest Letter; and Letter from J. Vinokur, dated May 1, 2020.

[445] *See* Proposing Release, at note 231 (*citing* to 2019 OASB Annual Report, which noted companies are seeking increased capital to fund early-stage operations finding that the average seed funding increased from $1.3 million in 2010 to $5.7 million in 2018).

[446] *See, e.g.,* SeedInvest Letter; and InnaMed Letter.

[447] *See, e.g.,* CCA Letter.

provide appropriate investor protections at this higher offering limit. We acknowledge the concerns raised by commenters about the increased offering limit in light of questions regarding issuer compliance with existing Regulation Crowdfunding requirements. As discussed in more detail in Section II.B.2 above, we remind issuers and intermediaries in Regulation Crowdfunding offerings of their obligation to comply with the terms of the exemption and the serious consequences that may result from a failure to do so. At this time, we do not believe additional disclosure or other requirements on issuers or intermediaries is appropriate, or would necessarily be effective in addressing these compliance concerns.[448] Commission staff will continue to work with FINRA to assess issuer and intermediary compliance with the requirements of Regulation Crowdfunding.

For these reasons, we continue to believe that it is necessary and appropriate in the public interest and consistent with the protection of investors to raise the Regulation Crowdfunding offering limit as proposed.

In response to commenters who recommended that we adjust the financial statement requirements or permanently adopt the temporary relief with respect to the financial statement review requirements,[449] we are extending certain provisions of the temporary final rules for an additional 18 months so that they will apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and August 28, 2022.[450]

Specifically, we are adopting new temporary Rule 201(bb) to extend the relief provided by existing temporary 17 CFR 227.201(z)(3), which applies to an eligible issuer in an offering or offerings that, together with all other amounts sold in Regulation Crowdfunding offerings within the preceding 12-month period, have, in the aggregate, a target offering amount of more than $107,000, but not more than $250,000. Such an issuer may provide financial statements of the issuer and certain information from the issuer's Federal income tax returns, both certified by the principal executive officer, in accordance with 17 CFR 227.201(t)(1) (''Rule 201(t)(1)''), instead of the financial statements reviewed by a public accountant that is independent of the issuer that would otherwise be required by 17 CFR 227.201(t)(2) (''Rule 201(t)(2)''). This temporary relief will apply only if reviewed or audited financial statements of the issuer are not otherwise available. In connection with the extension of this provision, we are also extending the disclosure requirement currently required by existing temporary 17 CFR 227.201(z)(1)(iii),[451] which requires an issuer relying on the temporary rule to provide prominent disclosure that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer.[452] We are also extending the enhanced eligibility requirements of temporary 17 CFR 227.100(b)(7)(i) and 17 CFR 227.100(b)(7)(ii).[453]

We believe that this extension of these portions of the temporary final rules is appropriate, particularly in light of the significant challenges for small businesses that COVID–19 continues to present. We continue to believe that a securities offering under Regulation Crowdfunding may be an attractive fundraising option for some small businesses at this time, particularly as a means of allowing an issuer to make use of the internet to reach out to its customers or members of its local community as potential investors as well as to existing investors. We understand that the temporary final rules have been well received to date and have proven effective for some issuers to raise capital under the current conditions, and we have received positive feedback from market participants with respect to the benefits of current temporary Rule 201(z)(3). The extension of these provisions of the temporary final rules also will provide us with the opportunity to analyze the use of the exemption and gather additional feedback from issuers, investors and other market participants as we consider its benefits and whether to adopt the provision on a permanent basis.

We are not adjusting, on either a temporary or permanent basis the financial statement requirements for offerings over $535,000. We have seen no evidence to indicate that investors should receive less information in offerings under Regulation Crowdfunding at this level, and continue to believe that the current requirements provide important information to investors. Offerings of more than $535,000 up to the increased $5 million offering limit will be subject to the financial statement requirements of 17 CFR 230.201(t)(3). We believe that this standard, which (1) requires the provision of audited financial statements similar to the requirements for other exempt offerings with higher

[448] We note, for example, that one commenter recommended we require a certification from an intermediary that it has reviewed a campaign for compliance prior to posting it on their platform. *See* CfPA Letter. However, intermediaries are already required to have a reasonable basis for believing that an issuer seeking to offer and sell securities through the intermediary's platform complies with requirements of Regulation Crowdfunding.

[449] *See, e.g.,* Silicon Prairie Letter (recommending relaxing the financial information requirements for offerings under $1 million); Nextseed Letter (highlighting the ability under the temporary relief to raise up to $250,000 without need for CPA-reviewed financials and recommending the Commission make the temporary relief provisions permanent as a micro-offering tier below $250,000); Honeycomb Letter (noting that the current financial statement thresholds and disclosure requirements impose additional costs on issuers without providing material benefit to investors—particularly for small businesses raising under $250,000.); Letter from MainVest, Inc. dated May 7, 2020 (recommending the requirement for reviewed financials not apply for offerings under $500,000); and Letter from Republic dated Aug. 22, 2020 (recommending that the Commission permanently adopt the temporary relief or extend the relief for at least 12 months). *See also* 2019 OASB Annual Report, at 48 (recommending the Commission reevaluate Regulation Crowdfunding's disclosure obligations, and specifically suggesting that ''reporting requirements could be simplified for companies raising under $250,000'').

[450] These amendments will be effective upon publication in the **Federal Register** and will expire on March 1, 2023. We find that there is good cause for the amendments to be effective immediately upon publication because a delay in implementation would substantially undermine the relief provided by the temporary rules and could exacerbate the existing challenges faced by many small businesses in need of capital to continue their operations. We also note that these temporary amendments grant an exemption or relieve a restriction. *See* 5 U.S.C. 553(d)(1) and (3).

[451] As part of these amendments, we have added a new provision to Rule 201 to be designated as Rule 201(z), therefore we are renumbering existing Rule 201(z) as Rule 201(aa). *See* Section II.B.2.b.

[452] We are temporarily amending the introductory paragraphs to the section of Form C entitled ''Optional Question & Answer Format for an Offering Statement'' to include a reminder to issuers relying on these temporary rules to review and tailor their responses to certain questions in the Form C appropriately.

[453] To rely on the temporary rules, issuers must meet the existing eligibility criteria and also cannot have been organized and cannot have been operating for less than six months prior to the commencement of the offering. In addition, an issuer that has sold securities in a Regulation Crowdfunding offering in the past must have complied with the requirements in 15 U.S.C. 77d–1(b) (''Section 4A(b)'') of the Securities Act and the related rules. In connection with the amendment to extend the eligibility criteria, we are making a related amendment to Rule 301, consistent with current temporary Rule 301(d), to require that an intermediary involved in an offering by an issuer that is relying on the temporary relief must have a reasonable basis for believing that the issuer has complied with the requirements of Section 4A(b) and the related requirements of Regulation Crowdfunding in prior offerings. For this requirement, the intermediary may reasonably rely on the representations of the issuer concerning compliance with these requirements unless the intermediary has reason to question the reliability of those representations.

offering limits, and (2) currently applies to issuers offering more than $535,000 of their securities, is sufficient for offerings subject to the increased $5 million offering limit.

We are amending the rules as proposed to remove or increase the investment limits for investors in Regulation Crowdfunding offerings.[454] First, we are amending the rules to no longer apply any investment limits to accredited investors. Commenters generally supported increasing the investment limits of accredited investors.[455] In addition, the 2018 Small Business Forum recommended that the Commission increase the investment limits for all investors,[456] and the 2017, 2018, and 2019 Small Business Forums, the SEC Small Business Capital Formation Advisory Committee, and the 2017 Treasury Report all recommended that the investment limits not apply to accredited investors, who face no such limits under other exemptions.[457]

When the Commission considered investment limits for Tier 2 Regulation A offerings, it determined that such limitations were unnecessary for accredited investors because these individuals satisfy certain criteria that suggest they are capable of protecting themselves in transactions that are exempt from registration under the Securities Act.[458] For similar reasons, we believe that investment limits for accredited investors under Regulation Crowdfunding are unnecessary.[459] Accordingly, we believe it is appropriate in the public interest and consistent with the protection of investors to treat accredited investors under Regulation Crowdfunding in the same manner as other exempt offerings.

Second, we are amending the Regulation Crowdfunding calculation method for the investment limits for non-accredited investors to allow them to rely on the greater of their annual income or net worth. Currently, Regulation Crowdfunding imposes a limit that is the lesser of a percentage of the investor's annual income or net worth subject to an absolute maximum of $107,000.[460] Some market participants recommended basing the limits on the greater of the investor's net worth or income, noting that the accredited investor definition only requires the investor to meet *either* the net worth *or* the income standard.[461] Commenters on the proposal also generally supported increasing these investment limits.[462]

When adopting Regulation Crowdfunding, the Commission considered whether to use a ''greater of'' or ''lesser of'' standard for the exemption's investment limits and determined to use the ''lesser of'' standard at that time due to concerns about investors incurring unaffordable losses.[463] By contrast, when the Commission considered investment limits for Tier 2 Regulation A offerings, it determined to permit investors to look to a percentage of the greater of their annual income or net worth.[464] At that time, the Commission indicated that limiting the amount of securities that a non-accredited investor can purchase in a particular Tier 2 offering should help to mitigate concerns that such investors may not be able to absorb the potential loss of the investment and that a limitation based on a percentage of the greater of such investor's net worth/net assets and annual income/revenue is generally consistent with similar maximum investment limitations placed on investors in Title III of the JOBS Act and would help set a loss limitation standard in such offerings.[465] The amendment conforms Regulation Crowdfunding with Tier 2 of Regulation A and applies a consistent approach to limiting potential losses investors may incur in offerings conducted in reliance on the two exemptions. In light of our experience with Regulation Crowdfunding since its adoption and the concerns that the existing investment limits may be hampering the utility of the exemption, we believe it is appropriate to use this less restrictive approach. Additionally, this change provides investors with more flexibility in making their investment decisions. Moreover, we are not aware of evidence since Regulation Crowdfunding's adoption to indicate this market requires a more stringent approach to investment limits than other exemptive regimes.[466]

### *F. Regulation Crowdfunding and Regulation A Eligibility*

The Commission's exempt offering framework includes specific eligibility restrictions excluding certain types of entities or activities by issuers that apply to both Regulation A[467] and

[454] Consistent with the current approach to investment limits, an issuer may rely on efforts that an intermediary is required to undertake in order to determine that the investor is an accredited investor, or that the aggregate amount of securities purchased by an investor does not cause the investor to exceed the investment limits, provided that the issuer does not have knowledge that the investor has exceeded, or will exceed, the investment limits as a result of purchasing securities in the issuer's offering. *See* Instruction 3 to 17 CFR 270.100(a)(2) of Regulation Crowdfunding.

[455] *See supra* note 431. Only one commenter expressed a specific concern regarding increasing the investment limits of accredited investors. *See* J. Pampena Letter. We believe, however, that rather than decreasing investment opportunities for non-accredited investors, permitting more investment by accredited investors may lead to a more robust market for offerings under Regulation Crowdfunding, which would provide more and better opportunities for non-accredited investors.

[456] *See* 2018 Forum Report.

[457] *See, e.g.,* 2017 Treasury Report, at 41; 2018 Forum Report; 2017 Forum Report, at 17; Recommendation of the SEC Small Business Capital Formation Advisory Committee regarding Regulation Crowdfunding (Dec. 13, 2019), *available at https://www.sec.gov/spotlight/sbcfac/recommendation-regulation-crowdfunding.pdf. See also* Final Report of the 2015 SEC Government-Business Forum on Small Business Capital Formation (Nov. 2015), *available at https://www.sec.gov/info/smallbus/gbfor34.pdf* (recommending increasing the investment limit for accredited investors). In conjunction with removing the investment limits for individual accredited investors, the 2018 Small Business Forum recommended verification of accredited investor status.

[458] *See* 2015 Regulation A Release, at note 145 and accompanying text.

[459] While a few commenters suggested that we add an accredited investor verification requirement, we believe that a verification requirement is unnecessary. *See, e.g.,* J. Clarke Letter; and Raise Green & New Haven Comm. Solar Letter. In making this determination, we note that there is no accredited investor verification requirement with respect to investors participating in Regulation A or other exempt offerings outside of offerings seeking to rely on Rule 506(c) and that Regulation Crowdfunding, like Regulation A, layers in additional protections for investors, such as required reporting and the use of intermediaries, that are not provided to investors in offerings relying on Rule 506(c).

[460] Rule 100(a)(2) of Regulation Crowdfunding is based on the requirement in Section 4(a)(6) that provides an exemption where the aggregate amount sold to an investor by an issuer does not exceed a given percentage of the annual income or net worth of such investor. The statutory language does not expressly provide that the investor use the lesser of annual income or net worth.

[461] *See supra* note 457.

[462] *See supra* note 432. While one commenter expressed concern about raising the investment limits for non-accredited investors and recommended that the Commission undertake any such changes cautiously, we believe that making this incremental change appropriately allows investors greater flexibility in making choices relating to their investments and risk tolerance choices, while still retaining substantial loss limitation standards through a consistent approach to investment limits across Regulation A and Regulation Crowdfunding. *See* Morningstar Letter.

[463] *See* Crowdfunding Adopting Release, at Section II.A.2.c.

[464] *See* 17 CFR 230.251(d)(2)(i)(C)(2); and 2015 Regulation A Release, at Section II.B.4.

[465] *See* Section 301 of the JOBS Act; and 2015 Regulation A Release, at notes 161 and 162 and accompanying text.

[466] *See* 2019 Regulation Crowdfunding Report, at Section III.C.3.

[467] *See* 17 CFR 230.251(b). Regulation A is not available to: Issuers that are organized in or have their principal place of business outside of the United States or Canada; investment companies registered or required to be registered under the Investment Company Act or business development companies; blank check companies; issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights; issuers that are required to, but that have not, filed with the Commission the ongoing reports required by the

Regulation Crowdfunding.[468] While Regulation Crowdfunding does not restrict the types of securities eligible to be sold under the exemption, the types of securities eligible for sale under Regulation A are limited to equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities.[469] The Commission proposed to amend Regulation Crowdfunding:

• To permit the use of certain special purpose vehicles to facilitate investing in Regulation Crowdfunding issuers; and

• To limit the securities eligible to be sold under Regulation Crowdfunding.

The Commission additionally proposed to amend Regulation A to exclude Exchange Act registrants that are delinquent in their Exchange Act reporting obligations from relying on the exemption.

1. Regulation Crowdfunding Eligible Issuers

Section 4A(f)(3) of the Securities Act prohibits investment companies, as defined in the Investment Company Act (or companies that are excluded from the definition of an investment company under section 3(b) or 3(c) of the Investment Company Act), from using the Regulation Crowdfunding exemption. When adopting Regulation Crowdfunding, the Commission did not create, as suggested by some commenters, an exception to this statutory prohibition that would have allowed a single purpose fund organized to invest in, or lend money to, a single company, to use Regulation Crowdfunding.[470] As a result, issuers may not use special purpose vehicles that invest in a single company (''SPVs'') that are investment companies (or companies that are excluded from the definition of an investment company under section 3(b) or 3(c) of the Investment Company Act) to conduct Regulation Crowdfunding offerings. Investors purchasing securities in an offering under Regulation Crowdfunding thus must hold the securities in their own name, which can create certain practical impediments to issuers' use of Regulation Crowdfunding. For example, we understand that a large number of investors on an issuer's capitalization table can be unwieldy, creating administrative complexities and potentially impeding future financing.[471]

a. Proposed Amendments

The Commission proposed to add a new exclusion under the Investment Company Act for limited-purpose crowdfunding vehicles (''crowdfunding vehicles''). Proposed Rule 3a–9 under the Investment Company Act would exclude from the definition of ''investment company'' under that Act a crowdfunding vehicle that meets certain conditions designed to require that it function as a conduit for investors to invest in a business that seeks to raise capital through a crowdfunding vehicle.[472] As a result, Section 4A(f)(3) of the Securities Act would not preclude an SPV that meets this definition of a crowdfunding vehicle from relying on Regulation Crowdfunding.

In proposing this exclusion, the Commission expressed its belief that proposed Rule 3a–9 would be consistent with the intent of Section 4(a)(6) because it would not be aimed at allowing investment companies or similar issuers to raise capital, but rather, solely at facilitating crowdfunding offerings by eligible issuers, and under the proposed rule, a crowdfunding vehicle would serve merely as a conduit for investors to invest in a single underlying issuer and would not have a separate business purpose. The proposed crowdfunding vehicle was intended to allow investors in the vehicle to achieve the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the underlying issuer in an offering made under Regulation Crowdfunding. The proposed approach also would allow an eligible issuer (''crowdfunding issuer'') to maintain a simplified capitalization table and, by reducing the administrative complexities associated with a large and diffuse shareholder base, may encourage crowdfunding issuers to offer voting rights, or other terms not currently offered as frequently to investors.[473]

Proposed Rule 3a–9 defined a crowdfunding issuer as a company that seeks to raise capital as a co-issuer in an offering with a crowdfunding vehicle that complies with all of the requirements under Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.[474] The Commission also proposed to define a crowdfunding vehicle as an issuer[475] formed by or on behalf of a crowdfunding issuer for the purpose of conducting an offering under Section 4(a)(6) of the Securities Act as a co-issuer with the crowdfunding issuer, which offering would be controlled by the crowdfunding issuer. The proposed limitations on the nature and scope of the crowdfunding vehicle's activities were designed to ensure that

rules under Regulation A during the two years immediately preceding the filing of a new offering statement (or for such shorter period that the issuer was required to file such reports); issuers that are or have been subject to an order by the Commission denying, suspending, or revoking the registration of a class of securities pursuant to Section 12(j) of the Exchange Act that was entered within five years before the filing of the offering statement; or issuers subject to ''bad actor'' disqualification under 15 CFR 230.262.

[468] Section 4A specifically excludes: Non-U.S. issuers; issuers that are required to file reports under Exchange Act Section 13(a) or 15(d); certain investment companies; and other issuers that the Commission, by rule or regulation, determines appropriate. *See* 15 U.S.C. 77d–1. Regulation Crowdfunding further excludes: Issuers disqualified under disqualification provisions that are substantially similar to those in 17 CFR 230.506(d) (''Rule 506(d)''); issuers that have failed to comply with the annual reporting requirements under Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement; and blank check companies. *See* 17 CFR 227.100(b).

[469] *See* 17 CFR 230.261 (''Rule 261''). Regulation A also specifically excludes asset-backed securities. *See* Rule 251 (providing that only ''eligible securities'' can be offered or sold under Regulation A); and Rule 261 (defining ''eligible securities''). An asset-backed security generally means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders. *See* 17 CFR 229.1101(c).

[470] *See* Crowdfunding Adopting Release, at 71397. In explaining its decision, the Commission stated that the primary purpose of Section 4(a)(6) is to facilitate capital formation by early stage companies that might not otherwise have access to capital, and expressed its belief that investment companies did not constitute the type of issuer that Section 4(a)(6) and Regulation Crowdfunding were intended to benefit. *Id.*

[471] *See* Concept Release, at Section II.F.1.a. *See also* Proposing Release, at note 323 and accompanying text (noting that commenters on the Concept Release stated that it can be difficult to obtain consent or approval from hundreds of investors as it relates to governance issues, strategic decisions, and later financing rounds).

[472] *See* proposed Rule 3a–9(a). A crowdfunding vehicle complying with the proposed rule would not be an investment company as defined in the Investment Company Act or an entity that is excluded from the definition of investment company by section 3(b) or section 3(c) of that Act, and would therefore not be precluded from relying on Regulation Crowdfunding by Section 4A(f)(3) of the Securities Act. *See* 17 CFR 227.100(b)(3).

[473] *See* Proposing Release, at note 328.

[474] As co-issuers, the crowdfunding issuer and crowdfunding vehicle would be jointly relying on Regulation Crowdfunding for the combined offering of the crowdfunding issuer's securities and the crowdfunding vehicle's securities to the investors. *See, e.g.,* 17 CFR 230.140. The crowdfunding issuer would also rely on Regulation Crowdfunding, and the Form C filed in connection with the offering of the crowdfunding vehicle's securities, for the offering of its securities to the crowdfunding vehicle.

[475] Under the Investment Company Act, an issuer means every person who issues or proposes to issue any security, or has outstanding any security which it has issued. *See* 15 U.S.C. 80–2(a)(22).

the crowdfunding vehicle would function as a means for the crowdfunding issuer to raise capital rather than as an independent investment vehicle that would be subject to regulation under the Investment Company Act.

The proposed rule included several conditions for crowdfunding vehicles intended to address specific investor protection concerns raised by a vehicle that acts as a conduit for investments in a crowdfunding issuer.[476] Specifically, under the proposed rule, the crowdfunding vehicle:

- Must be organized and operated for the sole purpose of acquiring, holding, and disposing of securities issued by a single crowdfunding issuer and raising capital in one or more offerings made in compliance with Regulation Crowdfunding;
- Would not be permitted to borrow money and would be required to use the proceeds of the securities it sells solely to purchase a single class of securities of a single crowdfunding issuer;
- Would be permitted to issue only one class of securities in one or more offerings under Regulation Crowdfunding in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act;
- Would be required to obtain a written undertaking from the crowdfunding issuer to fund or reimburse the expenses associated with the crowdfunding vehicle's formation, operation, or winding up, and the crowdfunding vehicle would not be permitted to receive other compensation, and any compensation paid to any person operating the vehicle would be required to be paid solely by the crowdfunding issuer;
- Would be required to maintain the same fiscal year end as the crowdfunding issuer, and maintain a one-to-one relationship between the number, denomination, type and rights of crowdfunding issuer securities it owns and the number, denomination, type and rights of its securities outstanding;
- Would be required to vote the crowdfunding issuer securities, and participate in tender or exchange offers or similar transactions, only in accordance with instructions from the investors in the crowdfunding vehicle;
- Would receive all of the disclosures and other information required under Regulation Crowdfunding from the crowdfunding issuer and would then be required promptly to provide such disclosures and information to the investors and potential investors in the crowdfunding vehicle's securities and to the relevant intermediary; and
- Would be required to provide to each investor the right to direct the crowdfunding vehicle to assert the rights under State and Federal law that the investor would have if he or she had invested directly in the crowdfunding issuer and provide each investor any information that it receives from the crowdfunding issuer as a shareholder of record of the crowdfunding issuer.

Under the proposal, the crowdfunding issuer and the crowdfunding vehicle would be co-issuers under the Securities Act, meaning each would be deemed to be the maker of any statements by the crowdfunding vehicle and any material misstatements or omissions with respect to the offering.[477] As co-issuers, the crowdfunding issuer and the crowdfunding vehicle would be required to jointly file a Form C, providing all of the required Form C disclosure with respect to (i) the offer and sale of the crowdfunding issuer's securities to the crowdfunding vehicle and (ii) the offer and sale of the crowdfunding vehicle's securities to investors.[478]

Finally, the Commission specifically considered, but did not propose, requiring that a registered investment adviser manage the crowdfunding vehicle. The Commission stated that it did not propose this requirement because of concerns that it could make the crowdfunding vehicle more than a conduit to hold the securities of the crowdfunding issuer and because of questions regarding economic feasibility.[479]

b. Comments

Commenters generally supported permitting crowdfunding issuers to use crowdfunding vehicles,[480] while a few commenters were opposed.[481] One commenter stated that crowdfunding vehicles would help issuers manage the large number of direct investors that can result from an offering under Regulation Crowdfunding and provide smaller investors with more leverage to negotiate better terms and protections.[482] Another commenter stated that SPVs may make crowdfunding safer and more profitable for investors, which could attract more capital and thereby offer more opportunities for startups.[483]

SPV Structure

Several commenters, while supportive of allowing crowdfunding issuers to use SPVs, questioned whether the proposed crowdfunding vehicle was structured appropriately.[484] Some commenters stated that the proposed structure was too prescriptive and costly, with little benefit to either investors or issuers.[485] For example, one commenter stated that investing through an SPV may have tax implications for certain investments and administrative burdens related to how the SPV is structured.[486]

Several commenters proposed alternative structures. One commenter suggested that an exempt reporting adviser (''ERA'') should be able to form SPVs.[487] This commenter also stated that an appropriately structured SPV should include a compensated lead investor associated with the ERA.[488]

[476] *See generally* proposed Rule 3a–9(a) for the proposed conditions.

[477] *See, e.g.,* 17 CFR 230.140. The crowdfunding vehicle's business would consist only of the purchase of securities of the crowdfunding issuer, and it would use the sale of its own securities to make such purchases of securities of the crowdfunding issuer.

[478] The Commission proposed to amend Rule 201 of Regulation Crowdfunding and Form C to require disclosure about the co-issuer in the offering statement. Because the crowdfunding vehicle would only be acting as a conduit for the crowdfunding issuer, we did not believe that the individual investment limitations under Regulation Crowdfunding should apply to transfer of the securities from the crowdfunding issuer to the crowdfunding vehicle. In addition, the amount of securities issued by the crowdfunding issuer to the crowdfunding vehicle would not reduce the amount of securities that could be offered and sold to the investors in the crowdfunding vehicle for purposes of the offering limit in Rule 100(a) of Regulation Crowdfunding.

[479] *See* Proposing Release, at Section II.F.1.

[480] *See, e.g.,* Wefunder Letter; SEC SBCFAC Letter; CCA Letter; J. Clarke Letter; SEI Letter; NextSeed Letter; W. Hubbard Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; D. Burton Letter; Rep. McHenry Letter; CrowdCheck Letter; and ABA Letter. *See also* 2019 OASB Annual Report, at 48.

[481] *See* CII Letter; and CFA Letter (stating that allowing the use of SPVs ''would further undermine transparency of private offerings and further erode incentives private companies have to become public companies once they have acquired a large and widely dispersed shareholder base.'').

[482] *See* ABA Letter. *See also* J. Clarke Letter (stating that the proposal would encourage issuers to offer voting rights to investors).

[483] *See* Engine Letter.

[484] *See e.g.,* Wefunder Letter; CrowdCheck Letter; Crowdwise Letter; and D. Burton Letter.

[485] *See* Wefunder Letter; D. Burton Letter; and CrowdCheck Letter.

[486] *See* Crowdwise Letter (stating that the proposed approach would create a Schedule K–1 burden for issuers with respect to SPVs organized as limited liability companies, and disadvantage investors by disqualifying them from certain preferential tax treatment).

[487] *See* Wefunder Letter. The commenter also requested guidance from the Commission that, in the absence of an ERA-advised SPV structure, an SPV would be permitted to hire a registered investment adviser that does not custody securities and that is permitted to charge performance fees to Regulation Crowdfunding investors, provided that certain conditions are met.

[488] An ERA is an investment adviser that qualifies for the exemption from registration under Section

Other commenters suggested that a crowdfunding vehicle should be managed by a registered investment adviser, ERA, or ''compensated administrator'' with a fiduciary duty to investors.[489] Some commenters stated that the Commission would need to address certain issues before a registered investment adviser would be interested in participating in this market, such as compliance with the Custody Rule.[490] Other commenters opposed requiring a registered investment adviser to manage the SPV,[491] with one commenter stating that the associated costs might deter small-medium enterprises, community groups, or women- and minority-owned businesses from utilizing an SPV.[492] One commenter suggested that a funding portal would be better situated to manage a crowdfunding vehicle due to the vehicle's small size.[493] Another commenter stated that many small investors do not want to spend time reading legal documents to authorize corporate actions and would rather authorize a lead investor to make such decisions.[494] Finally, one commenter suggested using an ''SEC-registered transfer agent'' as a custodian, with the ''portal entity'' paying all associated costs.[495]

SPV Conditions

Most commenters generally supported permitting crowdfunding issuers to use crowdfunding vehicles but suggested certain modifications to the proposed conditions.[496] For example, two commenters stated that they supported the proposed conditions and restrictions designed to require the crowdfunding vehicle act as a conduit for investors to invest in a single crowdfunding issuer.[497] One of these commenters also supported the required redemption of the crowdfunding vehicle's securities upon a liquidity event at the crowdfunding issuer level.[498] However, another commenter stated that the rule should not limit the number of issuers in which a crowdfunding vehicle can invest.[499] Similarly, several commenters stated that the rule should permit investment advisers to form funds for non-accredited investors that invest in multiple crowdfunding issuers.[500] Additionally, commenters suggested allowing crowdfunding vehicles to issue more than one class of securities.[501]

Commenters were generally supportive of the proposed conditions intended to provide investors in the crowdfunding vehicle the same economic exposure, voting power, and Regulation Crowdfunding disclosures as if the investors had invested directly in the crowdfunding issuers, but some suggested certain modifications.[502] Some commenters also supported deeming the crowdfunding vehicle and the crowdfunding issuer to be co-issuers for purposes of the Securities Act.[503] One commenter also suggested that over time the Commission should lessen the rule's restrictions.[504]

One commenter supported requiring crowdfunding vehicles to maintain a one-to-one relationship between the crowdfunding issuer securities it owns and the crowdfunding vehicle securities outstanding to provide investors in the crowdfunding vehicle the same economic exposure as they had invested directly in the crowdfunding issuer.[505] Other commenters opposed this one-to-one requirement.[506]

Commenters generally supported the proposal's requirement that the crowdfunding vehicle be required to seek instructions from its investors to vote the crowdfunding issuer securities it holds, and to participate in tender or exchange offers or similar transactions conducted by the crowdfunding issuer.[507] One commenter opposed this requirement, and asked the Commission to fully articulate what actions the SPV will take on behalf of its investors or, alternatively, to adopt a principles-based rule that would require the SPV to take all actions directed by its investors collectively.[508] One commenter suggested that the crowdfunding vehicle should automatically vote with the majority to simplify the voting process.[509] Other commenters stated that the rule should also address appraisal rights and allow for proxies.[510]

Commenters generally supported the proposed rule's disclosure requirements.[511] One commenter stated that the disclosures would improve compliance with ongoing reporting requirements under Regulation Crowdfunding by requiring the crowdfunding issuer to provide mandated information.[512] Another commenter stated that the proposed requirements would provide shareholders with the necessary information to determine whether to direct the crowdfunding vehicle to assert Federal and State rights for shareholders and would adequately pass through such rights.[513]

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203(l) of the Advisers Act because it is an adviser solely to one or more venture capital funds, or under 17 CFR 275.203(m)–1 because it is an adviser solely to private funds and has assets under management in the United States of less than $150 million. *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Release No. IA–3222 (June 22, 2011) [76 FR 39646 (July 6, 2011)]. This commenter stated that the Commission should create a ''new class'' of ERAs that are exempt from registration for an ''investment adviser to one or more crowdfunding vehicles'' that would be able to receive incentive compensation (and share such compensation with a lead investor), and as such not be subject to the audit requirement under 17 CFR 275.206(4)–2 (the ''Custody Rule''), which would otherwise make the arrangement uneconomical. *See* Wefunder Letter.

[489] *See* CrowdCheck Letter; NextSeed Letter (stating that a registered investment adviser or ERA could ensure all legal, regulatory and tax requirements of operating the vehicle are fulfilled); and NASAA Letter (stating rule should require the SPV be managed by a registered investment adviser or another fiduciary manager).

[490] *See* CrowdCheck Letter; and Wefunder Letter.

[491] *See* J. Clarke Letter; W. Hubbard Letter; and Raise Green & New Haven Comm. Solar. Letter.

[492] *See* Raise Green & New Haven Comm. Solar Letter.

[493] *See id.*

[494] *See* Wefunder Letter.

[495] *See id.*

[496] *See* J. Clarke Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; CrowdCheck Letter; and SEI Letter.

[497] *See* J. Clarke Letter; and W. Hubbard Letter.

[498] *See* W. Hubbard Letter.

[499] *See* SEI Letter.

[500] *See* Hubbard Letter; Raise Green & New Haven Comm. Solar Letter (noting that this approach would decrease investors' risk by spreading their capital over multiple offerings and increase the ease with which an issuer could raise capital, as it would be ''directed from one investment adviser and could be done in a recurrent fashion.''); and CrowdCheck Letter.

[501] *See* Raise Green & New Haven Comm. Solar Letter (also opposing requiring a crowdfunding vehicle to redeem or offer to repurchase its securities if there is a liquidity event at the crowdfunding issuer level and the requirement in the proposal that the crowdfunding issuer pay the costs of the crowdfunding vehicle); and W. Hubbard Letter. *But see* CrowdCheck Letter (stating that crowdfunding vehicles do not need to have multiple classes of securities since they are likely to be formed as series limited liability companies).

[502] *See* J. Clarke Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

[503] *See* Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

[504] *See* W. Hubbard Letter.

[505] *See* J. Clarke Letter.

[506] *See* CrowdCheck letter (stating that exact replication of rights is not possible since a crowdfunding issuer may be a corporation, an LLC or a limited partnership formed under the laws of any State or territory, while the crowdfunding vehicle will have to be a pass-through entity); and Raise Green & New Haven Comm. Solar Letter.

[507] *See* J. Clarke Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

[508] *See* NASAA Letter.

[509] *See* J Clarke Letter.

[510] *See* W. Hubbard Letter; and Raise Green & New Haven Comm. Solar Letter.

[511] *See* J. Clarke Letter; W. Hubbard Letter; and CrowdCheck Letter.

[512] *See* CrowdCheck Letter.

[513] *See* Hubbard Letter. The commenter also stated that while disclosure in writing of the differences may suffice from a substantive standpoint, ''the mechanics and funding for vehicle operations will likely require, from an operational

Continued

Form C Filings

Commenters supported requiring crowdfunding issuers and crowdfunding vehicles to jointly file a Form C, and several commenters noted its simplicity and efficiency.[514] One commenter also stated that having both parties file the same Form C and the same Form C–AR would reduce market confusion, help investors access information more easily, and assist the administrator of the crowdfunding vehicle in enforcing the crowdfunding issuer's ongoing reporting obligations.[515]

Some commenters supported requiring a crowdfunding issuer to file its own Form C if it is separately offering securities through a crowdfunding vehicle and directly to investors.[516] The commenters were concerned a joint filing in these circumstances could lead to investor confusion. Other commenters opposed this approach, stating that a joint form in these circumstances is necessary to focus the investment on the venture, instead of the crowdfunding vehicle.[517]

Treatment Under Other Sections of the Securities Laws

The Commission stated in the Proposing Release that a crowdfunding vehicle may constitute a single record holder for purposes of Section 12(g) of the Exchange Act, rather than treating each of the crowdfunding vehicle's investors as record holders, which would be the case if they had invested in the crowdfunding issuer directly, and solicited comment on the appropriate treatment.[518] Commenters generally supported treating a crowdfunding vehicle as a single record holder for Section 12(g) purposes.[519] Some of these commenters stated that treating crowdfunding vehicles as a single record-holder for Section 12(g) eases record-keeping, capital structures, and entity development [520] and is consistent with what they believed to be the intent of Section 12(g).[521] Commenters opposing this treatment stated that they were concerned that it would allow private companies to avoid going public and therefore reduce market transparency.[522]

The Proposing Release requested comment on whether the Commission should further address the status of a crowdfunding vehicle and persons operating the vehicle for purposes of the definition of broker under Section 3(a)(4) of the Exchange Act or dealer under Section 3(a)(5) of the Exchange Act. Commenters addressing the issue agreed that further clarity would be helpful but suggested differing approaches.[523]

Finally, with respect to the proposed definition of ''crowdfunding issuer,'' one commenter stated that it was unclear in the proposed rule whether the offering or the crowdfunding vehicle would be required to comply with all of the requirements of Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.[524]

c. Final Amendments

We are adopting Rule 3a–9 under the Investment Company Act, substantially as proposed, to exclude from the definition of ''investment company'' under that Act a crowdfunding vehicle that meets certain conditions designed to require that it function as a conduit for investors to invest in a business that seeks to raise capital through a crowdfunding vehicle. After considering the comments on the proposed structure and alternative structures commenters suggested, we believe that the ''conduit'' structure we proposed is consistent with the intent of Section 4(a)(6). We also continue to believe that this conduit structure would address concerns associated with managing the potentially large number of direct investors that could result from a crowdfunding offering.[525]

While some commenters suggested requiring a registered investment adviser or ERA to manage a crowdfunding vehicle, we do not believe this condition is necessary from an investor protection perspective given the conditions set forth in Rule 3a–9. For similar reasons, we do not believe it is necessary to create a new exemption from registration with the Commission for advisers to crowdfunding vehicles.[526] Collectively, the conditions in the rule require the crowdfunding vehicle to act solely as a conduit by limiting the scope of the activities in which the crowdfunding vehicle can engage, and restricting the compensation it can receive. In particular, Rule 3a–9's conditions are designed to limit the crowdfunding vehicle's activities to that of acting solely as a conduit to directly hold the securities of the crowdfunding issuer without the ability for independent investment decisions to be made on behalf of the crowdfunding vehicle.

Consistent with the concerns raised by commenters with respect to costs, we also continue to believe that it would not be economically feasible to require a registered investment adviser to manage the vehicle.[527] For example, we believe that compliance with the Custody Rule, coupled with the small size of the typical crowdfunding offering [528] and the fees and other expenses associated with operating a registered investment adviser, would

standpoint, a separate vehicle account with funds deemed sufficient for such purposes.'' *See id.*

[514] *See* J. Clarke Letter; SEI Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter (noting that filing obligations of the crowdfunding issuer and the crowdfunding vehicle should be coterminous and coordinated).

[515] *See* CrowdCheck letter.

[516] *See* W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

[517] *See* J. Clarke Letter; and SEI Letter.

[518] *See* Proposing Release, at Request for Comment 76 and text accompanying notes 420 and 421.

[519] *See* Wefunder Letter (also requesting clarification that it is permissible for a securities intermediary to hold securities in ''street name,'' and that ''that those beneficial owners don't count towards the 12(g) threshold.''); J. Clarke Letter; Carta Letter (noting that securities issued pursuant to Regulation Crowdfunding are conditionally exempted from Section 12(g)'s holder of record limit, but commending the Commission for proposing that the SPV be treated as a single holder of record to minimize any concerns around this threshold for those issuers who may have concerns.); W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter. *See also* 2019 OASB Annual Report, at 48 (suggesting that allowing SPVs to be used in Regulation Crowdfunding offerings would mitigate concerns related to Section 12(g)).

[520] *See* W. Hubbard Letter.

[521] *See* Raise Green & New Haven Comm. Solar Letter.

[522] *See* CFA Letter; and AFREF letter.

[523] *See* J. Clarke Letter (requesting the Commission clarify that the portal platform is acting as the broker, since the SPV is not taking dealer inventory risk); W. Hubbard Letter (suggesting ''[a] regulatorily conclusive presumption at some point statutorily codified may be helpful.''); Raise Green & New Haven Comm. Solar Letter (stating a need for ''a safe harbor to assure a crowdfunded issuer and for the intermediary that neither would trigger registration as a broker under Section 15(a) of the Exchange Act.''); and CrowdCheck Letter (stating that ''a [registered investment adviser] operating a crowdfunding vehicle . . . would not be a broker-dealer and that it would be appropriate for the Commission to confirm that doing so would not result in the operator being required to register as either a broker or a dealer.'').

[524] *See* ABA Letter (suggesting that the rule text be revised to state ''a company that seeks to raise capital as a co-issuer with a crowdfunding vehicle in an offering that complies with all of the requirements under Section 4(a)(6) of the Securities Act and Regulation Crowdfunding'').

[525] In particular, the crowdfunding vehicle may be able to appear as a single entry on the crowdfunding issuer's capitalization table. Several commenters stated that the permitting crowdfunding vehicles would help solve the ''messy cap table'' issues. *See* CrowdCheck Letter; and W. Hubbard Letter.

[526] *See* Wefunder Letter.

[527] *See* Proposing Release, at text accompanying note 349.

[528] Between May 16, 2016, and December 31, 2018, the average Regulation Crowdfunding offering had a maximum offering amount of approximately $577,385 and raised approximately $208,300 (*see* 2019 Regulation Crowdfunding Report, at 4), with a maximum offering size of $1.07 million pursuant to Rule 100(a)(1) of Regulation Crowdfunding.

not make it economically feasible for a registered investment adviser to serve as the manager of a crowdfunding vehicle. As some commenters suggested, requiring an adviser to manage the crowdfunding vehicle, along with the associated costs, also could deter small to medium enterprises, or women- or minority-owned businesses, which may not have access to such investment advisory expertise, from using the crowdfunding vehicle.[529] It is also unlikely that a registered investment adviser could receive performance-based compensation for managing a crowdfunding vehicle, since the typical crowdfunding investor may not meet the threshold to qualify as a qualified client.[530] We similarly do not believe that it would be economically feasible to require an ERA to manage the vehicle. Given that one of our objectives is for an investor to achieve the same economic exposure as if he or she had invested directly in the crowdfunding issuer, we continue to believe that it is not appropriate for investors in the crowdfunding vehicle to bear directly the cost of any compensation paid to any person operating the vehicle, and we are not convinced that the issuer would be willing to bear the additional cost associated with hiring an investment adviser, whether registered or exempt from registration.

We also do not believe that we should expand the scope of the activities in which the crowdfunding vehicle can engage and allow a compensated lead investor to make decisions on behalf of all investors. We believe this approach would be inconsistent with the ''conduit'' structure we are using to ensure that there is no material difference between an investment in the crowdfunding issuer and the crowdfunding vehicle. We also are concerned that a compensated lead investor may not serve as an advocate for the interests of other investors in the vehicle, given the potential conflicts of interest that could arise between the lead investor and other investors in the vehicle. For similar reasons, a ''SEC-registered transfer agent'' structure is inconsistent with the ''conduit'' structure we are adopting in this release.[531]

We recognize that there are costs associated with organizing and maintaining the crowdfunding vehicle under Rule 3a–9. However, we believe these costs and burdens are necessary to provide investors in the crowdfunding vehicle the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer. As discussed in Section IV.C.6 below, because the use of the crowdfunding vehicle structure will be voluntary, we expect issuers to use a crowdfunding vehicle only when an issuer determines that the benefits justify the costs. The balance of these tradeoffs is likely to vary depending on a number of factors, including the issuer's offering experience, potential for raising follow-on financing from a large investor, costs associated with the creation and administration of the crowdfunding vehicle, and the number of small investors participating in the crowdfunding offering.

Some commenters recommended that we permit advisers to form funds for non-accredited investors to invest in multiple crowdfunding issuers, effectively creating a ''private fund'' like structure for non-accredited investors. This ''fund'' structure is inconsistent with the ''conduit'' nature of the crowdfunding vehicle structure in Rule 3a–9, which underlies the limited exemption from Section 3(a) of the Investment Company Act that we are adopting. In addition, this conduit nature also protects investors by simply passing along the same exposures, rights and disclosures as if they had invested directly in the crowdfunding issuer in an offering made under Regulation Crowdfunding.[532]

In response to the commenter who stated that it was unclear whether the offering or the crowdfunding vehicle would be required to comply with applicable requirements, we are slightly modifying the definition of ''crowdfunding issuer'' from the proposal to clarify that the crowdfunding issuer is acting as a co-issuer with the crowdfunding vehicle and the combined offering of the crowdfunding issuer's securities and the crowdfunding vehicle's securities must comply with of Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.

In order to clarify that we do not intend to permit a crowdfunding vehicle to invest in another crowdfunding vehicle, creating a multi-tier structure to invest in one crowdfunding issuer, we are slightly modifying proposed Rule 3a–9(a)(1) to specify that crowdfunding vehicles must be organized and operated for the sole purpose of *directly* acquiring, holding, and disposing of securities issued by a single crowdfunding issuer and raising capital in one or more offerings made in compliance with Regulation Crowdfunding. As discussed below, we believe this is appropriate given our treatment of the crowdfunding vehicle under Section 12(g) of the Exchange Act in order to prevent a multi-tier crowdfunding vehicle from further excluding investors from the Section 12(g) calculation.

In response to commenters who requested guidance on this point, we are clarifying that a crowdfunding vehicle and persons operating the vehicle will not implicate the broker-dealer registration requirements of Section 15(a) of the Exchange act so long as the crowdfunding vehicle and persons operating the vehicle limit their activities solely to those permitted by new Rule 3a–9. Under Rule 3a–9, the crowdfunding vehicle would be a co-issuer formed by or on behalf of the underlying crowdfunding issuer to serve merely as a conduit for investors to invest in the crowdfunding issuer and will not have a separate business purpose. Issuers generally are not considered to be ''brokers'' within the meaning of Section 3(a)(4) of the Exchange Act because they sell securities for their own accounts and not for the accounts of others; nor are issuers generally considered to be ''dealers'' within the meaning of Section 3(a)(5) of the Exchange Act because they do not buy and sell their securities for their own accounts as part of a regular business. Further, given the limited activities in which a crowdfunding vehicle may engage under Rule 3a–9 and, in particular, the limitations 17 CFR 270.3a–9(a)(4) places on the receipt of compensation by and the payment of compensation to the crowdfunding vehicle, the Commission similarly does not believe that a person operating the crowdfunding vehicle in accordance with Rule 3a–9 would be in the business of effecting securities transactions for the account of others, or in the business

[529] *See* Raise Green & New Haven Comm. Solar Letter.

[530] 17 CFR 275.205–3 permits registered investment advisers to receive performance-based compensation only when the client is a qualified client. The rule's definition of ''qualified client'' includes a natural person who, or a company that, immediately after entering into the investment contract has at least $1,000,000 under the management of the investment adviser, and a natural person who, or a company that, the investment adviser entering into the investment contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $2,100,000 (exclude the value of a person's primary residence and certain associated debt).

[531] The commenter also requested guidance from the Commission on two additional issues that we believe are outside the scope of this rulemaking. *See supra* notes 493 and 517.

[532] *See* Raise Green & New Haven Comm. Solar Letter.

of buying and selling securities for the account of the crowdfunding vehicle.

We are adopting the conditions, as proposed, to address specific investor protection concerns raised by a vehicle that acts as a conduit for investments in a crowdfunding issuer.[533] While some commenters suggested modifications to these conditions to expand the crowdfunding vehicle's permissible investments, we believe these capabilities would make the crowdfunding vehicle more like a traditional investment fund, rather than merely a conduit entity for a single issuer consistent with its purpose. For the same reasons, we also do not believe that it is appropriate to permit the crowdfunding vehicle to issue different securities for different rounds of a Regulation Crowdfunding offering or to issue multiple classes of securities. Additionally, consistent with the crowdfunding vehicle's purpose as a conduit, the rule will require the crowdfunding vehicle to redeem or offer to repurchase its securities if there is a liquidity event at the crowdfunding issuer level since its reason for existence will cease on the occurrence of such liquidity event.

We disagree with one commenter's suggestion that we eliminate the requirement that the crowdfunding issuer pay the costs of the crowdfunding vehicle.[534] The crowdfunding vehicle provides direct benefits to the crowdfunding issuer, such as reducing capitalization table concerns and providing for greater efficiency for the administration of a large and diffuse investor base, and we believe that it is appropriate for the crowdfunding issuer itself to bear the direct costs of the crowdfunding vehicle. Additionally, requiring investors in the crowdfunding vehicle to bear directly the costs of the crowdfunding vehicle would be inconsistent with our goal of providing those investors with the same economic exposure as if they had invested directly in the crowdfunding issuer given the conduit nature of the SPV structure.

As one commenter pointed out, because investors are investing in the crowdfunding vehicle, and not directly in the crowdfunding issuer, there may be slight differences in the rights in the crowdfunding vehicle that investors receive.[535] However, we do not believe these slight differences in rights should in any way affect the ability of the crowdfunding vehicle to issue securities with rights that are materially indistinguishable from the rights a direct investor in the crowdfunding issuer would have. The rule as adopted will require a one-to-one relationship between the number, denomination, type and rights of crowdfunding issuer securities the crowdfunding vehicle owns and the number, denomination, type, and rights of its securities outstanding to ensure that there is no material difference in rights between investing in the crowdfunding vehicle and investing directly in the crowdfunding issuer. This requirement is designed to ensure that the crowdfunding vehicle maintains its character as a conduit to the crowdfunding issuer.

With respect to a commenter's concerns regarding voting, we do not believe that the rule is too narrow with respect to the specific actions the crowdfunding vehicle is required to take, nor do we think it is too ambiguous with respect to the assertion of investor rights.[536] The rule's voting conditions were designed to provide flexibility, knowing that it is impossible to anticipate every possible action that a crowdfunding vehicle will need to take in its lifespan. Furthermore, in response to one commenter's suggestion that we address appraisal rights,[537] we believe that the assertion of such rights is captured under the prong of the rule that provides each investor the right to direct the crowdfunding vehicle to assert the rights under State and Federal law that the investor would have if he or she had invested directly in the crowdfunding issuer.[538]

We recognize that permitting the crowdfunding vehicle to vote automatically with the majority or permitting the crowdfunding investors to otherwise delegate voting authority may simplify the voting process.[539] However, we do not believe the rule should permit either approach to voting because both would be inconsistent with the vehicle's purpose, which is to act merely as a conduit and not an independent investment entity like a fund or other similar investment vehicle. Furthermore, we do not believe that a registered investment adviser is necessary to assert rights attendant to an investment in the issuer as the ability to assert such rights (and the flow through of information related to thereto) will pass directly to investors as if they were direct investors in the crowdfunding issuer.[540]

We are adopting as proposed the requirement that crowdfunding vehicles jointly file a Form C with the crowdfunding issuer,[541] as opposed to requiring that each file a separate Form C or only requiring the crowdfunding vehicle to file a Form C. We continue to believe that by jointly filing a Form C describing both transactions and providing disclosure about both co-issuers, investors will be provided all information necessary to analyze both their direct investment in the crowdfunding vehicle and the terms of the crowdfunding vehicle's investment in the crowdfunding issuer.[542] This approach also will allow investors to review the entire business of the crowdfunding issuer and crowdfunding vehicle in one location (avoiding any confusion that could arise if the crowdfunding vehicle and crowdfunding issuer provided separate disclosure on the separate transactions, for example, on separate Forms C).

Additionally, we agree with commenters that supported requiring a crowdfunding issuer to file its own Form C if it is separately offering securities both through a crowdfunding vehicle and directly to investors, and are therefore clarifying this in Rule 203(a)(1). We believe that to do otherwise, as noted by commenters, would likely be confusing to investors and overcomplicate and unnecessarily burden the preparation, compliance, and related administrative responsibilities of both the crowdfunding issuer and the crowdfunding vehicle. We do not believe, as one opposing commenter suggested, that having two Form Cs in this context would only promote confusion, as each separate offering would have its own corresponding Form C.

As stated in the Proposing Release, we continue to believe that, because the crowdfunding vehicle is only acting as a conduit for the crowdfunding issuer, the individual investment limitations under Regulation Crowdfunding should not apply to transfer of the securities from the crowdfunding issuer to the

[533] *See* 17 CFR 270.3a–9(a) (''Rule 3a–9(a)'').

[534] *See* Raise Green & New Haven Comm. Solar Letter. A third-party (*e.g.,* a funding portal) could contribute to the issuer's coverage of these costs, as long as the crowdfunding issuer, and not the crowdfunding vehicle, ultimately bears the costs.

[535] *See* CrowdCheck Letter (stating that the exact replication of the rights attached to the securities of the crowdfunding issuer is impossible because of, for example, possible differences in legal structure and state of incorporation).

[536] *See* NASAA Letter.

[537] *See* W. Hubbard Letter.

[538] *See* 17 CFR 270.3a–9(a)(9).

[539] *See* J. Clarke Letter; W. Hubbard Letter.

[540] *See* CrowdCheck Letter (suggesting this is an area where a pro-active registered investment adviser could better provide investor protection).

[541] *See* amended Rule 201 of Regulation Crowdfunding and Form C.

[542] *See* 17 CFR 227.201(m). *See also* J. Clarke Letter; SEI Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

crowdfunding vehicle.[543] In addition, we do not believe that the amount of securities issued by the crowdfunding issuer to the crowdfunding vehicle should reduce the amount of securities that could be offered and sold to the investors in the crowdfunding vehicle for purposes of the offering limit in Rule 100(a) of Regulation Crowdfunding. To clarify this treatment of the transfer of securities from the crowdfunding issuer to the crowdfunding vehicle, we are amending 17 CFR 227.100(d) to state that a crowdfunding vehicle is not considered an investor for the purposes of Regulation Crowdfunding.

After considering comments, we have determined that a crowdfunding vehicle should constitute a single record holder in the crowdfunding issuer for purposes of Section 12(g) of the Exchange Act, but only to the extent that all investors in the crowdfunding vehicle are natural persons. As a result, we are adopting amendments to Exchange Act Rule 12g5–1. New Rule 12g5–1(a)(9) will specify that, for purposes of determining whether a crowdfunding issuer is required to register a class of equity securities with the Commission pursuant to Section 12(g)(1) of the Exchange Act, a crowdfunding issuer may exclude securities issued by a crowdfunding vehicle in accordance with Rule 3a–9 that are held by natural persons, but must include securities issued by a crowdfunding vehicle that are held by investors that are not natural persons.[544] The same provision will also apply to a crowdfunding vehicle, which is a separate legal entity from the crowdfunding issuer and itself is subject to Section 12(g). In connection with this new provision, we are also amending Rule 12g5–1(a)(2) to clarify that a crowdfunding issuer that makes use of Rule 3a–9 should look to new Rule 12g5–1(a)(9), even though the crowdfunding vehicle may otherwise have been considered a corporation, partnership, trust or other organization for purposes of Rule 12g5–1(a)(2). Regardless of the crowdfunding vehicle's Section 12(g) treatment, under the final rules, investors in the crowdfunding vehicle will have the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer.

We believe that this treatment of natural person and non-natural person investors is appropriate in light of the novel crowdfunding issuer-crowdfunding vehicle structure we are adopting and the types of offerings the Crowdfunding exemption was intended to facilitate.[545] It recognizes that the crowdfunding vehicle is a separate organization, holding the crowdfunding issuer securities in its own name, but by counting non-natural persons differently reduces the risk that the structure is used by either the crowdfunding issuer or the crowdfunding vehicle to further exclude investors from the Section 12(g) calculation.

Although commenters expressed concern that treating the crowdfunding vehicle as a single entity for Section 12(g) purposes would allow crowdfunding issuers to delay having to register a class of equity securities under Section 12(g) and reduce transparency, we do not believe it is necessary to require a crowdfunding issuer to ''look through'' the crowdfunding vehicle to count all of the holders in the vehicle. While this may result in some crowdfunding issuers being able to delay Exchange Act registration, we note that, as is the case for any Regulation Crowdfunding issuer, if the crowdfunding issuer and crowdfunding vehicle both meet the terms of Rule 12g–6, they will be able to rely on that conditional exemption. As a result, only the largest issuers that sell securities under Regulation Crowdfunding are likely to trigger a Section 12(g) registration requirement at any time, regardless of the approach we are adopting. Further, we believe that concerns about transparency are mitigated by the existing ongoing reporting requirements of Regulation Crowdfunding, which are tailored to the types of issuers and offerings the exemption is intended to accommodate.[546] Finally, not counting natural persons holding through the crowdfunding vehicle as holders for Section 12(g) purposes also has no impact on the requirement that investors in the crowdfunding vehicle receive the same disclosures as if they had invested directly in the crowdfunding issuer, ensuring that the investors have the full transparency into the crowdfunding issuer required by Regulation Crowdfunding.

We also do not agree with the commenter that suggested that the proposed crowdfunding vehicle is a complex and costly way to have one record holder for the purposes of Section 12(g) without benefits to the issuer that still needs to communicate with possibly thousands of strangers to make corporate decisions. Rule 3a–9 allows issuers to shift the administrative burden to the crowdfunding vehicle, meaning the crowdfunding vehicle could engage a third party (such as a funding portal) to handle the burden of communicating with investors regarding votes and for other administrative matters.

2. Regulation Crowdfunding Eligible Securities

Unlike Regulation A, which limits the types of securities eligible for sale to equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities,[547] Regulation Crowdfunding does not restrict the type of security that may be offered and sold in reliance on the exemption. As a result, issuers using Regulation Crowdfunding have offered and sold a number of non-traditional securities, such as Simple Agreements for Future Equity (''SAFEs''), Simple Agreements for Future Tokens, and certain revenue sharing agreements.

a. Proposed Amendments

The Commission proposed to amend Regulation Crowdfunding to harmonize the rule with Regulation A and limit the types of securities that may be offered under the exemption to correspond with the eligible securities provision of Regulation A. As proposed, the types of securities eligible for sale in an offering under Regulation Crowdfunding would be limited to equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities.

b. Comments

Commenters were divided on whether to revise Regulation Crowdfunding to restrict the securities eligible under the exemption to those included in Regulation A's list of eligible securities. Some commenters generally supported harmonizing the eligible securities

[543] *See* Proposing Release, at note 333.

[544] For purposes of the crowdfunding vehicle's calculation of holders of record, such non-natural persons will be treated the same way they would be if they held the crowdfunding issuer's securities directly.

[545] *See* Crowdfunding Adopting Release, at note 2 and text accompanying note 2 (discussing the intent of the crowdfunding provisions of the JOBS Act to help provide startups and small businesses with capital by making relatively low dollar offerings of securities, featuring relatively low dollar investments by the ''crowd,'' less costly).

[546] *See, e.g.,* Crowdfunding Adopting Release, at Section II.B.1.a.(1)(b)(iii) (noting that issuers engaging in crowdfunding transactions may have businesses at various stages of development in different industries, and the need for flexibility for these issuers regarding what information they disclose about their businesses).

[547] *See* 17 CFR 230.261.

under the two exemptions,[548] while other commenters supported harmonizing the exemptions by citing concerns regarding the use of SAFEs.[549] One of the commenters who supported harmonizing the eligible securities under the two exemptions specifically stated that ''tokenized securities and other forms of digital assets should not be included as eligible securities under Regulation Crowdfunding'' as they pose particular risks to investors.[550] A number of commenters specifically opposed revising Regulation Crowdfunding to track the securities eligible under Regulation A.[551] Of these commenters, many recommended there be no restrictions on the types of securities that can be offered under Regulation Crowdfunding.[552]

Commenters were similarly divided on whether to permit SAFEs under Regulation Crowdfunding. A number of commenters generally opposed revising the Regulation Crowdfunding eligible securities to specifically prohibit the offering and selling of SAFEs.[553] These commenters suggested that prohibiting the use of SAFEs under Regulation Crowdfunding would limit the usefulness of the exemption for many issuers [554] and indicated that there was not significant evidence that SAFEs pose undue risks for investors.[555] Another commenter recommended the Commission require issuers and portals to disclose a list of ''potentially risky or problematic deal terms'' in lieu of prohibiting SAFEs.[556] In contrast, a number of commenters supported explicitly prohibiting the offering and selling of SAFEs under Regulation Crowdfunding.[557]

c. Final Amendments

We are not adopting the proposed amendments to harmonize the securities eligible under Regulation Crowdfunding with the securities eligible under Regulation A at this time in light of commenters' concerns that doing so would limit the utility of Regulation Crowdfunding. We are also not adopting rule changes that would specifically prohibit SAFEs under Regulation Crowdfunding. We recognize the concern that the offer and sale of non-traditional securities to retail investors in an exempt offering could result in harm to investors who may face challenges in analyzing and valuing such securities or who may be confused by the descriptions of such securities on the funding portals. However, we believe that many of these concerns can be addressed by providing adequate disclosure to investors. To this end, issuers assessing their compliance with Regulation Crowdfunding should carefully consider whether they are clearly describing the terms of the offered securities, especially in the case of non-traditional securities, such as SAFEs. 17 CFR 227.201(m) requires issuers to disclose the terms of the securities being offered whether or not such securities have voting rights, any limitations on such voting rights, how the terms of the securities being offered may be modified and a summary of the differences between such securities and each other class of security of the issuer, and how the rights of the securities being offered may be materially limited, diluted or qualified by the rights of any other class of security of the issuer. We remind issuers of non-traditional securities of the need to carefully consider their obligations under this rule.

3. Regulation A Eligibility Restrictions for Delinquent Exchange Act Filers

Regulation A includes an eligibility requirement that an issuer conducting a Regulation A offering must have filed with the Commission all reports required to be filed, if any, pursuant to Rule 257 during the two years before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports).[558] However, because Exchange Act registrants are not required to file reports pursuant to Rule 257, the existing eligibility provision does not expressly require those registrants to have filed their Exchange Act reports in order to rely on Regulation A.

a. Proposed Amendments

The Commission proposed to amend Regulation A to require issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act to meet a similar eligibility requirement with respect to Exchange Act reports. As proposed, issuers that do not file all the reports required to have been filed by Sections 13 or 15(d) of the Exchange Act in the two-year period preceding the filing of an offering statement would be ineligible to conduct a Regulation A offering.[559]

b. Comments

Commenters that addressed the issue generally supported requiring Exchange Act reporting Regulation A issuers to be current in their Exchange Act reporting obligations.[560] Only one commenter opposed requiring applicable issuers to be current in their Exchange Act reporting obligations, arguing that because non-reporting companies can rely on Regulation A, there should be no requirement for reporting companies to be current in their reporting obligations.[561] Another commenter recommended that the Commission additionally make Regulation A available to business development companies as defined in Section 2(a)(48) of the Investment Company Act.[562]

c. Final Amendments

We are adopting the amendment as proposed. The amendment holds Exchange Act reporting companies to

[548] *See, e.g.,* ABA Letter; SEI Letter; SEC SBCFAC Letter; Wefunder Letter; and Letter from Y Combinator dated May 29, 2020 (''Y Combinator Letter''). Some of these commenters supported harmonization but indicated that SAFEs should be allowed under Regulation Crowdfunding. *See* Wefunder Letter; and Y Combinator Letter.

[549] *See, e.g.,* CrowdCheck Letter; and CFA Letter.

[550] *See* ABA Letter (expressing concern that non-traditional securities can create confusion for retail investors and potentially jeopardize the reputation of the Regulation Crowdfunding market and further recommending that tokenized securities and other forms of digital assets should not be included as eligible securities under Regulation Crowdfunding due to the continued regulatory uncertainty and risks that they pose to investors and issuers).

[551] *See, e.g.,* J. Clarke Letter; W. Hubbard Letter; Letter from Shane Hadden dated May 26, 2020 (''S. Hadden Letter''); Silicon Prairie Letter; Chamber of Digital Commerce Letter; Letter from Vezzit, Inc. dated July 13, 2020 (''Vezzit Letter''); Raise Green & New Haven Comm. Solar Letter; and Ketsal Letter.

[552] *See, e.g.,* S. Hadden Letter; Silicon Prairie Letter; Chamber of Digital Commerce Letter; Vezzit Letter; Raise Green & New Haven Comm. Solar Letter; and Ketsal Letter.

[553] *See, e.g.,* S. Hadden Letter; Wefunder Letter; Y Combinator Letter; Silicon Prairie Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; Vezzit Letter; Raise Green & New Haven Comm. Solar Letter; InnaMed, et al. Letter; Crowdwise Letter; Ketsal Letter; and Letter from Marshall E. Uzzle and Ron Montana dated June 1, 2020. Some of these commenters also contended that harmonizing securities eligible under Regulation Crowdfunding with Regulation A would not prohibit the use of SAFEs, as SAFEs are ''securities convertible into equity securities.'' *See* Letter from Joe Spivak dated Mar. 18, 2020; Y Combinator Letter; and Republic Letter.

[554] *See, e.g.,* Wefunder Letter; and Republic Letter.

[555] *See* Vezzit Letter.

[556] *See* Crowdwise Letter.

[557] *See, e.g.,* Letters from Miguel Costa dated Mar. 10, 2020, Mar. 14, 2020, and Mar. 22, 2020; J. Clarke Letter; SEI Letter; NASAA Letter; W. Hubbard Letter; CFA Letter; CrowdCheck Letter; and CFA Institute Letter.

[558] *See* 17 CFR 230.251(b)(7). Rule 257 requires issuers conducting Tier 2 offerings to comply with certain ongoing and periodic reporting requirements.

[559] If an issuer is delayed in filing a report, it would need to become current in its reports over the last two years in order to become eligible again.

[560] *See* CII Letter; NASAA Letter; CrowdCheck Letter; and CFA Institute Letter.

[561] *See* J. Clarke Letter.

[562] *See* ABA Letter.

the same standard as repeat Regulation A issuers. This requirement will benefit investors by assuring that they have access to historical financial and non-financial statement disclosure about Exchange Act reporting companies that are conducting Regulation A offerings and may facilitate the development of an efficient secondary market for the securities they purchase in Regulation A offerings. Furthermore, because they are already required to file such reports, the requirement does not increase the burden of making a Regulation A offering for Exchange Act reporting companies or issuers that were Exchange Act reporting companies within the two years prior to making a Regulation A offering. We are not persuaded by the commenter that suggested that because non-reporting companies can use Regulation A, reporting companies should not be required to be current in their reporting obligations. We believe Regulation A investors should be able to look to the Exchange Act filings of reporting company issuers for information supplemental to the issuers' Regulation A disclosures.[563]

We are not amending Regulation A as recommended by a commenter to make the exemption available to business development companies at this time. While we acknowledge that business development companies serve an important function in facilitating capital formation for small, developing and financially troubled companies, there are important considerations with respect to the application of Regulation A's requirements to such entities that we believe we should assess before expanding the eligibility criteria.

*G. Bad Actor Disqualification Provisions*

The Commission's exempt offering framework includes rules disqualifying certain covered persons, including felons and other ''bad actors,'' from relying on Regulation A, Regulation Crowdfunding, and Regulation D to offer and sell securities. While the disqualification provisions are substantially similar,[564] the lookback period for determining whether a covered person is disqualified differs between Regulation D and the other exemptions. For Regulation D, the lookback period is measured from the time of the sale of securities in the relevant offering. For 17 CFR 230.262(a) (''Rule 262(a)'' of Regulation A) and 17 CFR 227.503(a) (''Rule 503(a)'' of Regulation Crowdfunding), the lookback period is measured from the time the issuer files an offering statement.[565]

Under Regulation A, if a covered person triggers one of the disqualifying events in Rule 262, the Commission may suspend reliance on the Regulation A exemption through 17 CFR 230.258 (''Rule 258''), which requires a notice and hearing opportunity for the issuer prior to the suspension becoming permanent. Furthermore, if a covered person triggers one of the disqualifying events, the issuer may need to consider whether it must suspend the offering until it files a post-qualification amendment to reflect a fundamental change in the information set forth in the most recent offering statement or post-qualification amendment.[566] Regulation Crowdfunding, which similarly measures the lookback from the time of filing of the offering statement, does not have a suspension provision. Similar to Regulation A, it requires an issuer to amend the offering statement to disclose material changes, additions, or updates to information that it provides to investors for offerings that have not been completed or terminated.[567] Nevertheless, in certain circumstances, periods of time may exist during Regulation A and Regulation Crowdfunding offerings between the filing of the offering statement and the next required filing where an offering could continue despite an event that would have constituted a disqualifying event at the time of filing.

1. Proposed Amendments

The Commission proposed to harmonize the bad actor disqualification provisions in Rule 506(d) of Regulation D, Rule 262(a) of Regulation A and Rule 503(a) of Regulation Crowdfunding by adjusting the lookback requirements in Regulation A and Regulation Crowdfunding to include the time of sale in addition to the time of filing. Specifically, the Commission proposed to add ''or such sale'' to any lookback references that refer to the time of filing, such as the ''filing of the offerings statement,'' ''such filing,'' or ''the filing of the information required by Section 4A(b) of the Securities Act'' in Rule 262(a) and Rule 503(a).

In order to reflect the offering statement filing requirement before the first Regulation Crowdfunding sale, and more closely track the requirement in Rule 262(a) of Regulation A, the Commission proposed including ''any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale'' in Rule 503(a).[568] The proposed amendments would not alter the availability of the existing reasonable care exception, an issuer's ability to seek a waiver from disqualification from the Commission, or the exception applicable when a court or regulatory authority advises in writing that disqualification should not arise.[569] Nonetheless, with respect to the latter provision, the Commission proposed to amend 17 CFR 230.262(b)(3) (''Rule 262(b)(3)'') and 17 CFR 227.503(b)(3) (''Rule 503(b)(3)''), which currently provide that a court's or regulatory authority's advice with respect to the disqualifying effect of an order, judgment or decree must occur before: (i) The time of ''the filing of the offering statement,'' in the case of Regulation A, or (ii) ''the filing of the information required by section 4A(b) of the Securities Act,'' in the case of Regulation Crowdfunding. The proposed amendments would conform the existing language in Rules 262(b)(3) and 503(b)(3) with the parallel lookback language in 17 CFR 230.506(d)(2)(iii) by adding the phrase ''before . . . [the relevant/such] sale.''

[563] *See, e.g.,* 2020 Regulation A Review (stating that the requirement for Regulation A reporting company issuers to be current in their reporting requirements ''would benefit investors by ensuring that they have access to historical financial and non-financial statement disclosure about Exchange Act reporting companies that are conducting Regulation A offerings and may facilitate the development of an efficient secondary market for the securities they purchase in Regulation A offerings''). *See also* NASAA Letter (''By helping to make clear that issuers are expected to behave as public companies once they enter the public markets, even through the means of exempt offerings, the Commission is at least partly addressing the concern that the current proposals will cause even substantial companies to remain in the private markets permanently.'')

[564] Section 3(b)(2)(G)(ii) of the Securities Act [15 U.S.C. 77c(b)(2)(G)(ii)] provides the Commission with authority to issue bad actor disqualification rules under Regulation A that are ''substantially similar'' to those adopted for securities offerings under Rule 506 of Regulation D pursuant to Section 926 of the Dodd-Frank Act. *See* 2015 Regulation A Release; Disqualification of Felons, Other ''Bad Actors'' from Rule 506 Offerings, Release No. 33–9414 (July 10, 2013) [78 FR 44729 (July 24, 2013)] (''Rule 506(d) Final Release''); and Crowdfunding Adopting Release.

[565] Rule 503(a) provides lookback language based on ''the filing of the offering statement'' or ''the filing of the information required by section 4A(b) of the Securities Act'' on Form C. *See* 17 CFR 227.503. While the disqualification events in Securities Act Rule 262 and Regulation Crowdfunding Rule 503 are generally tied to the filing of an offering statement, 17 CFR 230.262(a)(6); and 17 CFR 227.503(a)(6) are not.

[566] *See* 17 CFR 230.252(f)(2).

[567] *See* 17 CFR 230.203(a)(2).

[568] Rule 503(a) currently covers only promoters connected with the issuer in any capacity ''at the time of such sale,'' making it possible that a promoter that previously engaged in fraudulent activities or violated securities or other laws or regulations, could be involved in offering activities under Regulation Crowdfunding so long as such promoter is not connected with the issuer in any capacity at the time of sale.

[569] *See* 17 CFR 230.262(b)(3).

2. Comments

Commenters generally supported revising the bad actor lookback provisions in Regulation A and Regulation Crowdfunding as proposed.[570] One commenter recommended that the Commission provide guidance on how often bad actor checks should be performed, using the same timing for all bad actor lookback periods, and including 20% holders in the revised lookback provisions.[571] Another commenter suggested establishing a consistent standard for bad actor determinations in conjunction with FINRA and providing a centralized bad actor database.[572] Other commenters recommended permitting issuers to continue their offerings and provide investors with disclosure and an option to cancel their investment commitments after a disqualifying event first arises.[573] Commenters also generally supported revising the bad actor language in Rule 503(a) of Regulation D to include ''any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale,'' to more closely track Rule 262(a) of Regulation A.[574]

One commenter opposed the revisions, suggesting the additional monitoring cost will prevent issuers from relying on Regulation Crowdfunding.[575] Another commenter, who was supportive of the revisions, also acknowledged the potential for significant monitoring costs, especially in Regulation Crowdfunding offerings.[576]

3. Final Amendments

We are adopting the amendments as proposed to further harmonize the disqualification provisions in Regulation A, Regulation Crowdfunding, and Regulation D by using the same disqualification lookback period. Although the amendments may, to some extent, increase the compliance costs associated with conducting an offering under Regulation A or Regulation Crowdfunding, for issuers that conduct offerings in reliance on more than one of these exemptions, using the same disqualification lookback period across exemptions may simplify compliance and due diligence for issuers.[577] In addition, the revised lookback period, which looks to both the time of filing of the offering document and the time of sale, will improve investor protections by further limiting the role of ''bad actors'' in exempt offerings and reducing the chance that investors may unknowingly participate in securities offerings involving offering participants who have engaged in fraudulent activities or violated securities or other laws or regulations.[578]

The disqualification provisions in Regulation A and Regulation Crowdfunding were intended to be ''substantially similar'' to those in Regulation D.[579] When the Commission adopted disqualification provisions under Regulation D, the Commission also adopted an exception from disqualification for offerings where the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed. At that time, the Commission was cognizant of the monitoring costs associated with Rule 506(d)'s disqualification provisions, particularly the costs of monitoring beneficial owners of 20 percent or more of the issuer's outstanding voting securities.[580]

For Regulation A and Regulation Crowdfunding issuers, monitoring covered beneficial owners may pose different challenges than for issuers in Regulation D offerings because shares sold under Regulation A are potentially freely tradable immediately following an investor's initial purchase, and shares sold under Regulation Crowdfunding are generally freely tradable after a holding period. In recognition of the additional monitoring burdens associated with Regulation A and Regulation Crowdfunding offerings, and the potential for such burdens to discourage reliance on Regulation Crowdfunding, we are, as proposed, retaining the current lookback period applicable to covered beneficial owners in Regulation A and Regulation Crowdfunding rather than amending it to start at the time of sale. We do not believe that permitting issuers to continue their offerings and provide investors with disclosure and an option to cancel their investment commitments after a disqualifying event first arises would provide sufficient investor protections, as it would treat issuers with older disqualifying events differently from issuers with more recent disqualifying events, prohibiting the former from engaging in a Regulation A or Regulation Crowdfunding offering but permitting the latter to engage in the offering with only updated disclosure provided.[581]

## III. Other Matters

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

Pursuant to the Congressional Review Act,[582] the Office of Information and Regulatory Affairs has designated these rules a ''major rule,'' as defined by 5 U.S.C. 804(2).

## IV. Economic Analysis

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 2(b) of the Securities Act,[583] Section 3(f) of the Exchange Act,[584] and Section 2(c) of the Investment Company Act[585] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the

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[570] *See, e.g.,* J. Clarke Letter; Netcapital Letter; NASAA Letter; Md. St. Bar Assoc. Letter; W. Hubbard Letter; CrowdCheck Letter; and IPA Letter.

[571] *See* CrowdCheck Letter. In contrast, one commenter supported continuing to use the time of filing, rather than time of sale, for covered persons. *See* J. Clarke Letter.

[572] *See* IPA Letter.

[573] *See* Geraci Law Letter; J. Clarke Letter; NextSeed Letter; and W. Hubbard Letter. *But see* CrowdCheck Letter contending that permitting the offerings to continue would treat more recent disqualifying events as less serious than older ones.

[574] *See, e.g.,* Geraci Law Letter; Netcapital Letter; NASAA Letter; Md. St. Bar Assoc. Letter; and CrowdCheck Letter.

[575] *See* NextSeed Letter.

[576] *See* CrowdCheck Letter.

[577] *See* 2015 Regulation A Release, at Section II.G. In adopting the 2015 Regulation A amendments, the Commission stated that a uniform set of bad actor triggering events would simplify due diligence, particularly for issuers that may engage in different types of exempt offerings.

[578] This may be particularly true for regulating the conduct of promoters connected with an issuer throughout an ongoing offering.

[579] *See* 2015 Regulation A Release and Crowdfunding Adopting Release. Section 302(d) of the JOBS Act requires the Commission to establish disqualification provisions under which an issuer would not be eligible to offer securities pursuant to Section 4(a)(6) and an intermediary would not be eligible to effect or participate in transactions pursuant to Section 4(a)(6). Section 302(d)(2) specifies that the disqualification provisions must be ''substantially similar'' to the ''bad actor'' disqualification provisions contained in Rule 262 of Regulation A. As noted above, the disqualification provisions under Regulation A are required to be ''substantially similar'' to those adopted for securities offerings under Rule 506. *See supra* note 564.

[580] *See* Rule 506(d) Final Release, at Section II.B. The Commission clarified that, for ongoing offerings, the issuer's reasonable care duty to monitor covered persons generally ''includes updating the factual inquiry'' on a periodic basis. *Id.* at Section II.D.2.

[581] *See* CrowdCheck Letter.

[582] 5 U.S.C. 801 *et seq.*

[583] 15 U.S.C. 77b(b).

[584] 15 U.S.C. 78c(f).

[585] 15 U.S.C. 80a–2(c).

Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act requires the Commission to consider the effects on competition of any rules the Commission adopts under the Exchange Act and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[586]

We have considered the economic effects of the final amendments, including their effects on competition, efficiency, and capital formation. Many of the effects discussed below cannot be quantified.[587] Consequently, while we have, wherever possible, attempted to quantify the expected economic effects, much of the discussion remains qualitative in nature.

*A. Broad Economic Considerations*

The final amendments will simplify, harmonize, and improve certain aspects of the Commission's exempt offering framework, including Regulation D, Regulation A, Regulation Crowdfunding, and other related rules. By providing a more streamlined and consistent exempt offering framework, these amendments are expected to incrementally facilitate capital formation through exempt offerings, expanding issuers' ability to pursue positive net present value (''NPV'') investment and growth opportunities. For example, the amendments to Regulation A and Regulation Crowdfunding that raise offering limits and incrementally facilitate compliance are expected to draw a larger and more diversified set of issuers, including issuers with high growth potential and associated high financing needs that might otherwise forgo these exemptions due to the costs of compliance combined with the existing, lower limits.[588] The final amendments may also address current uncertainties in the ability to use exempt offerings prior to, or concurrent with, registered offerings, which could ease the path to a registered offering for some private issuers.

We recognize that many of the issuers that rely on the amended exemptions likely would have relied on an exemption from registration without the final amendments.[589] For example, issuers using amended Regulation A, Regulation Crowdfunding, or Rule 504 might have relied on these exemptions in their current form, or, alternatively, relied on Rule 506 of Regulation D, which does not have an offering limit and does not require the filing of an offering statement or ongoing disclosures. The substitution between different offering methods is likely to limit the economic effects of the amendments. Nevertheless, the increased flexibility afforded by the amendments may enable some issuers to optimize their financing strategy and reduce their financing costs, helping them fund a broader range of investment projects and growth opportunities. Financing cost savings and enhanced ability to fund positive-NPV investment opportunities would in turn benefit shareholders through greater shareholder value.

The amendments may also provide incrementally greater choice of investment opportunities for investors. Importantly, the investor protections applicable to these exemptions will continue to provide significant safeguards against the risk of losses for non-accredited investors. The amendments we are adopting could expand non-accredited investor access to investment opportunities, such as through the following:

- Amendments to Regulation A, Regulation Crowdfunding, and Rule 504, which do not limit the number of non-accredited investors, may attract additional issuers or larger offerings.
- Amendments to Regulation Crowdfunding will increase investment limits for the subset of non-accredited investors whose annual income diverges from net worth, which may allow such investors to participate in more crowdfunding offerings.
- Amendments to Rule 506(b) may on the margin lead to additional offerings that permit non-accredited investors; however, the 35-person cap on the number of non-accredited purchasers in any Rule 506(b) offering in a 90-day period and the historically low proportion of Rule 506(b) offerings with non-accredited investors are expected to significantly limit this effect.

Greater flexibility under the amendments may enable non-accredited investors to optimize their capital allocation through incrementally greater access to exempt offering investment opportunities. The magnitude of the effect would depend on several factors, including:

- Whether issuers switch between offering methods that allow non-accredited investors, in which case the set of investment opportunities for non-accredited investors may change very little.
- Whether issuers prefer accredited investors due to their industry connections and expertise or due to the potential costs of having multiple non-accredited investors (*e.g.,* capitalization table concerns in light of subsequent financing plans[590] or Section 12(g) registration thresholds, costs of investor relations, or risks of proprietary information disclosure).
- Whether non-accredited investors choose not to invest in exempt offerings (*e.g.,* due to illiquidity; transaction, search, due diligence, and agency costs; or investment minimums).
- The efficiency of portfolio allocation of non-accredited investors. Such efficiency would depend on such investors' skill at obtaining and analyzing information about issuers that provide less disclosure compared to registered offerings.[591] Non-accredited investors may in some cases benefit from monitoring and screening by accredited investors, although the effect may be limited if the securities held by accredited investors offer different terms or payoffs.[592]

[586] 15 U.S.C. 78w(a)(2).

[587] For example, as discussed in the Proposing Release and noted by commenters (*see, e.g.,* Better Markets Letter; CFA Letter; Letter from Healthy Markets Association dated March 16, 2020 (''HMA Letter''); and NASAA Letter), scaled disclosures and a lack of secondary trading complicate the gathering of performance data on all exempt offerings. Where available, such data is not necessarily directly comparable to public market returns. *See* Proposing Release, at note 372. The analysis of available evidence on the performance of exempt offerings can be found in Report to Congress on Regulation A/Regulation D Performance. *See also* CCA Letter (discussing evidence on the performance of crowdfunding offerings) and Letter on the Concept Release from AngelList Venture dated September 14, 2020 (''AngelList Letter'') (discussing evidence on the performance of investments through their platform).

[588] The amended offering limits also may attract financial intermediaries that might presently opt out of this market segment because of fixed costs of due diligence and marketing or a small issuer pool.

[589] Aggregate conditions, such as a prolonged period of low interest rates, may also contribute to sustained reliance on exempt offerings. *See, e.g.,* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline in the Public Company.* 68 Hastings L. J. 445 (2017), at footnote 7; McKinsey, *Private Markets Come of Age: McKinsey Global Private Markets Review* (2019), *https://www.mckinsey.com/~/media/mckinsey/industries/private%20equity%20and%20principal%20investors/our%20insights/private%20markets%20come%20of%20age/private-markets-come-of-age-mckinsey-global-private-markets-review-2019-vf.ashx* (noting the role of low interest rates in investor pursuit of high-yield investments, including in private capital markets).

[590] *See, e.g., supra* Section II.F.

[591] *See also* Proposing Release, at note 375.

[592] *See also* Proposing Release, at note 376. Differences in payoffs may be compensation for value added by the expertise, advice, governance, and network connections contributed by large investors.

Today non-accredited investors may invest in a wide range of financial assets with high risk or due diligence costs, both as part of the securities market (*e.g.,* leveraged investments in individual listed securities; short positions; holdings of registered securities of foreign, small-cap, and over-the-counter (OTC) issuers; and holdings of registered nontraded securities, including REITs and structured notes) and outside the securities market (*e.g.,* futures, foreign exchange, real estate, individual small businesses, peer-to-peer lending, and financial transactions that entail high risk or leverage). Thus, the incremental effects on non-accredited investors of potential additional investment in exempt offerings under the amendments should be assessed relative to the existing market conditions.

Some commenters expressed concerns that facilitating capital raising through exempt offerings may incrementally contribute to the ongoing decline in U.S. registered offerings, limiting the overall set of investment opportunities and information available to non-accredited investors.[593] While the aggregate trend of the decline in U.S. registered offerings, which dates back to the aftermath of the 2000 stock market crash, is an important element of the baseline, we expect the amendments being adopted in this release to have at most a marginal impact on this trend for the following reasons:

• Amendments to individual exemptions that have the greatest potential to result in the growth in capital raising pursuant to those exemptions relative to the baseline affect the market segments that are relatively small in absolute terms today (Regulation A, Regulation Crowdfunding, and Rule 504). While individual issuers may realize significant gains in the form of greater availability or decreased cost of capital, the aggregate effects of the amendments on the market as a whole are likely to be modest in absolute terms. Moreover, issuers that rely on Regulation A, Regulation Crowdfunding, and Rule 504 tend to be at a much earlier stage of development than a traditional IPO issuer.[594] While expanded offering limits may attract some additional issuers that are larger or more mature, the typical issuer relying on these exemptions—especially Regulation Crowdfunding—is unlikely to be able to conduct a traditional IPO at the issuer's present stage of development. This should mitigate concerns about increased substitution of traditional IPOs for Regulation Crowdfunding or Regulation A under the amendments.

• While changes to the disclosure requirements for sales to non-accredited investors under Rule 506(b) will reduce the cost to issuers of sales to such investors and may draw additional issuers to allow non-accredited investors in Rule 506(b) offerings, Rule 506(b) offerings with non-accredited investors currently comprise a relatively small portion of the market. Almost all such offerings report only having accredited investors.[595] Exempt offering integration amendments are most likely to affect issuers that rely on multiple exemptions, particularly ones involving non-accredited investors. We believe that the added flexibility and reduced cost of capital raising may be highly beneficial to the affected issuers—particularly for smaller issuers and issuers that lack an established network of angel investors or venture backing and thus rely on a combination of capital raising strategies to finance their growth. Nevertheless, for the majority of non-reporting issuers that raise financing from accredited investors without general solicitation (see Table 6 below), the integration amendments will likely have limited effects.

• Further, the integration amendments we are adopting include provisions intended to facilitate exempt and registered offerings occurring close in time and, as such, may make it easier for some issuers to attempt registered offerings. For some issuers looking to do bridge financing right before an IPO, the additional certainty provided by the new integration rule may allow them to accelerate the process of initiating the IPO (or at least provide additional certainty that the prior offering will not be integrated with the IPO).

To the extent that the amendments contribute to some substitution between registered and exempt offerings, it is important to consider any such substitution in the context of other economic channels through which the amendments affect capital allocation and the availability of investable opportunities:

• We do not expect the amendments to deter a significant proportion of the issuers that are large and mature enough to be on the cusp of going public from pursuing a public offering. Such issuers likely already have a developed network of angel investors and/or backing from venture capitalists on which they can rely to raise the necessary amount of financing today. Thus, such issuers' decision to go public is likely driven more by the benefits of being a reporting company (relative to the cost of a registered offering and being a reporting company).[596]

• Additional flexibility in access to capital can help existing issuers meet their financing needs at a lower cost and allocate capital to growth opportunities more efficiently, with the resulting benefits for economic growth, competition, and capital markets as a whole.

• The amendments might have the most significant effects on smaller growth issuers that presently lack sufficient access to financing that they require to develop their business model and gain scale. Such issuers may face significant financing constraints and lack an established network of angel investors or venture capital backing and may be too early in their lifecycle to be a candidate for a public offering. Thus, if the flexibility added by the amendments allows some of these small issuers to raise enough external financing to develop their business model and scale up to a point where they may become viable candidates for a public offering, the amendments might diversify the pool of prospective issuers that are able to conduct a registered

[593] *See, e.g.,* Better Markets Letter; Letter from Center for American Progress, et al. dated May 26, 2020 (''CAP, et al. Letter''); CFA Letter; and HMA Letter.

[594] *See infra* note 596.

[595] *See supra* note 127.

[596] One commenter stated that ''[w]hile we do not disagree with the statement that provisions of the Release would not be expected to 'deter a significant portion' of issuers from pursing a public offering, we believe . . . that the provisions of the Release would be expected to contribute to a lower (rather than higher) number of SEC-registered companies.'' *See* CII Letter. However, the data on IPO issuer age and size over time appears to support our view. *See, e.g.,* Jay R. Ritter, *Initial Public Offerings: Median Age of IPOs Through 2019,* (Jan. 14, 2020), *available at https://site.warrington.ufl.edu/ritter/files/2020/02/IPOs2019Age.pdf* (citing median IPO issuer age during 2001 through 2019 as ten years) and Jay R. Ritter, *Initial Public Offerings: Sales Statistics Through 2019,* (Mar. 10, 2020), *available at https://site.warrington.ufl.edu/ritter/files/IPOs2019_Sales.pdf* (citing in Table 12 median sales of IPO issuers, expressed in 2005 dollars, as approximately $47 million in 2019). By comparison, the age and size of Regulation A and Regulation Crowdfunding issuers is much smaller. The median Regulation Crowdfunding issuer had no revenues and had an age of approximately two years. *See* Table 9 below. The median Regulation A issuer had no revenues and had an age of approximately three years. *See* 2020 Regulation A Review, at Table 5. In Regulation D offerings, the median issuer age is two years; the median non-fund issuer size (revenues), where reported, is $1 million–$5 million; to the extent that the offering proceeds can serve as a proxy for issuer size and financing needs in offerings without an offering limit, the median Rule 506(b) reported proceeds were $1.5 million. *See* Table 7 below. Thus, we continue to believe that the amendments to offering limits and integration provisions will not result in significant substitution between new IPO activity and additional exempt offerings.

offering, which could result in a higher number of IPOs in the future.[597]

- Overall, expanded access to capital may draw new businesses to capital markets, which might have otherwise found a securities offering to be impractical or too costly. Without a securities offering, some of these businesses might not have been able to grow their operations (and in the process create value for their owners).

Some of the amendments affect the same offerings and issuers or have mutually reinforcing or partly offsetting effects, which makes it more difficult to draw conclusions about the net effects of the final amendments package as a whole. For example, it is difficult to predict how the amendments that expand, simplify, and increase the uniformity of integration safe harbors will affect issuer reliance on individual exemptions. Nevertheless, we expect that these integration amendments will overall facilitate capital formation by harmonizing requirements, reducing legal costs, and providing additional flexibility to issuers seeking an exemption from registration or transitioning to a registered offering. The amendments to offering limits for individual exemptions may lead to increased substitution between exemptions. On the other hand, Regulation Crowdfunding amendments relaxing investment limits and raising offering limits may result in mutually reinforcing benefits for capital formation.

Finally, we recognize that the amendments to exemptions that are relatively infrequently used today compared to Rule 506(b) of Regulation D (such as Regulation Crowdfunding, Regulation A, Rule 504, and Rule 506(c)) are likely to have limited aggregate economic effects on issuers and on investors in absolute terms, even if the percentage changes in the offering activity conducted under those exemptions are significant.

Recently, the Commission amended the accredited investor definition.[598] Those amendments may affect the economic effects of the amendments considered here. In particular, some of the economic effects of the amendments discussed here that facilitate exempt offerings to accredited investors (*e.g.,* expanded integration safe harbors, exemption of accredited investors from Regulation Crowdfunding investment limits) will be amplified to the extent that issuers can offer securities to an expanded pool of accredited investors. In turn, some of the effects of the amendments discussed here that facilitate exempt offerings to non-accredited investors (*e.g.,* expanded offering limits under Regulation A, Regulation Crowdfunding, and Rule 504, testing-the-waters and crowdfunding vehicle provisions of amended Regulation Crowdfunding, and amendments to non-accredited investor disclosure requirements under Rule 506(b)) may be smaller to the extent that issuers able to access an expanded accredited investor pool become less reliant on exempt offerings to non-accredited investors.

*B. Baseline*

We examine the economic effects of the final amendments relative to the baseline, which comprises the existing regulatory requirements (described in detail in Section I above) and market practices related to exempt offerings (described below).

Generally, the parties affected by the amendments include current and prospective issuers and investors in exempt offerings. To the extent that the amendments affect how issuers choose between registered and exempt offerings, the amendments also might affect issuers and investors in the registered offering market. In cases where intermediaries are involved in exempt offerings and either receive transaction-based compensation or perform some of the offering-related or compliance functions on behalf of issuers, intermediaries will also be affected by the amendments. In particular, Regulation Crowdfunding requires offerings to be conducted through an intermediary's online platform. Thus, to the extent that the amendments affect Regulation Crowdfunding offering activity, they are expected to have direct effects on all crowdfunding intermediaries. In other instances, the effects of the amendments on intermediaries might be more limited (*e.g.,* intermediaries might verify investor status for issuers under Rule 506(c), be authorized by some issuers to test the waters with investors prior to an offering, or be drawn to the Regulation A market if they find that the increase in the offering limit makes underwriting more cost-effective).

Below we present data on the recent state of the market affected by the amendments. In 2019, registered offerings accounted for $1.2 trillion (30.8 percent) of new capital, compared to approximately $2.7 trillion (69.2 percent) that we estimate was raised through exempt offerings.[599] Of the approximately $2.7 trillion estimated as raised in exempt offerings in 2019, the following table shows the amounts that we estimate were raised under each of the identified exemptions.[600]

[597] Private capital can provide a critical lifeline to startup and other small private firms to proceed from a development stage to implementing their business model, generating revenue, and growing in size. Larger firms, firms past the development stage, and firms that have venture capital backing (although private capital may also take other, non-venture capital forms) are more likely to achieve a successful IPO exit (as opposed to, for instance, being acquired by a larger competitor). *See, e.g.,* Annette B. Poulsen & Mike Stegemoller, *Moving from Private to Public Ownership: Selling out to Public Firms versus Initial Public Offerings,* 37 Fin. Mgmt. 81 (2008), at Table 7; James C. Brau, Bill Francis & Ninon Kohers, *The Choice of IPO versus Takeover: Empirical Evidence,* 76 J. Bus. 583 (2003), at 583; Onur Bayar & Thomas Chemmanur, *What Drives the Valuation Premium in IPOs versus Acquisitions*? *An Empirical Analysis,* 18 J. Corp. Fin. 451 (2012), at Table 3. *See also supra* note 596 (discussing the substantial size of a typical IPO issuer).

[598] *See* Amending the ''Accredited Investor'' Definition, Rel. No. 33–10824 (Aug. 26, 2020) [85 FR 63726 (Oct. 9, 2020)].

[599] Unless otherwise indicated, information in this release on Regulation D, Regulation A, and Regulation Crowdfunding offerings is based on analyses by staff in the Commission's Division of Economic Risk and Analysis of data collected from SEC filings.

[600] ''Other exempt offerings'' includes Section 4(a)(2), Regulation S, and Rule 144A offerings. The data used to estimate the amounts raised in 2019 for other exempt offerings includes: (1) Offerings under Section 4(a)(2) of the Securities Act that were collected from Thomson Financial's SDC Platinum, which uses information from underwriters, issuer websites, and issuer Commission filings to compile its Private Issues database; (2) offerings under Regulation S that were collected from Thomson Financial's SDC Platinum service; and (3) resale offerings under Rule 144A that were collected from Thomson Financial SDC New Issues database, Dealogic, the Mergent database, and the Asset-Backed Alert and Commercial Mortgage Alert publications, to further estimate the exempt offerings under Section 4(a)(2) and Regulation S. We include amounts sold in Rule 144A resale offerings because those securities are typically issued initially in a transaction under Section 4(a)(2) or Regulation S but generally are not included in the Section 4(a)(2) or Regulation S data identified above. These numbers are accurate only to the extent that these databases are able to collect such information and may understate the actual amount of capital raised under these offerings if issuers and underwriters do not make this data available. The data on Rule 144A debt offerings from Mergent is available only through the end of August 2019. We have extrapolated the data to obtain a full calendar year.

TABLE 5—OVERVIEW OF AMOUNTS RAISED IN THE EXEMPT MARKET IN 2019

| Exemption | Amounts reported or estimated as raised in 2019 (billion) |
|---|---|
| Rule 506(b) of Regulation D | $1,492 |
| Rule 506(c) of Regulation D | 66 |
| Regulation A: Tier 1 | 0.044 |
| Regulation A: Tier 2 | 0.998 |
| Rule 504 of Regulation D | 0.228 |
| Regulation Crowdfunding | 0.062 |
| Other exempt offerings | 1,167 |

The following table [601] summarizes recent data on the Regulation D market.

TABLE 6—OFFERINGS UNDER REGULATION D IN 2019

| | Rule 504 | Rule 506(b) | Rule 506(c) |
|---|---|---|---|
| Number of New Offerings | 476 | 24,636 | 2,269. |
| Amount Reported Raised | $0.2 billion | $1,491.9 billion | $66.3 billion. |

As can be seen from Table 6, Rule 506(b) dominates the market for exempt securities offerings. Amounts raised under Rule 506(b) also exceeded the amounts raised in the registered market, estimated to be $1.2 trillion in 2019.[602]

The table below presents summary statistics for Regulation D offering and issuer characteristics over 2009–2019.

TABLE 7—SUMMARY OF REGULATION D ISSUER AND OFFERING CHARACTERISTICS, 2009–2019 [603]

| | |
|---|---|
| Number of issuers | 173,697. |
| Number of Offerings | 242,070. |
| Amounts Reported Sold | $13,576 billion. |
| Mean Amount Sold (if reported) | $58 million. |
| Median Amount Sold (if reported) | $1.50 million. |
| Mean Offer Size (if reported) | $71 million. |
| Median Offer Size (if reported) | $2.25 million. |
| Median Years Since Incorporation | 2. |
| Median Issuer Size (if reported): | |
| Private Funds (Net Asset Value) | $25 million–$50 million. |
| Non-Fund Issuers (Revenue) | $1 million–$5 million. |
| Used Intermediary | 20%. |
| Total Investors: | |
| As reported in initial Form D filings | 3.4 million. |
| All filings, including amendments | 5.9 million. |
| Average Investors/Offering (if reported) | 10. |

The table below [604] summarizes amounts sought and reported raised in offerings under Regulation Crowdfunding since its inception.[605]

[601] This table includes offerings by pooled investment funds. Information on Regulation D offerings, including offerings under Rule 504 and Rule 506, is based on staff analysis of data from Form D filings on EDGAR. The amount raised is based on the amounts reported as ''Total amount sold'' in all Form D filings (new filings and amendments) on EDGAR. Subsequent amendments to a new filing were treated as incremental fundraising and recorded in the calendar year in which the amendment was filed. It is likely that the reported data on Regulation D offerings underestimates the actual amount raised through these offerings. First, Rule 503 of Regulation D requires issuers to file a Form D no later than 15 days after the first sale of securities, but a failure to file the notice does not invalidate the exemption. Accordingly, it is possible that some issuers do not file Form D for offerings relying on Regulation D. Second, underreporting could also occur because a Form D may be filed prior to completion of the offering, and our rules do not require issuers to amend a Form D to report the total amount sold on completion of the offering or to reflect additional amounts offered if the aggregate offering amount does not exceed the original offering size by more than 10 percent.

[602] *See also* Concept Release; and Scott Bauguess, Rachita Gullapalli, & Vladimir Ivanov, *Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009–2017* (U.S. Sec. and Exch. Comm'n, Division of Economic and Risk Analysis White Paper, Aug. 1, 2018), *available at https://www.sec.gov/dera/staff-papers/white-papers/dera_white_paper_regulation_d_082018.*

[603] *See also supra* note 601. The number of issuers is based on a unique Central Index Key (CIK) identifier. Number of offerings represents all new offerings initiated during the period 2009 through 2019, as represented by a Form D filing, and offerings initiated prior to 2009 but continuing into the period 2009 through 2019 (as represented by an amendment filed). Amounts Reported Sold is calculated as described above and includes amounts sold reported in initial Form D filings and incremental amounts sold reported in amendment filings. Total number of investors, as reported in Form D and Form D/A filings, is calculated similarly. Issuers are not required to file a Form D at the close of offering. Not all offerings report amounts raised sold in their initial Form D filing.

[604] *See supra* note 599. Issuers that have not raised the target amount or not filed a report on Form C–U are not included in the estimate of proceeds.

[605] For a discussion of the Regulation Crowdfunding market, *see also* 2019 Regulation Crowdfunding Report.

TABLE 8—REGULATION CROWDFUNDING OFFERING AMOUNTS AND REPORTED PROCEEDS, MAY 16, 2016–DECEMBER 31, 2019

| | Number | Average | Median | Aggregate (million) |
|---|---|---|---|---|
| Target amount sought in initiated offerings | 2,003 | $63,791 | $25,000 | $126.9 |
| Maximum amount sought in initiated offerings | 2,003 | 599,835 | 535,000 | 1,174.2 |
| Amounts reported as raised in completed offerings | 795 | 213,678 | 106,900 | 169.9 |

Given the offering limits, crowdfunding is used primarily by relatively small issuers. The table below[606] presents data on the characteristics of issuers in crowdfunding offerings.

TABLE 9—CHARACTERISTICS OF ISSUERS IN REGULATION CROWDFUNDING OFFERINGS, MAY 16, 2016–DECEMBER 31, 2019

| | Average | Median |
|---|---|---|
| Age in years | 2.9 | 1.8 |
| Number of employees | 5.3 | 3.0 |
| Total assets | $455,280 | $29,982 |
| Total revenues | $325,481 | $0 |

Based on information in new Form C filings, the median crowdfunding offering was by an issuer that was incorporated approximately two years prior to the offering and employed about three people. The median issuer had total assets of approximately $30,000 and no revenues (just over half of the offerings were by issuers with no revenues). Approximately ten percent of offerings were by issuers that had attained profitability in the most recent fiscal year prior to the offering.

The following table[607] summarizes amounts sought and reported raised in offerings under Regulation A since the effective date of the 2015 Regulation A amendments.

TABLE 10—REGULATION A OFFERING AMOUNTS AND REPORTED PROCEEDS IN $ MILLION, JUNE 19, 2015–DECEMBER 31, 2019

| | Tiers 1 & 2 | Tier 1 | Tier 2 |
|---|---|---|---|
| All Filed Offerings: | | | |
| Aggregate dollar amount sought | $11,170.2 million | $1,101.5 million | $10,068.6 million. |
| Number of offerings | 487 | 145 | 342. |
| Average dollar amount sought | $22.9 million | $7.6 million | $29.4 million. |
| Offerings Qualified by Commission Staff: | | | |
| Aggregate dollar amount sought | $9,094.8 million | $759.0 million | $8,335.8 million. |
| Number of offerings | 382 | 105 | 277. |
| Average dollar amount sought | $23.8 million | $7.2 million | $30.1 million. |
| Capital Reported Raised: | | | |
| Aggregate dollar amount reported raised | $2,445.9 million | $230.4 million | $2,215.6 million. |
| Number of issuers reporting proceeds | 183 | 39 | 144. |
| Average dollar amount reported raised | $13.4 million | $5.9 million | $15.4 million. |

As can be seen, Tier 2 accounted for the majority of Regulation A offerings (70 percent of filed and 73 percent of qualified offerings), amounts sought (90 percent of amounts sought in filed offerings and 9 percent of amounts sought in qualified offerings), and reported proceeds (91 percent) during this period.

Because reliance on integration safe harbors is not required to be disclosed, we lack a way to reliably quantify the pool of issuers and offerings that would be affected by the amended approach to integration. Nevertheless, some indication of the scope of issuers affected by integration provisions may come from indirect sources: In 2019, based on the analysis of Form D filings, we estimate that approximately 1,256 issuers other than pooled investment funds filed more than one Form D (excluding amendments) and an additional 258 issuers filed one new Form D and either had a registration statement declared effective, had a Regulation A offering statement qualified, or filed a new or amended Form C. Many private placements, however, rely on Section 4(a)(2) rather than on the Regulation D safe harbor. We lack data on Section 4(a)(2) offerings due to the absence of filing or disclosure requirements associated with this statutory exemption. Also, for issuers filing forms for multiple offerings, in most cases we cannot reliably determine if, and when, proceeds were raised or the offering closed, or whether the specific offerings were eventually subject to integration or not. For instance, a closeout filing on Form D is

[606] *See supra* note 599. The estimates are based on data from Form C or the latest amendment to it, excluding withdrawals. *See also* 2019 Regulation Crowdfunding Report.

[607] The estimates include post-qualification amendments and exclude abandoned or withdrawn offerings. *See also* 2020 Regulation A Review.

not required, making it difficult to know when the offering closed or how much was raised. Similarly, proceeds data for Regulation A and Regulation Crowdfunding can be lagged or incomplete.

Except where specified otherwise, the analysis is based on available data through the most recently completed calendar year (2019). Subsequent to the end of the period analyzed here, as of September 2020, the U.S. market has experienced significant macroeconomic and market dislocations related to the global effects of COVID–19 and the related response.[608] These factors are expected to have a negative market-wide impact on the levels of offering activity (including under Regulation A, Regulation D, and Regulation Crowdfunding).[609] Offering activity data through the second quarter of 2020 is likely not reflective of the full-year effects of this shock due to significant lags in the completion of offerings and reporting of proceeds data: For the twelve months ending June 2020, approximately $1.50 trillion in proceeds was reported under Regulation D (including $0.2 billion under Rule 504, $1,430.8 billion under Rule 506(b), and $68.6 billion under Rule 506(c)); $1.3 billion under Regulation A; and $88 million under Regulation Crowdfunding (compared to approximately $1.56 trillion in proceeds under Regulation D; $1 billion under Regulation A and approximately $62 million under Regulation Crowdfunding during calendar year 2019).[610] Irrespective of these short-term fluctuations, we believe that the economic analysis considerations discussed below generally continue to apply. Inherent cyclicality of offering activity, irrespective of the cause of the macroeconomic shock, is a part of the baseline and prior academic research.[611] While macroeconomic shocks generally reduce capital formation levels (due to both supply and demand factors), which in the short run will negatively affect offering activity incremental to the rule in absolute terms, the effects of the economic considerations we discuss below are likely to remain applicable over the medium- to long-run, which encompasses periods of sustained growth interspersed with market contractions.

Further, on May 4, 2020, the Commission adopted temporary final rules under Regulation Crowdfunding to facilitate capital formation for small businesses impacted by COVID–19, which include, among other things, an exemption from certain financial statement review requirements for issuers offering $250,000 or less of securities in reliance on Regulation Crowdfunding within a 12-month period.[612] These temporary final rules were subsequently extended and apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and February 28, 2021.[613]

### *C. Economic Effects of the Final Amendments*

#### 1. Integration

The final amendments will revise the framework for integration analysis. As discussed in greater detail in Section II.A, the amendments update and expand existing integration provisions to provide greater uniformity and flexibility to issuers regarding integration of offerings. Considered together, the final amendments are expected to facilitate compliance and reduce issuer costs through greater consistency and uniformity across exemptions, and thus promote the use of exemptions by issuers that undertake multiple offerings.

##### a. Benefits

The final amendments expand and simplify the integration framework, provide greater uniformity in integration tests applicable across offering types, and in many cases shorten the period of time that issuers must wait between offerings to rely on a safe harbor from integration. The amendments are expected to reduce the cost of compliance with the integration requirements for issuers, which was generally supported by commenters.[614] In particular, the reduction in certain safe harbor periods from six months to 30 days is expected to facilitate compliance for issuers that might need to adjust their financing strategy as a result of evolving business circumstances, growing financing needs, or an inability to attract sufficient capital through a single offering method. A six-month waiting period between consecutive offerings, or the need to assess whether consecutive offerings can be treated as separate offerings or whether they must be integrated, can significantly limit such issuers' ability to raise sufficient capital or react to dynamic business conditions. Similarly, expanding the bright-line safe harbors from integration to a broader set of offering types generally reduces the need for an issuer to conduct an in-depth facts-and-circumstances analysis, as Rule 152(b) states that ''[n]o integration analysis under paragraph (a) of this section is required, if any of the following non-exclusive safe harbors apply.'' This is expected to reduce the costs for issuers seeking to raise capital through multiple offering exemptions. Overall, greater emphasis in the integration analysis on whether a particular offering satisfies the registration requirements or conditions of the specific exemption is expected to reduce integration-specific compliance efforts. The amendments are expected to reduce the costs of compliance with the provisions of the exemptions for issuers that conducted an offering before, or close in time with, another offering. The resulting decrease in compliance costs may encourage additional issuers to pursue one or more exempt offerings or to pursue a private placement and a registered offering.

The amendments are expected to be particularly beneficial to young, financially constrained, or high-growth issuers whose capital needs, and thus preferred capital raising methods, may change more frequently. The flexibility may be especially valuable in cases where one or more of the exempt offerings conducted by an issuer is subject to offering limits, as well as in cases where an issuer conducts multiple offerings that are subject to different solicitation, disclosure, offering size, or investor requirements. Overall, this flexibility may promote capital formation and enable issuers to optimize their financing strategy so as to attain a lower overall cost of capital

[608] *See, e.g.,* Scott R. Baker, Nicholas Bloom, Steven J. Davis, Kyle J. Kost, Marco C. Sammon, & Tasaneeya Viratyosin, *The Unprecedented Stock Market Impact of COVID–19,* (NBER Working Paper 26945, 2020). *See also* Maryam Haque, *Startup Ecosystem Faces Capital Crunch over Coming Months—What We Expect & Why It Matters,* (NVCA White Paper, 2020), *https://nvca.org/wp-content/uploads/2020/04/Startup-Ecosystem-Faces-Capital-Crunch-over-Coming-Months-5.pdf.*

[609] For a discussion of the effects of COVID–19 and temporary relief for Regulation Crowdfunding issuers, *see* Temporary Amendments Adopting Release and Temporary Amendments Extension.

[610] As an important caveat, Regulation A and Regulation Crowdfunding issuers were also provided temporary relief from certain periodic reporting requirements on March 26, 2020. Thus, proceeds information reported as of June 30, 2020, may be incomplete to the extent that issuers had offering proceeds but availed themselves of this relief. *See* SEC Rel. No. 33–10768 (Mar. 26, 2020) Relief for Form ID Filers and Regulation Crowdfunding and Regulation A Issuers Related to Coronavirus Disease 2019 (COVID–19) [85 FR 17747 (Mar. 31, 2020)].

[611] *See, e.g.,* Michelle Lowry, *Why Does IPO Volume Fluctuate So Much*? 67 J. Fin. ECON. 3 (2003); Chris Yung, Gonul Colak, & Wei Wang, *Cycles in the IPO Market,* 89 J. Fin. Econ. 192 (2008); Amy Dittmar & Robert Dittmar, *The Timing of Financing Decisions: An Examination of the Correlation in Financing Waves,* 90 J. Fin. Econ. 59 (2008).

[612] *See* Temporary Amendments Adopting Release.

[613] *See* Temporary Amendments Extension.

[614] *See supra* notes 39–41 and accompanying text.

while raising the required amount of external financing. The described benefits also are expected to accrue to the shareholders of those issuers through enhanced shareholder value, particularly if the increased flexibility in accessing external financing enables issuers to more efficiently pursue high-growth investment opportunities.

The described benefits may be limited in cases of amendments that codify existing guidance, to the extent that the market has already developed similar practices. Further, if issuers in certain exempt offerings, such as offerings under Rule 506(c), Regulation A, or Regulation Crowdfunding, account for most of the use of the integration safe harbor amendments, the aggregate effects of the integration amendments are expected to be limited, given the relatively small market share of these exemptions, compared to the far more prevalent Rule 506(b) and Section 4(a)(2) offerings.[615] Because Rule 506(b) does not impose an offering limit, and most such offerings do not involve non-accredited investors,[616] many issuers are likely able to meet their financing needs without having to conduct multiple offerings, which may further limit the effects of the integration amendments.

b. Costs

The amendments could on the margin result in additional financing being raised from non-accredited investors without registration requirements.[617] The disclosure requirements of all of these exemptions are less extensive than the requirements associated with a registered offering, which could result in less public disclosure generally if companies that would have become reporting companies decide to remain non-reporting companies.

Another potential concern is that a decrease in the integration of multiple offerings might result in inadvertent overlaps in solicitation of investors for offerings with different communications provisions. For example, Rule 506(b) and Section 4(a)(2) offerings, which do not allow general solicitation, may be preceded by offerings relying on exemptions that allow general solicitation (such as Regulation Crowdfunding, Regulation A, or Rule 506(c)), which could condition the market for the subsequent private placement offering. This may marginally increase risks to non-accredited investors that may participate in the subsequent private placement offering to the extent such investors rely on the general solicitation, because private placement offerings incorporate fewer investor protections.[618] Several factors are expected to largely alleviate these potential risks to investors. Importantly, the amendments do not alter the substantive requirements, including investor protections, associated with individual offering methods. The amendments more closely align issuer efforts to comply with integration provisions and requirements of the respective exemptions, including, importantly, the investor protection provisions of each respective exemption. Moreover, nothing in the amendments eliminates the requirements of the respective exemption or, in the context of registered offerings, the registration and gun jumping provisions of the Securities Act. New Rule 152 specifies that the provisions of the rule will not have the effect of avoiding integration for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act. Further, issuers remain prohibited from using general solicitation in a Rule 506(b) offering, through any means, irrespective of the integration amendments.

The amendments contain several other specific safeguards that are expected to minimize potential costs and risks to investors. Rule 152(a)(1) requires that for an exempt offering prohibiting general solicitation, the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either did not solicit such purchaser through the use of general solicitation, or established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation. This provision is expected to minimize the effect on investors of possible solicitation overlaps in cases of multiple offerings. This provision further bolsters existing solicitation restrictions in the individual exemptions and, crucially, focuses the integration analysis on the requirement that the issuer comply with solicitation restrictions intended to protect investors.

Further, Rule 152(a)(2) provides that an issuer conducting two or more concurrent exempt offerings permitting general solicitation, in addition to satisfying the particular requirements of each exemption relied on, general solicitation offering materials for one offering that include information about the material terms of a concurrent offering under another exemption may constitute an offer of the securities in such other offering, and therefore the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any legend requirements and communications restrictions. This requirement will strengthen investor protection by assuring that one exemption is not being improperly used to make offers under the second exemption, without being subject to the same offering restrictions. The legend requirement will provide notice to investors and thereby help minimize potential confusion about the offering methods, reducing the risk of uninformed investor decisions as a result of reliance on preliminary information contained in such solicitations.

[615] We recognize that other amendments we are adopting in this release, such as increased offering limits under Regulation A and Regulation Crowdfunding, increased investment limits under Regulation Crowdfunding, and additional optional means of verification of accredited investor status under Rule 506(c), might increase the use of Regulation A, Regulation Crowdfunding, and Rule 506(c).

[616] We recognize that the amendments to non-accredited investor disclosure requirements might increase the incidence of non-accredited investors in Rule 506(b) offerings.

[617] For example, conducting a Rule 506(b) offering and a Regulation A or Regulation Crowdfunding offering may enable an issuer to reach a broader non-accredited investor base and/or raise a greater amount of non-accredited investor capital. Certain exemptions (Regulation Crowdfunding, Regulation A Tier 2) also conditionally exempt securities offered under the respective exemption from the number of shareholders of record for purposes of Section 12(g). *See supra* note 52 and accompanying text (discussing commenters that opposed the integration amendments because they would allow an issuer to do indirectly what it cannot do directly). For example, one commenter stated that the amendments would allow issuers to "easily avoid registration requirements by dividing large financings into multiple smaller exempt offerings separated by only a brief period of time." *See* R. Rutkowski Letter. Another commenter stated that, under the proposed integration framework, "the original goal of preventing issuers from artificially separating related transactions into multiple offerings to avoid the registration requirement is gone under this approach." *See* CFA Letter. Requiring no integration so long as each individual offering satisfies a particular exemption, according to this commenter, "subverts the purpose of integration, which specifically looks at the totality of a financing scheme rather than different components in isolation." *Id.* This commenter stated that the proposal "would enshrine a framework that effectively allows concurrent and serial offerings that are clearly part of a single plan of financing to avoid integration." *Id.*

[618] For instance, Regulation A and Regulation Crowdfunding offerings are subject to more extensive substantive disclosure requirements. Rule 506(c) offerings do not incorporate disclosure requirements but require verification of accredited investor status, reducing the likelihood of inadvertent non-accredited investor participation, compared to a Rule 506(b) offering.

The amended non-exclusive safe harbors from integration are designed to minimize potential risks to investors. The 30-day period in the first safe harbor is expected to minimize inadvertent overlaps between offerings and investor solicitation for different offerings while providing issuers greater flexibility to adjust their financing strategy as a result of evolving circumstances. For an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of Rule 152(a)(1) shall apply,[619] which is expected to further mitigate such concerns. In addition, if an issuer conducts more than one offering under Rule 506(b), the number of non-accredited investors purchasing in all such offerings within 90 calendar days of each other may not exceed 35. This requirement is expected to address concerns that failure to integrate multiple Rule 506(b) offerings could result in sales to a large number of non-accredited investors.

The second safe harbor involves offerings under Rule 701 or Regulation S. As discussed above, offers and sales pursuant to Rule 701 and employee benefit plans are limited to employees, consultants and advisors, with whom the issuer has written compensation plans or agreements. Given the relationship between these investors and the issuer, excluding such offerings from integration is not likely to raise meaningful investor protection concerns. The amendments also codify a long-standing Commission position with respect to integration of offshore transactions made in compliance with Regulation S with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.[620] When determining the availability of this safe harbor, it will still be necessary to assess each transaction separately for compliance with Regulation S or the other exemption. After considering commenter input, to avoid disruption to the existing Regulation S market practices, we are not adopting the proposed amendment to Regulation S that would have changed the definition of ''directed selling efforts'' in Rule 902 nor the proposed requirement that a Regulation S issuer that engages in general solicitation activity prohibit resales to U.S. persons of the Regulation S securities for a period of six months from the date of sale except to QIBs or IAIs. We recognize that general solicitation activity undertaken in connection with offers and sales under an exemption from registration concurrent with a Regulation S offering may raise concerns about flowback of the Regulation S securities to the United States. However, the Commission has previously addressed the risks related to abuse of Regulation S by imposing enhanced restrictions applicable to offshore sales of equity securities of domestic issuers[621] and we are of the view that these existing requirements will continue to be effective in addressing such concerns.

The third safe harbor concerns offerings for which a Securities Act registration statement has been filed following a completed or terminated offering. The third safe harbor provides that an offering for which a Securities Act registration statement has been filed will not be integrated if it is made subsequent to a terminated or completed offering for which general solicitation is not permitted. Because private placements would continue to restrict general solicitation, the impact on investors in the private placement, most of which are deemed to have the financial sophistication and ability to sustain the risk of loss of investment or fend for themselves, is likely to be minimal. In turn, because private placements do not permit general solicitation, and because the extensive registration requirements apply to the registered offering, it is unlikely to have any impact on investors in the registered offering. The third safe harbor also provides that a registered offering will not be integrated if made subsequent to a completed or terminated exempt offering for which general solicitation is permitted but that was either limited to QIBs and IAIs, or was terminated or completed more than 30 calendar days prior to commencement of the registered offering. This is similar to current Rule 147(h), Rule 147A(h), and Rule 255(e) of Regulation A. Because of the extensive protections built into the registration requirements and the 30-day waiting period that would apply if a solicitation involved investors other than QIBs or IAIs, this safe harbor is unlikely to have adverse impacts on investors in the registered offering. In cases where solicitation was limited to QIBs and IAIs, due to the sophistication of those investors, we do not believe that the lack of a 30-day waiting period in the integration safe harbor meaningfully affects investor protection. The amendment is also consistent with Securities Act Section 5(d) and Rule 163B, which allow solicitation of QIBs and IAIs at any time prior to a registered offering.

The fourth safe harbor extends the approach in Regulation A and Rules 147 and 147A and in the guidance regarding Regulation Crowdfunding to provide that offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated if made subsequent to any prior terminated or completed offering. The disclosure and substantive requirements of these exemptions should minimize potential costs to investors from not integrating these offerings with prior offers and sales.

We believe these amendments appropriately calibrate the effort required on the part of issuers to address potential overlaps between multiple offerings by the same issuer that may raise investor protection concerns. Overall, because the amendments contain anti-evasion language and issuers must continue to meet the conditions of each exemption they are relying on, and because investor protection provisions of each exemption as well as general antifraud provisions continue to apply, the amendments are not expected to have significant adverse effects on investor protection.

We recognize that issuers seeking to rely on one or more of the integration provisions will incur costs of analyzing the facts and circumstances of the contemplated offerings and/or the respective integration safe harbors. While we believe that the amendments substantially simplify and streamline the integration safe harbors, we recognize that some issuers might find that navigating the amended integration framework requires additional time and effort. Because use of the integration safe harbors will remain voluntary, we expect that issuers will only rely on the safe harbors if such reliance might reduce their compliance costs.

c. Effects of Efficiency, Competition, and Capital Formation

The amended integration provisions are expected to improve capital formation by enabling issuers to combine financing under different

[619] The provision requires that the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either: (i) Did not solicit such purchaser through the use of general solicitation, or (ii) established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

[620] *See* Offshore Offers and Sales (Regulation S), Release No. 33–7505 (Feb. 17, 1998) [63 FR 9632 (Feb. 25, 1998)] (''Offshore Offers and Sales Release''), at Section III.C.1.

[621] *See* Offshore Offers and Sales Release.

exemptions and registered offerings more optimally as part of their financing strategy. However, the net capital formation benefits may be modest for issuers that do not need multiple offerings (*e.g.,* relying on a single Rule 506(b) offering with no, or few, non-accredited investors but seeking a larger amount of financing).

It is unclear how the integration amendments will affect competition for investor capital. To the extent the amendments reduce issuer compliance costs associated with accessing a broader range of offering exemptions, competition for investor capital in those market segments might increase. However, net effects on overall competition for investor capital may be limited to the extent that issuers reallocate between offering exemptions or additional investor capital is drawn to these markets under the amendments.

As discussed above, the amendments might offer the greatest benefits to smaller issuers that have varying financing needs or to issuers that need to rely on multiple offering exemptions to meet their financing needs (*e.g.,* because they lack an established accredited investor network to support financing exclusively through Rule 506(b) and need to rely on non-accredited investors or general solicitation).

By streamlining and harmonizing integration safe harbors, the amendments are expected to improve the efficiency and reduce the cost of an issuer's compliance efforts, particularly for issuers conducting multiple offerings.

d. Reasonable Alternatives

As an alternative, we could adopt a uniform safe harbor with a time period other than 30 days (*e.g.,* 15, 45, 60, 75, or 90 days). Compared to the final amendments, the alternative of a universal safe harbor with a shorter (longer) time period would reduce (increase) the likelihood that multiple offerings are integrated and, accordingly, reduce (increase) issuer costs of compliance. Compared to the final amendments, the alternative of a safe harbor with a shorter (longer) time period would provide issuers with greater (lower) flexibility in tailoring their capital raising strategy to changing financing needs and market conditions. Compared to the final amendments, such an alternative also might increase (reduce) the number of instances where issuers improperly divide a single plan of financing into multiple offerings.

As another alternative, we could replace the integration doctrine with general anti-evasion principles[622] or a disclosure requirement.[623] Compared to the amendments, this alternative would increase the likelihood that multiple offerings could be conducted consistent with Section 5 or the terms of any applicable exemptions and, accordingly, reduce costs of compliance for some issuers that seek to avoid or postpone registration. However, conducting an anti-evasion analysis or providing disclosures in cases of multiple offerings under this alternative could increase compliance costs for some issuers, compared to the amendments, depending on the nature of the disclosure requirement and issuer circumstances. Compared to the final amendments, this alternative would provide issuers with greater flexibility in tailoring their capital raising strategy to changing financing needs and market conditions. However, compared to the final amendments, such an alternative also would likely increase the number of instances where issuers improperly divide a single plan of financing into multiple offerings, even in the presence of general anti-evasion or disclosure requirements.

The amendments replace the five-factor test. As another alternative, we could codify the use of the five-factor test for all analyses of integration.[624] Compared to the final amendments, such an alternative could be more successful in identifying instances where issuers improperly divide what is economically a single offering into multiple offerings to avoid exemption limitations. However, it also would result in additional costs for issuers and reduced flexibility to combine multiple offering methods.

2. General Solicitation and Offering Communications

a. ''Demo Days'' and Similar Events

As discussed in greater detail in Section II.B.1 above, we are adding certain ''demo day'' communications to the list of communications that will not be deemed general solicitation. In a change from the proposal, in response to comments, we are expanding the types of entities that may sponsor an event in reliance on the exemption to include State governments and instrumentalities of State and local governments (in addition to local governments, as proposed). We are also revising the definition of ''angel investor group'' to specify that, such a group must have ''defined'' processes and procedures for making investment decisions, but that such processes and procedures do not necessarily need to be written. In response to commenters,[625] we are also revising the information that issuers may convey about an offering of securities during a ''demo day'' to add the unsubscribed amount in an offering. These changes may incrementally increase the reliance on the exemption, compared to the proposed provision. In addition, as discussed above, to address concerns raised by commenters with respect to the possibility of offering-related communications being made broadly to non-accredited investors, we are adopting certain limitations on the pool of investors that may virtually attend such events. This change may incrementally reduce reliance on the exemption, compared to the proposed provision.

i. Benefits

The amendments to Rule 148 specify that certain limited ''demo day'' activities would not be deemed general solicitation. These events are generally organized by a group or entity (such as a university, angel investors, an accelerator, or an incubator) that invites issuers to present their businesses to potential investors, with the aim of securing investment. These amendments are expected to benefit issuers by expanding the range of options for communicating about their business with prospective investors without incurring the cost of restrictions associated with general solicitation and by allowing them to more efficiently access potential investors, as supported by various commenters.[626] These benefits may be relatively more pronounced for small and emerging issuers that may not have a sufficient existing angel investor network to rely on in a Rule 506(b) or Section 4(a)(2) offering. The additional restrictions on the virtual participation of prospective

[622] *See* CrowdCheck Letter. In a comment on the Concept Release, this commenter explained its view that the ''integration doctrine should only be retained as an anti-avoidance mechanism where an issuer artificially divides an offering in order to comply with a number-of-investors or dollar offering limit.'' *See* CrowdCheck Concept Release Letter.

[623] *See* J. Clarke Letter (suggesting to replace the concept of integration with a form required by all issuers to file and keep current describing all historical and current exempt and registered offerings made by the issuer).

[624] *See* CFA Letter; and Md. St. Bar Assoc. Letter (suggesting that the five-factor test be retained).

[625] *See, e.g.,* IAA Letter; ACA Letter; Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf,* at 70. An issuer would also be able to disclose at a ''demo day,'' as proposed, that (i) it is in the process of offering or planning to offer securities; (ii) the type and amount of securities being offered; and (iii) the intended use of the proceeds of the offering.

[626] *See supra* note 216.

investors in ''demo day'' events excluded from the definition of general solicitation are expected to reduce the likelihood of non-accredited investor participation, thus decreasing potential risk to investors.

ii. Costs

Several commenters expressed concern about the effect of the amendments on investors,[627] for example, because such expanded use of ''demo day'' activities could lead to an increase in instances of fraud.[628] Overall, we expect costs to investors from the ''demo day'' amendments to be modest because the amendments significantly restrict permissible activities of ''demo day'' sponsors. In particular, the sponsor of the seminar or meeting will not be allowed to: make investment recommendations or provide investment advice to attendees of the event; engage in any investment negotiations between the issuer and investors attending the event; charge attendees of the event any fees, other than reasonable administrative fees; receive any compensation for making introductions between event attendees and issuers or for investment negotiations between such parties; or receive any compensation with respect to the event that would require registration of the sponsor as a broker-dealer or an investment adviser. These restrictions are expected to mitigate the risk that investors would be improperly induced into an investment as a result of misleading information or sales pressure from financially incentivized ''demo day'' sponsors.

iii. Effects on Efficiency, Competition, and Capital Formation

The final amendments are expected to make it easier for issuers to participate in ''demo days'' without incurring the costs of restrictions associated with general solicitation. To the extent that the amendments encourage some additional issuers to participate in ''demo days,'' and such participation facilitates their efforts to raise capital, issuers might realize capital formation benefits. Overall, the effects of the amendments on efficiency, competition, and capital formation are expected to be modest because issuers may offer securities to the same individuals and groups other than through a ''demo day''.

iv. Reasonable Alternatives

As an alternative, we could limit the ''demo day'' exception under the amendments by prohibiting any form of control or affiliation with the issuer or group of issuers, prohibiting entities whose sole or primary purpose is to attract investors to private issuers, and limiting issuer's discussion to factual business information and prohibiting discussion of any potential securities offering, as suggested by one commenter.[629] This alternative would potentially reduce the risk of investors receiving biased information about the investment opportunity at the ''demo day''. However, the restrictions under this alternative could significantly reduce the flexibility for issuers to solicit prospective investors and raise capital.

As another alternative, we could adopt a definition of general solicitation that would either narrow or expand the scope of communications that constitute general solicitation. The alternative of narrowing (expanding) the scope of communications that constitute general solicitation, either through changes to the examples of communications that constitute general solicitation or through a definition of general solicitation, would provide greater (lower) flexibility to issuers with regard to the manner of communicating offers of securities and reaching prospective investors, potentially expanding (limiting) the ability of issuers that lack an established network of investors with whom they have a pre-existing relationship to raise capital through an exempt offering. Narrowing (expanding) the scope of communications that constitute general solicitation also could expose investors, including non-accredited investors, to more (fewer) offers of securities from prospective issuers. Additional offers of securities might reduce investor search costs for investors eligible and seeking to invest in the offerings of issuers that engage in solicitation, enabling investors to potentially make more informed decisions and allocate capital more efficiently to a broader range of investment opportunities, and vice versa. The alternative of providing a specific definition of general solicitation might incrementally reduce the compliance costs of issuers to determine whether communications that fall outside the list of provided examples constitute general solicitation. However, this alternative could decrease the flexibility for issuers to consider all relevant facts and circumstances in determining whether a particular communication constitutes general solicitation.

As another alternative, we could simplify the existing framework for all exempt offerings by deregulating offers, thus eliminating general solicitation restrictions and focusing on disclosure requirements for sales.[630] This alternative would significantly expand the options for pre-offering and offering-related communications, giving issuers greater flexibility and reducing costs compared to the final amendments, some of which expand pre-offering communications but impose additional conditions (such as filing and legending). However, by shifting the investor protections to requirements for sales and antifraud provisions, this alternative might result in investors that are used to relying on information in offers having to wait for the disclosures required in conjunction with a sale.

b. Solicitations of Interest and Other Offering Communications

As discussed in greater detail in Section II.B.2 above, we are adopting a generic test-the-waters exemption that would permit an issuer to use testing-the-waters materials for an offer of securities prior to making a determination as to the exemption under which the offering may be conducted. In connection with this exemption, we are requiring that the generic solicitation materials be made publicly available as an exhibit to, or with, the offering materials filed with the Commission, if the Regulation A or Regulation Crowdfunding offering is commenced within 30 days of the generic solicitation. Further, if the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation to non-accredited investors, the issuer would be required to provide such investors with any written communication used under the generic testing-the-waters exemption. We are also expanding permissible offering communications under Regulation Crowdfunding by permitting testing the waters prior to filing a Form C with the Commission. Issuers will be required to use legends and to include any solicitation materials with the Form C that is filed with the Commission. The economic effects of the amendments will be limited if issuers are reluctant to test the waters, for example, as a result of the filing requirements or applicable State restrictions. Finally, as discussed in Section II.B.3 above, we are amending Rule 204 to expand communications permissible under Regulation Crowdfunding after the filing of Form C.

[627] *See supra* note 222.

[628] *See* Better Markets Letter.

[629] *See* NASAA Letter.

[630] *See* CrowdCheck Letter.

i. Benefits

In general, allowing issuers to gauge interest through expanded testing the waters is expected to reduce uncertainty about whether an offering could be completed successfully.[631] Allowing solicitation prior to conducting an offering will enable issuers to determine market interest in their securities before incurring the costs of preparing and conducting an offering. Testing the waters before filing can reduce the risk of a failed offering and the associated reputational costs. If, after testing the waters, the issuer is not confident that it would attract sufficient investor interest, the issuer could consider modifying offering plans or the target amount of the offering, reconsidering the contemplated offering structure and terms, postponing the offering, or exploring alternative methods of raising capital. This option might be useful for smaller issuers, especially early stage issuers, first-time issuers, issuers in lines of business characterized by a considerable degree of uncertainty, and other issuers with a high degree of information asymmetry. The ability to engage in testing-the-waters communications might attract certain issuers—those that may be uncertain about the prospects of raising investor capital—to consider using an exempt offering, thus potentially promoting competition for investor capital as well as capital formation. Importantly, the amendments could benefit issuers that find after testing the waters that their offering is unlikely to be successful and choose not to proceed with an offering, thus saving disclosure preparation and filing costs (including, where applicable, the cost of review or audit of financial statements by an independent accountant), lowering the risk of disclosure of potentially sensitive proprietary information to competitors and mitigating the reputational cost from a failed offering.

Enabling issuers to engage in generic testing-the-waters communications prior to determining the specific exemption type may provide additional flexibility to gauge market interest that is likely to be especially valuable for smaller, less well known issuers that may lack an accurate understanding of prospective investor demand for their securities. Similarly, permitting issuers to solicit investor interest, orally or in writing, in Regulation Crowdfunding offerings is expected to benefit issuers by enabling them to gauge investor interest in a prospective Regulation Crowdfunding offering before incurring the full costs of preparing and filing an offering circular.

The requirement to include legends is expected to provide notice to investors of the preliminary nature of these communications. Issuers that proceed with an offering under Regulation A or Regulation Crowdfunding after testing the waters will be required to include as exhibits to the offering statement any written materials used in a generic testing-the-waters communication within 30 days prior to the filing of a Regulation A or Regulation Crowdfunding offering statement. Issuers will also be required to include as exhibits any Regulation Crowdfunding testing-the-waters materials. Combined, these requirements are expected to provide informational benefits to investors and allow them to compare the solicitation materials with the offering statement disclosures, leading to potentially more informed investment decisions. The requirement to provide materials used for a generic testing-the-waters solicitation to any non-accredited investors in a Rule 506(b) offering that occurs within 30 days of such solicitation is expected to incrementally enhance the ability of investors in the offering to make informed decisions.

The amendments expanding communications permissible under Regulation Crowdfunding after the filing of Form C are expected to benefit issuers by allowing greater flexibility to communicate with prospective investors about the offering.[632] In addition to permitting oral communications, in response to comments received, we are expanding the information that an issuer may provide in accordance with Rule 204 to include a brief description of the use of proceeds of the offering and information on the progress of the offering toward its funding goals. We are also amending Rule 204 to clarify that an issuer may provide information about the terms of an offering under Regulation Crowdfunding in the offering materials for a concurrent offering (such as a Form 1–A for a concurrent Regulation A offering or a Securities Act registration statement). Being able to communicate with prospective investors outside the communications channels provided by the online crowdfunding platform is expected to facilitate the efforts of issuers to solicit prospective investors and advertise the offering, potentially resulting in a higher rate of offering success and more capital formation, particularly for lesser known, small issuers. Off-portal communications about the terms of the offering are also expected to incrementally improve the information available to investors and reduce costs of searching for information about offering terms for some prospective investors (*e.g.,* investors that may have prior knowledge of, or be customers of, the issuer) that would prefer to find out about offering terms without first reviewing the crowdfunding platform's website and communications channels. Should such prospective investors decide to invest in an offering, they would still have to do so through the portal and would have access therein to the filed offering materials, other offering information, and investor education materials required by Regulation Crowdfunding. Communications intended to drive traffic to the intermediary's website, and therefore to the issuer's offering, would continue to be governed by the Regulation Crowdfunding advertising restrictions.

ii. Costs

We recognize that there might also be potential costs associated with expanding the use of testing-the-waters communications in connection with a contemplated Regulation Crowdfunding offering or another exempt offering. If the contents of the offering circular differ substantively from the material distributed through testing-the-waters communications, and if investors rely on testing-the-waters materials when making investment decisions, this might lead investors to make less informed investment decisions.[633] For example, if the information conveyed through testing-the-waters communications is an incomplete representation of the risk of an offering, and if investors fail to read the subsequent offering circular before making the investment decision, they might make a less informed investment decision. These investor costs might be exacerbated to the extent that, currently, investors in Regulation Crowdfunding offerings are likely to be small and potentially limited in their capacity to process information contained in testing-the-waters communications. The removal of accredited investor investment limits under the Regulation Crowdfunding amendments is expected to increase the participation of accredited investors in such offerings

[631] *See supra* notes 233 (discussing commenter support for generic testing the waters) and 253 (discussing commenter support for testing the waters under Regulation Crowdfunding) and accompanying text.

[632] *See supra* note 269 (discussing commenters that supported expanded oral communications by Regulation Crowdfunding issuers).

[633] *See supra* notes 237 (discussing commenters that expressed concern about generic testing the waters) and 258 (discussing commenters that opposed testing the waters under Regulation Crowdfunding), and accompanying text.

and thus the average Regulation Crowdfunding investor's size and financial sophistication.

These potential investor protection concerns are expected to be alleviated by several factors:

- The application of the antifraud provisions of the Federal and State securities laws; [634]
- For issuers that proceed with a Regulation Crowdfunding offering:
  - The availability of an offering circular, allowing investors to review disclosures compliant with Regulation Crowdfunding prior to investing;
  - The requirement that written testing-the-waters materials be included with Form C, allowing the public and Commission staff to review written solicitation materials and compare them to the contents of the offering circular;
  - The availability of investor education materials required to be provided by crowdfunding intermediaries before investing; and
  - The continued application of other provisions of Regulation Crowdfunding, including ones expected to provide additional investor protection, such as investment limits for non-accredited investors, offering limits, crowdfunding intermediary requirements, periodic reporting requirements, and issuer eligibility restrictions; and
- The reputational incentives of issuers and intermediaries, as well as the risk of litigation (particularly for issuers and intermediaries that have assets and that engage in testing-the-waters communications).

Further, concerns about costs of expanding testing-the-waters communications to investors should be considered in the context of the baseline. Investors in Regulation Crowdfunding offerings today might perform an incomplete analysis of the offering risks if they base their investment decision on the promotional video or summary information from the crowdfunding platform's campaign page and fail to review the entire contents of the offering materials. Low investment minimums (many around $100, and some as low as $25) might make it optimal for investors to allocate a limited amount of time to due diligence regarding prospective crowdfunding investments. While some unscrupulous issuers might seek to disseminate misleading information through testing-the-waters communications, such issuers or intermediaries already could engage in misleading communications today, and such misleading offering communications would remain violations of the antifraud provisions of the Federal securities laws.

The amendments to Rule 204 of Regulation Crowdfunding expanding the ability to advertise the ongoing offering and discuss it in off-portal oral and written communications with prospective investors might similarly result in some investors receiving incomplete information about the offering from the issuer, and, if such investors fail to review the offering circular and other filed offering materials, potentially making less well informed investment decisions.[635]

Several factors are expected to mitigate potential costs to investors due to expanded off-portal communications:

- The availability of the offering circular containing disclosures compliant with Regulation Crowdfunding prior to investing, as well as the continued applicability of Rule 204 requirements, such as the requirement to include a link directing the potential investor to the intermediary's platform where the Form C disclosure document is available;
- The application of antifraud provisions of Federal and State securities laws;
- The availability of investor education materials required to be provided by funding portals;
- The other provisions of Regulation Crowdfunding, including ones expected to provide additional investor protection, such as investment limits, offering limits, crowdfunding intermediary requirements, periodic reporting requirements, and issuer eligibility restrictions, continue to apply; and
- The reputational incentives of issuers, as well as the risk of litigation (for issuers with assets).

The amendments that allow issuers to engage in testing the waters prior to determining the specific exemption type might lead to investor confusion with regard to the regulatory framework applicable to the contemplated offering, particularly for non-accredited investors that may be less sophisticated. However, for issuers that proceed with an exempt offering, the investor protections of the respective exemption would continue to apply. Importantly, because investors would be able to review the offering circular that clearly delineates the exemption relied on for issuers that proceed with a Regulation A or Regulation Crowdfunding offering, investors are expected to receive the disclosure necessary to reach an informed investment decision. Furthermore, should an issuer elect to proceed with a Regulation A or Regulation Crowdfunding offering within 30 days of a generic testing-the-waters communication, the testing-the-waters materials must be filed as an exhibit to, or with, the offering statement, enabling investors and the Commission staff to review testing-the-waters materials and compare them against the disclosures in the offering statement. In cases where an issuer decides to proceed with a Rule 506(c) offering after testing the waters, non-accredited investors that might have received solicitations would remain restricted from participation in a Rule 506(c) offering.

In cases of issuers that choose not to proceed with a Rule 506(c), Regulation A, or Regulation Crowdfunding offering following testing the waters for an exempt offering, but that choose instead to undertake an exempt offering under an exemption that does not permit general solicitation, the amendments are not expected to have significant effects on investors in such a private placement or registered offering. Restrictions specific to private placements, including a restriction on general solicitation for a Rule 506(b) or a Section 4(a)(2) offering would continue to apply in that case. In cases of issuers proceeding with a registered offering, gun jumping provisions of the Securities Act and other investor protections associated with registered offerings (including staff review, Section 11 liability, disclosure requirements in the registration statement, and Exchange Act reporting requirements) would continue to apply.

Because the use of testing-the-waters communications will remain voluntary, we anticipate that issuers will rely on testing-the-waters communications only if the benefits anticipated by issuers justify the expected costs. Issuers that elect to test the waters may incur costs, including direct costs of identifying prospective investors and developing testing-the-waters solicitation materials; indirect costs of potential disclosure of proprietary information to solicited investors; and in some instances, potential legal costs associated with liability arising from testing-the-waters communications with prospective investors. We note that issuers that proceed with an exempt offering without testing the waters similarly might incur costs of searching and soliciting investors, either on their own or through an intermediary.

[634] Testing-the-waters communications under Regulation Crowdfunding would be treated as offers of securities, similar to testing-the-waters communications under Regulation A, Section 5(d), and the recently adopted Rule 163B.

[635] *See supra* note 270 (discussing commenters that opposed expanded oral communications by Regulation Crowdfunding issuers).

iii. Effects of Efficiency, Competition, and Capital Formation

The expansion of permissible testing the waters prior to exempt offerings is expected to facilitate capital formation for small issuers by giving prospective issuers that might not otherwise consider an exempt offering a low-cost method of assessing investor interest in a potential offering and efficiently adjusting their financing strategy to reflect information about market demand. These effects are expected to be particularly significant for issuers contemplating Regulation Crowdfunding offerings that presently have to incur the compliance costs of preparing and filing Form C and the risk of disclosure of proprietary information to competitors, as well as the reputational risk of a failed offering, and do not have a cost-effective way of gauging investor demand. Similarly, the amendments to expand permissible issuer communications in Regulation Crowdfunding offerings might promote capital formation in the Regulation Crowdfunding market by allowing issuers to more effectively reach prospective investors as part of marketing the offering and to more efficiently structure the offering based on feedback from prospective investors. Combined, these amendments might make it easier for the smallest issuers with low investor recognition and limited or no securities offering experience to access the Regulation Crowdfunding market or issue securities pursuant to another offering exemption, resulting in potential positive effects on competition. To the extent that these amendments result in issuers switching between offering exemptions, the net effects on capital allocation might be modest. However, in that scenario some issuers might still benefit from a lower cost of capital if they are able to obtain preliminary information that helps them to identify the most cost-effective offering method and terms that are likely to attract sufficient investor demand.

iv. Reasonable Alternatives

The final amendments permit testing-the-waters communications about a contemplated exempt offering for issuers that have not yet narrowed their offering plans to a specific exemption, so long as the testing-the-waters materials contain required legends and, should an issuer proceed with an exempt offering under Regulation A or Regulation Crowdfunding within 30 days, that written testing-the-waters communications be filed. As an alternative, we could have permitted testing-the-waters communications in conjunction with a contemplated exempt offering that does not currently permit such communications, but required the issuer to have determined and to specify in a legend the offering exemption that would be used. Compared to the proposal, by informing solicited investors about the contours of the exempt offering that is being contemplated, this alternative could potentially increase the utility of the information in the solicitation to prospective investors (*e.g.,* whether the offering would be open to non-accredited investors, and if it is, whether investment limits or other requirements apply). However, because small and early stage issuers might be testing the waters to gauge their optimal offering strategy, including how much capital might in principle be raised (and thus, whether a Regulation A offering, or for instance, a Regulation Crowdfunding offering, is more cost-effective), such an alternative would significantly limit the flexibility of issuers to obtain valuable information from pre-offering communications. It also may not result in meaningful investor protection benefits compared to the final amendments in light of the legend requirements, antifraud provisions, and, for issuers that proceed with an offering, the exhibit filing requirements and other investor protections specific to the respective exemption the issuer uses.

The final amendments permit testing-the-waters communications in connection with Regulation Crowdfunding offerings prior to the filing of Form C. As an alternative, we could permit testing-the-waters communications both before and after the filing of Form C.[636] This alternative would provide greater flexibility to issuers compared to the final amendments, potentially increasing the likelihood that the issuer would raise the desired amount of capital. This option might be most useful for smaller and early stage issuers. This alternative might also require investors to expend additional effort to compare testing-the-waters communications after the filing of an offering statement with the filed offering statement disclosures. However, the incremental economic effects of this alternative on investors and issuers might be limited because of the advertising permitted under Rule 204 and because the incremental costs of filing testing-the-waters materials might discourage the use of testing the waters after the filing of Form C under this alternative.

As an alternative, we could require testing the waters to be conducted through a registered intermediary, as suggested by some commenters.[637] Including the registered intermediary in the testing-the-waters process under the alternative could provide an additional layer of investor protections, compared to the amendments, particularly, for non-accredited investors that could participate in a Regulation Crowdfunding offering if it is launched. However, such benefits may be attenuated by the other investor protections included in the amendments (such as the filing requirement and the availability of the offering circular containing disclosures compliant with Regulation Crowdfunding prior to investing), and in the event the offering is launched, by the general investor protections of Regulation Crowdfunding. Compared to the amendments, this alternative could result in additional costs for issuers that already incur various other costs to launch a small offering. By limiting the options for testing-the-waters communications to intermediary-facilitated communications, this alternative also could reduce issuer ability and flexibility to reach prospective investors.

Issuers that proceed with a Regulation Crowdfunding offering will be subject to a filing requirement with respect to written testing-the-waters communications, consistent with Rule 255 of Regulation A. As an alternative, we could allow testing-the-waters communications prior to a contemplated Regulation Crowdfunding offering but not impose a filing requirement. As another alternative, we could waive the filing requirement for testing-the-waters communications prior to any exempt offering, including a Regulation A offering. Issuers that have elected to use testing-the-waters communications have already incurred the cost of preparing the materials, so the incremental direct cost of the requirement to file the materials with the Commission would be relatively low. We recognize that this alternative could reduce the indirect costs of some

[636] Under Regulation A, testing the waters is permitted before and after the filing of Form 1–A before the qualification of Form 1–A. However, unlike Regulation Crowdfunding, Regulation A issuers are not able to accept investor commitments between the filing and the qualification of Form 1–A. Under Regulation Crowdfunding, issuers may accept investor commitments upon the filing of Form C because Commission qualification is not applicable to Form C. Thus, permitting testing-the-waters communications before the filing of Form C would be more consistent with the testing-the-waters communications permissible under Regulation A, before investor commitments may be accepted.

[637] *See* NextSeed Letter; and CrowdCheck Letter.

issuers by limiting the ability of the issuer's competitors to discover information about the issuer or the costs associated with requesting confidential treatment for the proprietary portions of the information. However, we note that this information may become available to competitors in any event through the solicitation process or as part of the offering materials (to the extent that the offering materials contain similar information). Furthermore, removing the requirement to publicly file the materials for issuers that proceed with an offering might result in adverse effects on the protection of investors to the extent that it may facilitate fraudulent statements by issuers to all or a selected group of investors that might fail to compare the statements in the solicitation materials against the offering circular. This consideration is especially salient because testing-the-waters communications under Rule 255 and under the amendments could be directed at any investor, including non-accredited investors. On balance, we believe that the requirements governing the use of testing-the-waters communications appropriately balance the goals of providing flexibility to issuers and protection to investors.

Amended Rule 204 allows oral communications with prospective investors once the Form C is filed, so long as the communications comply with the requirements of Rule 204, and moderately expands the information that an issuer may provide in accordance with that rule. As an alternative, we could expand Rule 204 further, broadening the range of terms an issuer may advertise or not restricting the scope of issues that may be addressed in offering advertisements, as suggested by some commenters.[638] Such an alternative would provide greater flexibility to issuers to advertise the offering to prospective investors, which might increase the likelihood of offering success and yield capital formation benefits. However, such an alternative might increase information processing challenges for investors—particularly less sophisticated investors—that might incur greater effort to compare the more extensive advertising content with the offering statement disclosure, or if they are unable to validate the extended advertising content against the offering statement disclosure, potentially be at risk of less informed investment decisions.

[638] *See supra* note 271.

3. Rule 506(c) Verification Requirements

As discussed in Section II.C above, to address some of the concerns about challenges and costs associated with accredited investor status verification in Rule 506(c) offerings, the amendments add a new item to the non-exclusive list in Rule 506(c) that allows an issuer (or those acting on its behalf) to establish that an investor remains an accredited investor as of the time of sale if the issuer (or those acting on its behalf) previously took reasonable steps to verify that investor as an accredited investor, the investor provides a written representation that the investor continues to qualify as an accredited investor to the issuer (or those acting on its behalf), and the issuer (or those acting on its behalf) is not aware of information to the contrary. After considering commenter input, we are adding a five-year limitation on the use of this verification method, after which the issuer must take reasonable steps to verify that the investor is an accredited investor.

a. Benefits

The addition to the non-exclusive list in Rule 506(c) concerning verification of investors for which the issuer previously took reasonable steps to verify accredited investor status is expected to reduce the cost of verification for issuers that may opt to engage in more than one Rule 506(c) offering over time with potential repeat investors.[639] This new method also may help reduce the risk of harm to investors from continually having to provide financially sensitive information to the issuer (or those acting on its behalf) when the additional investor protection benefits of doing so are limited given the pre-existing relationship between the issuer (or those acting on its behalf) and such investors.

b. Costs

Generally, because the amendment represents an incremental revision to the principles-based approach to verification in Rule 506(c), its costs are expected to be modest. However, we recognize that some previously verified investors that experience changes in financial circumstances and lose accredited investor status over time might provide written representations that they are accredited investors,[640] and if issuers are not aware of information to the contrary, such issuers might sell securities to those non-accredited investors under Rule 506(c). As noted above, we expect these risks would be mitigated by the pre-existing relationship between the issuer (or those acting on its behalf) and such investors. Further, consistent with some commenters' suggestions,[641] in a change from the proposal, we are adopting a time limit in conjunction with this additional means of verification of accredited investor status. We expect this time limit will further mitigate the likelihood of the costs to investors described above.

[639] *See supra* note 284 and accompanying text.

[640] *See supra* note 288.

c. Effects on Efficiency, Competition, and Capital Formation

Generally, because the final amendments represent an incremental revision to the principles-based approach to verification in Rule 506(c), we expect modest effects on efficiency, competition, and capital formation.

d. Reasonable Alternatives

We are adopting amendments to the existing non-exclusive list of verification methods. As an alternative, we could rescind the non-exclusive list. Compared to the final amendments, this alternative could reduce costs for some issuers that presently feel constrained to use one of the listed verification methods, even though other, less costly methods may be better suited for their particular facts and circumstances. However, the effects of eliminating the non-exclusive list might be limited if issuers that presently rely on the listed verification methods continue to do so under a more principles-based approach.

We are allowing issuers to establish that a previously verified investor remains accredited for up to a five-year period if the investor provides a representation to that effect and the issuer is not aware of information to the contrary. As an alternative, as proposed, we could allow issuers to make such a determination for an unlimited period of time. Compared to the final amendments, this alternative could reduce costs for issuers with repeat investors through less frequent verification of investor status. At the same time, this alternative could increase the likelihood of having investors that previously were accredited but subsequently exited accredited investor status (*e.g.,* due to a change in income or net worth) and thus may have a lower ability to incur the risks of a Rule 506(c) offering becoming purchasers in a Rule 506(c) offering.

As another alternative, we could adopt additional means of verification of accredited investor status (such as

[641] *See supra* note 290.

investment amounts[642] or self-certification[643]) as suggested by some commenters.[644] Compared to the final amendments, these alternatives would further reduce the costs of accredited investor status verification for issuers. However, they would result in a significantly higher likelihood of non-accredited investors becoming purchasers in an offering involving general solicitation under Rule 506(c). In particular, self-certification would be a significantly less rigorous means of verification that, in conjunction with general solicitation, could significantly increase risks to non-accredited investors. Relatedly, the alternative of basing verification on the amount invested would increase the likelihood that a non-accredited investor participates in an offering. Moreover, this alternative would increase risks to such non-accredited investors because they would be more likely to have an underdiversified position in the event they allocate a high investment amount to an investment opportunity under Rule 506(c) to meet the verification requirement, resulting in a greater risk of losses to such investors.

As another alternative, we could amend Rule 506(c) to add the fact that an offering is conducted through a registered intermediary to the optional means of accredited investor status verification, building on the suggestion of one commenter.[645] The benefit of this alternative compared to the amendments would be to reduce costs for issuers. As some commenters have stated, the requirement to take reasonable steps to verify accredited investor status has generally impacted issuers' willingness to use Rule 506(c).[646] However, because this alternative would not involve verifying each purchaser's accredited investor status, it could significantly increase the likelihood of non-accredited investors that learned about the offering through general solicitation under Rule 506(c) becoming purchasers in the offering, with the associated increase in risks to such investors.

[642] *See, e.g.,* CrowdCheck Letter; Invesco Letter; and NextSeed Letter.

[643] *See, e.g.,* Sen. Toomey Letter; IPA Letter; and NextSeed Letter. *See also* D. Burton Letter; and J. Clarke Letter.

[644] *See supra* note 290.

[645] *See, e.g.,* TIAA Letter (recommending not requiring verification for offerings involving a registered investment adviser, broker-dealer placement agent or other such intermediary).

[646] *See supra* note 285.

4. Disclosure Requirements

a. Required Disclosures to Non-Accredited Investors in Rule 506(b) Offerings

The amendments to Rule 502(b) generally align financial disclosure requirements for non-reporting companies that sell to non-accredited investors under Rule 506(b) with the disclosures required for offerings under Tier 1 and Tier 2 of Regulation A, which also allows sales to non-accredited investors.

i. Benefits

The amendments to the Rule 502(b) disclosure requirements for sales to non-accredited investors will lower the burden of preparing financial disclosures, particularly the costs of audited financial statements, for issuers in Rule 506(b) offerings up to $20 million that would no longer be subject to those requirements.[647] We do not have information on the costs of an audit in Rule 506(b) offerings involving sales to non-accredited investors. As a proxy, we consider audit costs reported by Regulation A Tier 2 issuers and smaller reporting company issuers. Based on Regulation A Tier 2 offerings qualified from June 2015 through December 2019, the average (median) audit cost, where reported, was $29,015 ($12,319). Based on information from Audit Analytics, the average (median) audit fees, where available, for reporting companies with market capitalization up to $75 million were $386,876 ($95,000) for fiscal years ending in 2018 or 2019.[648] We recognize that these costs may differ from the costs incurred by issuers in Rule 506(b) offerings to non-accredited investors. Overall, relatively few non-accredited investors participated in Rule 506(b) offerings affected by these amendments. We estimate that in 2019 among new Rule 506(b) offerings by non-reporting issuers other than pooled investment funds seeking up to $20 million, between approximately 4.6 percent and 9.5 percent had at least one non-accredited investor.[649]

Lowering costs of sales to non-accredited investors under Rule 506(b) may expand access to capital for some issuers that are not able to obtain sufficient external financing through other methods or through sales of securities to accredited investors only under Rule 506(b). Compliance cost savings in the offering process and expanded access to external financing are expected to enhance shareholder value and thus benefit the issuer's existing shareholders.

[647] *See supra* note 313.

[648] Estimates reflect data as recorded in Audit Analytics as of August 26, 2020, including the full set of filings due for fiscal year ending in 2019.

[649] *See supra* note 127. This estimate is based on the analysis of data in initial Form D filings with reported offer size, excluding pooled investment fund issuers and reporting issuers. Reporting issuers are identified based on 2019 filings of annual reports or amendments to them.

As a result of lower disclosure costs, some issuers in Rule 506(b) offerings that presently do not sell securities to non-accredited investors may be more willing to sell securities to non-accredited investors, which could increase the number of issuers subject to the amendments compared to the estimates above. If the amendments result in more issuers selling securities to non-accredited investors under Rule 506(b), those non-accredited investors could benefit from an expanded set of investment opportunities, which might allow them to allocate their capital more efficiently. These benefits might be attenuated if the increase in sales to non-accredited investors under Rule 506(b) is driven by issuers switching from Rule 504, Regulation A, or Regulation Crowdfunding offerings, which also accept non-accredited investors, to Rule 506(b), resulting in little change in the set of investment opportunities available to non-accredited investors. It is difficult to predict whether an increase in sales to non-accredited investors under Rule 506(b), if any, will be due to additional non-accredited investors in Rule 506(b) offerings or greater participation by existing non-accredited investors in other issuers' Rule 506(b) offerings. Due to the limited data disclosed about investors on Form D, we cannot estimate the number of unique non-accredited purchasers in such offerings because a single investor may be a purchaser in multiple Rule 506(b) offerings in a given year.

ii. Costs

Scaling Rule 502(b) disclosure requirements for sales to non-accredited investors—and particularly repealing the requirement to provide audited balance sheets in offerings up to $20 million—can result in less informed investor decisions by some non-accredited investors.[650] For instance, to the extent that audited financial statements are valuable for informed investment decisions,[651] scaled

[650] *See supra* note 314.

[651] *See, e.g.,* Erik Boyle & Melissa Lewis-Western, *The Value-Add of an Audit in a Post-SOX World* (Working Paper, Apr. 2018) (finding that an audit continues to be associated with reduced financial statement error at public companies post-SOX and that the size of the effect is economically

Continued

disclosures in offerings of up to $20 million might cause some non-accredited investors to incorrectly value the offered securities and to make less well informed investment decisions. Further, the elimination of audit requirements for disclosures to non-accredited investors in Rule 506(b) offerings of up to $20 million might encourage some issuers with relatively higher information risk to sell securities to non-accredited investors given the absence of investment limits in such offerings. Costs to investor protection from scaling the audit requirement in Rule 506(b) offerings with non-accredited purchasers may be higher than in Regulation A offerings because Rule 506(b) offerings do not undergo Commission review.[652] The requirement that non-accredited investors must satisfy the knowledge and experience standard of 17 CFR 230.506(b)(2)(ii) (''Rule 506(b)(2)(ii)'') in order to be eligible to participate in an offering under such rule is expected to mitigate some of these costs. Further, in the aggregate these costs to investors are expected to be limited by the cap on the number of non-accredited investors that can participate in a Rule 506(b) offering.

In evaluating the investor costs of the amendments, we consider the baseline, which includes similarly scaled requirements for financial disclosures required to be made to non-accredited investors in Regulation A Tier 1 and Regulation Crowdfunding offerings of the same size. However, those offering types are associated with certain additional provisions intended to protect non-accredited investors, which are not afforded to non-accredited purchasers in Rule 506(b) offerings (*e.g.,* Commission qualification and State registration of Regulation A Tier 1 offerings, offering statement disclosure requirements in Regulation A and Regulation Crowdfunding offerings, as well as investment limit, periodic disclosure, and funding portal requirements in Regulation Crowdfunding offerings). If non-accredited investors remain infrequently represented in Rule 506(b) offerings, the aggregate impacts on costs to investors may be limited. However, the aggregate impacts on investor protection could be amplified if the scaled requirements encourage additional issuers to accept non-accredited investors in Rule 506(b) offerings.

iii. Effects on Efficiency, Competition, and Capital Formation

If scaled financial statement disclosures lead to more non-accredited investor offerings under Rule 506(b), and if such investors contribute additional capital the issuers would not have otherwise raised from accredited investors, the amendments may incrementally promote capital formation through Rule 506(b). If non-accredited investor capital drawn to Rule 506(b) offerings is mostly reallocated from other offerings to non-accredited investors (*e.g.,* registered offerings or offerings under Regulation A, Regulation Crowdfunding, Rule 504, Rule 147/147A, etc.), the net effects on aggregate capital formation will be limited. However, in that instance, issuers may still benefit if they are able to obtain a lower cost of capital under the amendments (*e.g.,* because of lower compliance costs in Rule 506(b) offerings, even after providing disclosures to non-accredited investors, or because non-accredited investors in Rule 506(b) offerings provide better financing terms).

Streamlining disclosure requirements in Rule 506(b) offerings with non-accredited investors to be more aligned with those under Regulation A is expected to make compliance more efficient for those issuers that undertake these types of offerings along with Rule 506(b) offerings to non-accredited investors.

The amendments also may incrementally increase the availability of Rule 506(b) offerings that allow non-accredited investors, potentially enabling more efficient allocation of capital of non-accredited investors among investment alternatives that are otherwise unavailable to them. While non-accredited investors can participate in other exempt offerings, Rule 506(b) offerings account for the largest share of the exempt offerings market and draw issuers that typically do not participate in Regulation A or Regulation Crowdfunding offerings. The majority of Rule 506(b) offerings are by issuers that are not reporting companies. While non-accredited investors can invest in registered offerings, in most cases issuers in registered offerings have a different profile than issuers in private placements.[653] Expanding opportunities

significant); Petro Lisowsky & Michael Minnis, *The Silent Majority: Private U.S. Firms and Financial Reporting Choices* (Univ. of Chi. Booth Sch. of Bus., Research Paper No. 14–01, Apr. 12, 2018) (finding that ''[n]early two-thirds [of private firms] do not produce audited GAAP financial statements. Moreover, while firms with external capital are more likely to produce audited GAAP statements, we find that thousands of firms with external debt and dispersed ownership do not. Equity and trade credit are potentially more important factors than debt in affecting private firms' production of audited GAAP reports. Finally, young, high growth firms lacking tangible assets are significantly more likely to produce audited GAAP reports relative to established firms with physical assets, suggesting that audited financial reports play an important information role in capital allocation when business activity is less verifiable.''); Michael Minnis, *The Value of Financial Statement Verification in Debt Financing: Evidence from Private U.S. Firms,* 49 J. Acct. Res, 457 (2011) (showing the value of audited financial statements for private debt pricing); David W. Blackwell, Thomas R. Noland, & Drew B. Winters, *The Value of Auditor Assurance: Evidence from Loan Pricing,* 36 J. Acct. Res. 57 (1998) (finding cost of debt reductions in a small sample of small private firms with audited financial statements); and Jeong-Bon Kim et al., *Voluntary Audits and the Cost of Debt Capital for Privately Held Firms: Korean Evidence,* 28 Contemp. Acct. Res. 585 (2011) (confirming the result in a Korean sample). *See also* Ciao-Wei Chen, *The Disciplinary Role of Financial Statements: Evidence from Mergers and Acquisitions of Privately Held Targets,* 57 J. Acct. Res. 391 (2019) (examining ''whether requiring the disclosure of audited financial statements disciplines managers' mergers and acquisitions (M&As) decisions'' and finding that ''the disclosure of private targets' financial statements is associated with better acquisition decisions . . . [and] that this disciplining effect of disclosure is more pronounced when monitoring by outside capital providers is more difficult and costly'').

However, two studies using survey data from the Federal Reserve's Survey of Small Business Finances do not find that an audit is significantly associated with a lower interest rate in small privately held firms. *See* Kristian D. Allee & Teri Lombardi Yohn, *The Demand for Financial Statements in an Unregulated Environment: An Examination of the Production and Use of Financial Statements by Privately-Held Small Businesses,* 84 Acct. Rev. 1 (2009); and Gavin Cassar, Christopher D. Ittner, & Ken S. Cavalluzzo, *Alternative Information Sources and Information Asymmetry Reduction: Evidence from Small Business Debt,* 59 J. Acct. & Econ. 242 (2015).

[652] *See* NASAA Letter.

[653] Investors in public firms can access more extensive disclosures and rely on the protections of the Securities Act registration and Exchange Act reporting regimes. Listed public firms are more likely to have analyst coverage, which may provide additional information to investors.

Past academic studies comparing private and publicly listed firms arrive at somewhat mixed conclusions about investment and innovation behavior of such firms. For example, one study finds that public firms' patents rely more on existing knowledge, are more exploitative, and are less likely in new technology classes, while private firms' patents are broader in scope and more exploratory. *See* Huasheng Gao, Po-Hsuan Hsu, & Kai Li, *Innovation Strategy of Private Firms,* 53 J. Fin. & Quantitative Analysis 1 (2018). *See also* Daniel Ferreira, Gustavo Manso, & André C. Silva, *Incentives to Innovate and the Decision to Go Public or Private,* 27 Rev. Fin. Stud. 256 (2014) (showing, in a theoretical model, that private ownership creates incentives for innovation). Another study shows that public firms in external finance dependent (but not in internal finance dependent) industries spend more on research and development and generate a better patent portfolio than their private counterparts. *See* Viral Acharya & Zhaoxia Xu, *Financial Dependence and Innovation: The Case of Public versus Private Firms,* 124 J. Fin. Econ. 223 (2017). A different U.S. study finds that listed firms invest less and are less responsive to changes in investment opportunities compared to observably similar, matched private firms, especially in industries in which stock prices are particularly sensitive to current earnings. *See* John Asker, Joan Farre-Mensa, & Alexander Ljungqvist, *Corporate Investment and Stock Market Listing: A Puzzle?,* 28 Rev. Fin. Stud. 342 (2015). *But see* Naomi E. Feldman et al., *The Long and the Short of It: Do Public and Private Firms Invest Differently?* (Working Paper, 2019) (finding that public firms invest more in long-term assets—

for investment in operating company and exempt investment fund offerings under Rule 506(b) might allow non-accredited investors to construct a more efficient portfolio.[654] However, as discussed above, the amendments also may in some cases result in less informed investment decisions, lowering the efficiency of capital allocation.

The incremental economic effects of the amendments to non-accredited investor disclosures in Rule 506(b) offerings discussed above might be modest, relative to the baseline, for several reasons: (i) While non-accredited investors are not subject to investment limits in Rule 506(b) offerings, their participation in Rule 506(b) offerings remains highly limited by the restriction that no more than 35 investors participate and that such investors must meet the knowledge and experience standard of the rule; (ii) non-accredited investors may be unwilling to participate in the majority of Rule 506(b) offerings because of the higher due diligence and transaction costs, potentially higher investment minimums that may be inconsistent with optimal diversification in their portfolio, and significantly lower liquidity involved in private placements due to transferability restrictions and a highly limited secondary market; (iii) issuers may be unwilling to accept non-accredited investors in Rule 506(b) offerings for reasons other than the cost of disclosures (*e.g.,* a preference to attract accredited investors that may be able to bring a larger amount of capital and business expertise, an unwillingness to expand the capitalization table that may make future angel investors or venture capital (''VC'') funding less interested in providing funding to the issuer, an unwillingness to increase the number of non-accredited investors that may draw the issuer incrementally closer to the Section 12(g) registration threshold, or concerns about investor relations and risk of litigation involving less informed investors); and (iv) even though required disclosures to non-accredited investors would be scaled under the amendments, the direct and indirect costs of such disclosures (such as risks of disclosure of proprietary information to a broader range of investors) may discourage issuers from selling to non-accredited investors in Rule 506(b) offerings.

iv. Reasonable Alternatives

We are repealing audit requirements for Rule 506(b) offerings of up to $20 million involving non-accredited investors. As an alternative, we could repeal audit requirements for all Rule 506(b) offerings, irrespective of offer size. As compared to the proposal, this alternative would result in additional compliance cost savings for issuers in Rule 506(b) offerings with sales to non-accredited investors and might induce additional Rule 506(b) issuers to accept non-accredited investors. However, the relative benefits of compliance cost savings under this alternative might have a more limited impact in larger offerings. Further, such an alternative could increase costs to non-accredited investors as a result of less well informed investment decisions, particularly if non-accredited investors, which are not subject to investment limits in Rule 506(b), invest significant amounts in large Rule 506(b) offerings without the benefit of audited financial statements. Limitations on the number and types of non-accredited investors that are eligible to participate in Rule 506(b) offerings (no more than 35 non-accredited investors are allowed to participate and such investors must possess sophistication) would limit the aggregate costs to non-accredited investors under this alternative. Such an alternative would also be inconsistent with the requirements applicable to other larger offerings available to non-accredited investors, including larger offerings under Regulation A Tier 2 and registered offerings, both of which require audited financial statements.

Under the final amendments, audited financial statement disclosures will not be required for sales to non-accredited investors in Rule 506(b) offerings of up to $20 million by non-reporting issuers, irrespective of how much capital is invested by non-accredited purchasers. As another alternative, we could require audited financial statement disclosures in Rule 506(b) offerings by non-reporting issuers that have up to $20 million in sales to non-accredited investors. On the one hand, this alternative would reduce costs for non-reporting issuers with limited sales to non-accredited investors under Rule 506(b). On the other hand, each non-accredited investor that is a purchaser in such an offering may incur a potentially significant loss of information and increase in due diligence costs, which do not depend on the amount of capital committed by other non-accredited investors to this offering.

As another alternative, rather than scale disclosure requirements in Rule 506(b) offerings by non-reporting issuers of up to $20 million with sales to non-accredited investors, we could waive the requirements for disclosures to non-accredited investors altogether. This alternative would result in significantly lower compliance costs for issuers and could encourage more issuers to sell securities to non-accredited investors under Rule 506(b). However, the loss of information to non-accredited investors could significantly reduce their ability to allocate capital in an informed manner, particularly because a lack of a secondary trading market in many cases precludes effective price discovery through other sources. Alternatively, we could require issuers to provide the same disclosures to non-accredited investors if they provide any disclosures, such as a private placement memorandum, to accredited investors. While such a provision could significantly lower non-accredited investor information risk and due diligence costs in some cases, without dramatically increasing issuer costs (because they already would have to incur many of the direct costs to provide the disclosure to accredited investors), non-accredited investors might suffer a significant loss of information in cases where the issuer's disclosures to accredited investors are limited. The existing requirement that the non-

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particularly innovation—than private firms). *See also* Vojislav Maksimovic, Gordon M. Phillips, & Liu Yang, *Do Public Firms Respond to Investment Opportunities More than Private Firms? The Impact of Initial Firm Quality* (Nat'l Bureau of Econ. Research, Working Paper No. 24104, Dec. 2017) (finding that public firms respond more to demand shocks after their IPO and are more productive than their matched private counterparts, particularly in industries that are capital intensive and dependent on external financing); and Sandra Mortal & Natalia Reisel, *Capital Allocation by Public and Private Firms,* 48 J. & Quantitative Analysis 77 (2013) (a cross-country study showing that public listed firms take better advantage of growth opportunities than private firms, although the differential only exists in countries with well-developed stock markets).

Some studies also find that private and public firms differ in their financing, cash, and payout decisions, cost of capital, and other characteristics. *See, e.g.,* Kim P. Huynh, Teodora Paligorova, & Robert Petrunia, *Debt Financing in Private and Public Firms,* 14 Annals Fin. 465 (2018); Huasheng Gao, Jarrad Harford, & Kai Li, *Determinants of Corporate Cash Policy: Insights from Private Firms,* 109 J. Fin. Econ. 623 (2013); Sandra Mortal, Vikram Nanda, & Natalia Reisel, *Why Do Private Firms Hold Less Cash than Public Firms? International Evidence on Cash Holdings and Borrowing Costs,* 113 J. Banking & Fin. 1 (2020); Roni Michaely & Michael R. Roberts, *Corporate Dividend Policies: Lessons from Private Firms,* 25 Rev. Fin. Stud. 711 (2012); Menachem Abudy, Simon Benning, & Efrat Shust, *The Cost of Equity for Private Firms,* 37 J. Corp. Fin. 431 (2016); Ilan Cooper & Richard Priestley, *The Expected Returns and Valuations of Private and Public Firms,* 120 J. Fin. Econ. 41 (2016); and Serkan Akguc, Jongmoo Jay Choi, & Suk-Joong Kim, *Do Private Firms Perform Better than Public Firms?* (Working Paper, 2015).

[654] In portfolio theory, constraining the set of investment opportunities yields a potentially inferior optimal portfolio. However, the presence of information frictions due to a lack of investor sophistication might reverse this general prediction and result in lower portfolio risk-adjusted returns. *See supra* note 591.

accredited investor satisfy the knowledge and experience standard of Rule 506(b)(2)(ii), as well as the continued application of the antifraud provisions of the Federal securities laws, might mitigate some of the investor protection risks under this alternative.

We are extending the disclosure requirements of Regulation A Tier 2 for sales to non-accredited investors by non-reporting issuers under Rule 506(b), irrespective of the size of the Rule 506(b) offering above $20 million. As an alternative, we could extend the financial statement requirements of Regulation A Tier 2 to sales to non-accredited investors in offerings under Rule 506(b) up to $75 million (the amended Regulation A Tier 2 offer limit), and continue to apply the existing financial statement disclosure requirements (that are aligned with the financial statement disclosure requirements applicable to registration statements) to Rule 506(b) offerings exceeding $75 million that include sales to non-accredited investors. Compared to the final amendments, this alternative might increase compliance costs for non-reporting issuers seeking to raise over $75 million under Rule 506(b) and sell securities to non-accredited investors. At the same time, these financial statement disclosures may lower the risk of less informed investment decisions by non-accredited investors in such offerings compared to the proposal, particularly for small and pre-revenue issuers with large financing needs. However, the impact of this alternative may be modest because relatively few offerings would be affected by this alternative compared to the final amendments. We estimate that in 2019 there were approximately 383 offerings under Rule 506(b) by non-reporting issuers other than pooled investment funds with offer sizes in excess of $75 million (excluding undefined offer sizes), of which between 3.1 percent and 4.4 percent of offerings involved non-accredited investors.[655] This alternative might also decrease the willingness of non-reporting issuers to accept non-accredited investors in Rule 506(b) offerings exceeding $75 million, resulting in potentially fewer investment opportunities for non-accredited investors compared to the proposal.

As another alternative, we could extend Regulation Crowdfunding financial statement disclosure requirements to Rule 506(b) offerings with non-accredited purchasers, as suggested by one commenter.[656] Under such an alternative, issuers in offerings above $107,000 and up to $5 million (the amended Regulation Crowdfunding limit) would have to provide non-accredited purchasers with financial statements that have been either reviewed or audited by an independent accountant (depending on offering size). Compared to the amendments, which only require audited financial statements in offerings with non-accredited purchasers of above $20 million, this alternative could provide non-accredited purchasers in such offerings with additional certainty about financial statement disclosures. However, it also would introduce additional costs for such issuers to obtain an independent accountant review[657] or audit of its financial statements.

b. Simplification of Disclosure Requirements in Regulation A Offerings

The final amendments extend to Regulation A issuers certain accommodations presently available to reporting companies, namely: (1) The option to redact confidential information from material contracts and certain other agreements filed as exhibits without a need to submit a confidential treatment request; (2) the option to redact information that would constitute a clearly unwarranted invasion of personal privacy in any exhibit; and (3) the option of incorporating by reference financial statement information into Regulation A offering statements. The amendments also eliminate the requirement to file a draft offering statement as a separate exhibit with Form 1–A and instead enable automated public dissemination of the draft offering statement through EDGAR, similar to the framework in place for registered offerings. In addition, the amendments permit the Commission to declare an offering statement, or a post-qualification amendment to such offering statement, abandoned, consistent with the rule applicable to registered offerings.

i. Benefits

Extending to Regulation A issuers the option to redact confidential information from material contracts and certain other agreements filed as exhibits without a need to submit a confidential treatment request—provided that information is not material and is the type of information that the issuer both customarily and actually treats as private and confidential—is expected to reduce disclosure costs for Regulation A issuers and expedite the filing process by eliminating the need to file a confidential treatment application and the associated cost, which was supported by the commenters that addressed these amendments.[658] Similarly, extending to Regulation A issuers the option to redact information that would constitute a clearly unwarranted invasion of personal privacy in any exhibit is expected to reduce disclosure costs and expedite the filing process for affected Regulation A issuers. These accommodations are currently available to reporting companies. Submitting a confidential treatment request requires a filer to prepare a detailed application to the Commission that identifies the particular text for which confidential treatment is sought, a statement of the legal grounds for the exemption, and an explanation of why, based on the facts and circumstances of the particular case, disclosure of the information is unnecessary for the protection of investors. If the Commission staff issues comments on the application, the filer might need to revise and resubmit the application. These requirements impose direct compliance costs on filers, for instance, in the form of legal counsel costs. For filers not willing or not able to incur such costs, inclusion of confidential information of proprietary value in a material contract or similar exhibit that is filed publicly can result in significant indirect costs due to the disclosure of sensitive information to potential competitors. While under the amendments, filers would still need to determine whether information they are redacting is material, they will not need to follow the confidential treatment application process.

Based on EDGAR filings analysis, we have identified 11 issuers in qualified Regulation A offerings that have also filed confidential treatment applications as of December 2019. We lack data to determine how many of those filers had filed confidential treatment applications with regard to information that could be redacted under the amendments. In general, more than 90 percent of the confidential treatment requests granted by the Commission in fiscal year 2018

[655] *See supra* note 127. This estimate is based on the analysis of Form D data in initial Form D filings with reported offer size, excluding pooled investment fund issuers and reporting issuers. Reporting issuers are identified based on 2019 filings of annual reports or amendments to them.

[656] *See, e.g.,* J. Clarke Letter.

[657] In the Regulation Crowdfunding Adopting Release, the Commission estimated review costs to be approximately $1,500 to $18,000. *See* Regulation Crowdfunding Adopting Release, at 71499. Recent reports and commenters estimate such costs at between $1,500 and $6,000. *See* Temporary Amendments Adopting Release, at 27127.

[658] *See supra* note 326.

were made in reliance on the exemption concerning competitive harm. It is also difficult to gauge how many filers had proprietary information in material contracts or similar exhibits but opted not to file a confidential treatment request due to legal and other costs of preparing such a request. One commenter on the FAST Act Modernization Release estimated that legal fees for confidential treatment requests ranged from $35,000 to over $200,000,[659] while another commenter estimated that attorneys and paralegals at the company spend an average of 80 hours each quarter preparing redacted exhibits and related confidential treatment requests.[660] According to another commenter, the cost savings of streamlining the confidential treatment process are expected to be relatively more impactful for smaller filers because such issuers have a lower threshold for determining whether a contract is material and therefore required to be filed publicly, as well as for issuers in industries that are associated with more confidential treatment requests, such as biotechnology.[661] We generally expect similar cost savings from extending this accommodation to Regulation A issuers.

Similarly, extending to Regulation A issuers the option of incorporation by reference of previously filed financial statement information into the offering statement, consistent with the current rules applicable to registered securities offerings filed on Form S–1, is expected to incrementally reduce Form 1–A preparation costs.

Enabling automated dissemination of draft offering statements in lieu of the existing exhibit filing requirement, consistent with the process of dissemination of draft registration statements, is expected to incrementally reduce filer effort to prepare the offering statement and promote greater efficiency of the filing process and regulatory harmonization.

Similarly, permitting the Commission to declare an offering statement, or a post-qualification amendment to such offering statement, abandoned, consistent with the rule applicable to registered offerings, is expected to promote greater regulatory harmonization and to incrementally promote efficiency of the filing process in cases where only a post-qualification amendment, rather than the entire offering, is abandoned. The amendments are expected to benefit investors by reducing potential investor confusion arising from the presence of the unqualified post-qualification amendment on EDGAR.

ii. Costs

The extension of the option to redact confidential information from material contracts filed as exhibits to Regulation A filings is not expected to result in a significant loss of information to investors because of the condition that any information being omitted not be material. Filers electing to rely on this accommodation would still need to incur costs to determine that information meets the standard for redaction, as they do today when they file a confidential treatment request, but they would not incur the cost of preparing a confidential treatment application.[662] One potential cost of the final amendments to Regulation A investors is that information might be redacted by filers that would not otherwise be afforded confidential treatment by the staff. However, based on previous experience and a review of confidential treatment applications by reporting companies, we believe that such instances would be rare.[663]

Allowing Regulation A issuers to rely on incorporation by reference of financial statement information from previously filed periodic reports may marginally increase search time for potential investors. Instead of having all the information available in one location, investors may need to separately access the incorporated reports in order to price the offered security. However, the inclusion of hyperlinks should facilitate the retrieval of such information by investors. As a result, any increase in the costs to investors of assembling and assimilating necessary information is expected to be minimal. We do not have data to assess if, and to what extent, the Form 1–A revision would be burdensome to investors.

iii. Effects on Efficiency, Competition, and Capital Formation

Extending certain disclosure accommodations presently available to reporting companies to Regulation A issuers is expected to have an incremental beneficial effect on capital formation under Regulation A by reducing disclosure and compliance costs required to undertake a Regulation A offering. If lower compliance costs encourage new issuers, particularly smaller issuers with less compliance experience that might not have otherwise been able to access external financing, to raise capital under Regulation A, the amendments may, on the margin, promote competition. Compliance cost savings may have relatively greater benefits for smaller issuers to the extent that such costs have a fixed component.

If the amendments marginally reduce the amount of information available to investors such that the ability to make informed investment decisions is affected, they may result in less efficient capital allocation and, for Regulation A securities with a secondary market (*e.g.,* OTC-quoted Regulation A securities), less informationally efficient secondary market prices.

iv. Reasonable Alternatives

[659] *See* FAST Act Modernization Release, at note 341.

[660] *See* FAST Act Modernization Release, at note 342. Under the amendments, filers will still need to prepare redacted exhibits and in some cases filers will incur costs to respond to a staff request to demonstrate that redacted information was not material.

[661] *See* FAST Act Modernization Release, at note 343 and accompanying text.

[662] Filers may be asked by the Commission staff to provide on a supplemental basis an unredacted copy of the exhibit and provide an analysis of why the redactions are consistent with the redacted exhibit rules, which might result in incremental additional costs.

[663] *See* FAST Act Modernization Release, at Section VI.D.2.

The amendments will permit Regulation A issuers to incorporate previously filed financial statements by reference. As an alternative, we could also permit forward incorporation by reference on Form 1–A with the same conditions as the ones for forward incorporation by reference available to smaller reporting companies on Form S–1. Forward incorporation by reference allows an issuer to automatically incorporate by reference periodic and current reports filed subsequent to the qualification of the registration statement. This would result in compliance cost savings for Regulation A issuers and allow for greater regulatory harmonization and more uniformity in disclosure requirements applicable to different categories of offerings by small issuers. Forward incorporation by reference would eliminate the need for Regulation A issuers to update information in a qualified Form 1–A filing that has become stale or is incomplete and file post-qualification amendments solely related to updating information from periodic reports, thereby reducing compliance costs.[664] By avoiding the need to file certain post-qualification amendments, under this alternative Regulation A issuers might be able to move more quickly and at a lower cost to raise capital when favorable market conditions occur. Forward incorporation by reference, however, could increase investor search costs and eliminate the benefit of staff review of post-qualification amendments. Because issuers with a relatively higher level of information risk—for instance, issuers not current in their reports, blank check companies, shell companies (other than business combination related shell companies), and penny stock issuers, as well as issuers whose reports are not available on a website maintained by or for the issuer—would be ineligible for forward incorporation under this alternative, the increase in investor information gathering costs under this alternative might be small.

The disclosure simplification amendments will apply to all Regulation A issuers. As an alternative, we could extend the provisions only to Regulation A issuers that are reporting companies. This alternative would be generally consistent with the treatment of reporting companies in registered offerings. It would decrease the potential for loss of information available to Regulation A investors about material contracts and similar agreements and marginally reduce their costs of retrieving financial statement information from previously filed periodic reports that are incorporated by reference for issuers other than reporting companies. However, this alternative also would decrease the benefits of the rule, compared to the proposal.[665]

c. Confidential Information Standard

As discussed in Section II.D.3 above, the current requirements for registrants to file material contracts as exhibits to their disclosure documents permit registrants to redact provisions or terms of exhibits required to be filed if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed. We are adopting as proposed the amendments to the exhibit filing requirements by removing the competitive harm requirement and replacing it with a standard more closely aligned with the Supreme Court's definition of ''confidential'' that permits information to be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential and that is also not material. These amendments are expected to benefit issuers through greater regulatory simplification and harmonization of the requirements governing confidential information in exhibits with the Supreme Court's definition, enabling more efficient compliance and greater flexibility to redact confidential information from exhibits. To the extent that the amendments makes the option to redact certain information from exhibits more attractive to issuers, it may result in a marginally decreased availability of information to investors.

As an alternative, as suggested by one commenter, we could have extended the amendments to include participation agreement and administrative contract exhibits to Form N–6.[666] This alternative would be unlikely to result in significant benefits to issuers because information contained in such exhibits is already disclosed to investors in other contexts and, in our staff's experience, these exhibits do not contain confidential or proprietary information.

5. Offering and Investment Limits

a. Offering and Investment Limits Under Regulation A, Regulation Crowdfunding, and Rule 504

As proposed, the final amendments increase the 12-month offering limit for Regulation Crowdfunding, presently set at $1.07 million, to $5 million; the 12-month offering limit for Regulation A Tier 2, presently set at $50 million, to $75 million with the associated revision of the 12-month offering limit for sales by existing affiliate security holders from $15 million to $22.5 million; and the 12-month offering limit for Rule 504, presently set at $5 million, to $10 million.

We can gain some insight into the likely capital formation benefits of a higher offering limit from repeat issuers that have raised multiple rounds of financing under the capped offering exemptions. Some of those issuers might have had to raise financing over multiple years because of the existing offering limits. The following table examines total proceeds per issuer reported raised during 2016 through 2019.

TABLE 11—CAPITAL RAISING DURING 2016–2019 BY REPEAT ISSUERS USING AFFECTED EXEMPTIONS

| | |
|---|---|
| Number of Regulation A issuers that raised at least $50 million | 14. |
| Average (median) amount reported raised | $13.4 million ($5.0 million). |
| Number of Regulation Crowdfunding issuers that raised at least $1.0 million ($1.07 million) | 51 (27). |
| Average (median) amount reported raised | $213,678 ($106,900). |
| Number of Rule 504 issuers other than pooled investment funds that raised at least $5 million | 7. |
| Average (median) amount reported raised | $384,200 ($100,000). |

[664] We lack data for a reliable estimate of the number of affected issuers because it is difficult to determine which of the post-qualification filings solely update information from periodic reports versus other information, such as offering price, amount sought, offering deadline, as well as financial information. Based on the analysis of EDGAR filings from June 2015 through December 2019, we estimate that the average (median) issuer in a qualified Regulation A offering has filed 1.7 (0) post-qualification amendments.

[665] The change to permit Exchange Act registrants to use Regulation A was adopted in December 2018 and approximately 17 Exchange Act registrants sought to use Regulation A to conduct an offering in 2019, of which 11 of those offerings were qualified.

[666] *See* Comm. of Annuity Insurers Letter.

Some of the existing issuers under the exemptions being amended have conducted other types of offerings that are not subject to offering limits. Information about offering sizes in Rule 506 can provide additional insights for the review of the offering limits for Regulation A, Regulation Crowdfunding, and Rule 504.[667] Generally, however, we do not know whether those issuers used Rule 506 because the offering limits of the exemptions being amended were too low for their needs or for other reasons. The table below shows the capital raising under Rule 506 in 2019 by issuers using offering exemptions being amended.[668]

TABLE 12—CAPITAL RAISING UNDER RULE 506 IN 2019 BY ISSUERS USING AFFECTED EXEMPTIONS

| | |
|---|---|
| Number of Regulation A issuers raising financing under Rule 506 | 34. |
| Average (median) amount reported raised under Rule 506 per Regulation A issuer | $5.8 million ($0.2 million). |
| Number of Regulation Crowdfunding issuers raising financing under Rule 506 | 139. |
| Average (median) amount reported raised under Rule 506 per Regulation Crowdfunding issuer | $2.4 million ($0.2 million). |
| Number of Rule 504 issuers raising financing under Rule 506 | 110. |
| Average (median) amount reported raised under Rule 506 per Rule 504 issuer | $1.4 million ($0.3 million). |

Evidence in Tables 11 and 12 suggests that most issuers that rely on Regulation A, Regulation Crowdfunding, and Rule 504 tend to raise amounts of financing, both under these exemptions and when they raise financing under Rule 506, which has no offering limit, that are below the existing offering limits. This observation is based on the pool of issuers attracted to these offering exemptions with the provisions that are in place today. It is likely that issuers with larger financing needs forgo the exemptions with offering limits that are too low for their financing needs. Expanding the offering limits is therefore expected to attract additional issuers to these exemptions.

It is difficult to predict how many new issuers will be drawn to Regulation Crowdfunding, Regulation A, and Rule 504 under the amended offering limits. Because of potential unobservable differences in issuer characteristics, comparisons presented below are intended as illustrative examples. The table below[669] examines the use of other securities offering methods by issuers that raised amounts above the existing limits but below the amended offering limit thresholds, some of which may consider using the amended exemptions. We consider (1) Rule 506 and registered offerings for purposes of analyzing the amended offering limit threshold under Regulation A; (2) Regulation A, Rule 504, and Rule 506 offerings for purposes of analyzing the amended offering limit threshold under Regulation Crowdfunding; and (3) Regulation A and Rule 506 offerings for purposes of analyzing the amended offering limit threshold under Rule 504.[670] Information on amounts raised under Section 4(a)(2), Section 3(a)(11), and Rules 147/147A is not available to us.

TABLE 13—EVALUATION OF OFFERING LIMIT AMENDMENTS BASED ON EVIDENCE FROM SELECT OTHER SECURITIES OFFERING METHODS IN 2019

| | |
|---|---|
| **Regulation A: Offering limit increase from $50 million to $75 million** | |
| Number of issuers in offerings that raised above $50 million and up to $75 million: | |
| Rule 506 [a] | 171 |
| Registered offerings [b] | 57 |
| **Regulation Crowdfunding: Offering limit increase from $1.07 million to $5 million** | |
| Number of issuers in offerings that raised above $1.07 million and up to $5 million: | |
| Regulation A [c] | 13 |
| Rule 504 [d] | 55 |
| Rule 506 [e] | 4,004 |
| **Rule 504: Offering limit increase from $5 million to $10 million** | |
| Number of issuers in offerings that raised above $5 million and up to $10 million: | |
| Regulation A [f] | 10 |

[667] We focus on Rule 506 offerings due to data limitations. First, reporting companies are ineligible under Rule 504. Additionally, we have identified only one Regulation Crowdfunding issuer that has undertaken a registered offering as of December 31, 2019. Further, very few Regulation A issuers have undertaken a registered offering during this period, resulting in a lack of reliable data on such issuers' registered offering proceeds. From June 19, 2015, through December 31, 2019, we identified 14 issuers in qualified Regulation A offerings that had a registration statement declared effective, based on the analysis of EDGAR filings. These were issuers that proceeded to list on an exchange after their Regulation A offering and then sought follow-on financing through a registered offering.

[668] For purposes of this table, Regulation A issuers are defined as issuers in qualified Regulation A offerings from June 2015 through December 2019; Rule 504 issuers are defined as issuers in new and amended Rule 504 offerings from 2016 through 2019; Regulation Crowdfunding issuers are issuers in Regulation Crowdfunding offerings from May 2016 through December 2019. Data on Rule 506 financing is based on total proceeds reported raised per issuer in new and amended Form D filings from 2019. Pooled investment funds are excluded.

[669] For purposes of this table, Regulation A issuers are defined as issuers in qualified Regulation A offerings from June 2015 through December 2019; Rule 504 issuers are defined as issuers in new and amended Rule 504 offerings from 2016 through 2019; Regulation Crowdfunding issuers are issuers in Regulation Crowdfunding offerings from May 2016 through December 2019. Data on Rule 506 financing is based on total proceeds reported raised per issuer in new and amended Form D filings from 2019. Pooled investment funds are excluded.

[670] For purposes of analyzing the amended offering limit thresholds under Regulation Crowdfunding and Rule 504, we do not consider registered offering activity, as registered offerings are not likely to be a cost-effective alternative at those offer sizes.

TABLE 13—EVALUATION OF OFFERING LIMIT AMENDMENTS BASED ON EVIDENCE FROM SELECT OTHER SECURITIES OFFERING METHODS IN 2019—Continued

| | |
|---|---|
| Rule 506 [g] | 1,618 |

[a] Regulation A eligibility criteria exclude investment companies and blank check companies and limit the exemption to U.S. and Canadian issuers, so for comparability pooled investment funds and issuers outside the U.S. and Canada are excluded from the Rule 506 proceeds used in this estimate. Reporting companies are eligible to rely on Regulation A under the 2018 amendments.

[b] Registered offering proceeds are based on gross proceeds reported in SDC Platinum for U.S. public offerings of equity, debt, and convertible securities with issue dates in 2019, excluding withdrawn, postponed, and rumored offerings, asset-backed securities offerings, blank check issuers, investment fund issuers, and issuers outside the U.S. and Canada.

[c] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through December 2019. Regulation Crowdfunding eligibility criteria limit the exemption to U.S. issuers and exclude Exchange Act reporting companies, so for comparability non-U.S. issuers and reporting companies are excluded from the Regulation A proceeds used in this estimate.

[d] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds and non-U.S. issuers are excluded from Rule 504 proceeds used in this estimate. Reporting companies are ineligible under Rule 504.

[e] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds, reporting companies, and non-U.S. issuers are excluded from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

[f] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through the end of the period. Rule 504 eligibility criteria exclude Exchange Act reporting companies, so for comparability reporting companies are excluded from the Regulation A proceeds used in this estimate.

[g] For comparability with other estimates in this table, we exclude reporting companies and pooled investment funds from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

Given the scale of Regulation A offering activity today, the number of Rule 506 and registered offerings in the $50 million to $75 million range suggests potential for a significant relative increase in Regulation A activity under the amended offering limit. As a crucial caveat, issuers choosing to rely on Rule 506 or registered offerings today may be inherently different from the types of issuers that might find Regulation A attractive under the amended limit. Further, the number of Rule 506 offerings in the $1.07 million to $5 million range significantly exceeds the absolute number of Regulation Crowdfunding offerings today, which thus may suggest potential for a significant relative increase in Regulation Crowdfunding activity under the amended offering limit. Similarly, the number of Rule 506 offerings in the $5 million to $10 million range significantly exceeds the absolute number of Rule 504 offerings today, which thus may suggest potential for a significant relative increase in Rule 504 activity under the amended offering limit. As a caveat, issuers choosing to rely on Rule 506 today may be inherently different from the types of issuers that might find Regulation Crowdfunding or Rule 504 attractive under the amended limits. Importantly, historical use of other offering methods may not fully represent potential future use of the exemptions being amended, particularly if the amendments facilitate offerings by issuers that may not currently rely on securities offerings. We lack data or a methodology to predict how many new issuers that would not have otherwise undertaken any securities offering will be drawn to Regulation Crowdfunding, Regulation A, and Rule 504 under the amendments.

As discussed above, in response to commenters, we also are extending for an additional 18 months the temporary relief from certain financial statement review requirements for eligible issuers offering up to $250,000 of securities in reliance on Regulation Crowdfunding in a 12-month period. The temporary final rules adopted on May 4, 2020, and subsequently extended on August 28, 2020, serve as the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of these amendments are measured. Consistent with the existing temporary relief, the eligibility criteria exclude (1) issuers that were organized or had operations for less than six months prior to the commencement of the offering and (2) issuers that were not compliant with Regulation Crowdfunding requirements with regard to any prior offerings in which they sold securities. Historical data provides an indication of the potential share of offerings eligible for the extended relief among all offerings. From the inception of Regulation Crowdfunding through December 31, 2019, we estimate that 1,537 (approximately 77 percent of the total number of crowdfunding offerings during this period) were initiated by 1,407 issuers that were eligible or would have been eligible for the relief under the six-month eligibility criteria.[671] It is more difficult to estimate the percentage of prior Regulation Crowdfunding issuers that would not be eligible because they were not compliant with one or more of the requirements of Regulation Crowdfunding in a prior offering. From inception through December 31, 2019, we estimate that there were 149 repeat Regulation Crowdfunding issuers, including 116 such issuers that had reported successful completion of at least one Regulation Crowdfunding offering on Form C–U.[672] We are unable to predict precisely the number of issuers likely to rely on this provision among eligible issuers.[673] A review of new filings made on Form C on or after May 4, 2020, provides some information about issuer reliance on this provision under the existing temporary relief. As of September 30, 2020, we find that, of the 400 new offerings on Form C by eligible issuers (excluding filings withdrawn as of September 30, 2020, and duplicate filings, across offerings of all sizes), 53 offerings, or 13% provided certified

[671] For this estimate, eligibility was estimated approximately based on the issuer having been formed at least six months prior to the filing date of the offering as reported in the XML portion of Form C and having had (1) either positive assets, revenues, net income, debt, accounts receivable, cost of goods sold, taxes paid, or employees in the most recent fiscal year reported in the XML portion of Form C, or (2) a prior Regulation Crowdfunding offering. In addition, we recognize that many of the past Regulation Crowdfunding issuers may meet the six-month eligibility criterion as of the effective date of these amendments, should they wish to avail themselves of the relief for a follow-on offering under Regulation Crowdfunding.

[672] This figure likely provides a lower bound on the number of issuers that have initiated a follow-on offering after successfully completing a prior offering due to incomplete reporting of offering proceeds on Form C–U. Follow-on issuance activity may differ from historical data due to changes in the crowdfunding market as a result of confounding market factors and continued uptake of the relief under the temporary rules by past issuers. *See also* Temporary Amendments Adopting Release, at 27124.

[673] For a more detailed discussion, *see* Temporary Amendments Adopting Release, at 27124–5.

rather than reviewed financial statements.[674]

i. Benefits

The amended Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 offering limits are expected to increase capital formation in those markets by enabling existing issuers that are approaching offering limits to raise larger amounts of financing, as well as by drawing new issuers that are deterred by relatively low offering limits today.[675]

We recognize that these benefits will be limited if issuers raise amounts below the limit. We note that some commenters suggested that there is not compelling evidence of the need for increased offering limits in Regulation A, Regulation Crowdfunding, or Rule 504 or that more information is needed to determine whether such an increase is appropriate.[676] While historical utilization rates for these exemptions have not reached offering limits for the average issuer, it is important to note that estimates from past data obtained under the existing limits are inevitably subject to selection bias—high-growth issuers or larger issuers with considerable financing needs may forgo these offering methods because it may not make sense for such issuers to incur the cost of an offering with a lower offering limit in addition to pursuing other financing options. Similarly, the high fixed cost of due diligence and marketing related to the kinds of small issuers and offerings represented in the market today may cause intermediaries to be unwilling to participate in the Regulation A market under the existing offering limits. As a result, if smaller issuers, issuers with a lower growth rate, or issuers without intermediaries are overrepresented in the Regulation A market today, they may account for relatively low average proceeds raised. Thus, historical utilization rates could fail to capture the potentially expanded pool of prospective issuers with larger financing needs that may consider these exemptions, and pursue larger offerings, under the amendments, as well as the potentially expanded pool of intermediaries and investors that are expected to be drawn to the Regulation A market under the amended offering limit. Similarly, startups whose financing needs may exceed the existing $1.07 million annual Regulation Crowdfunding limit or the existing $5 million Rule 504 limit—such as startups with a significant growth potential—may be reluctant to consider Regulation Crowdfunding or Rule 504 because even after they incur the cost of compliance and other offering costs, they would still have to resort to other financing to meet their remaining financing needs. Thus, the existing offering limits likely shape the composition of issuers, intermediaries, and investors attracted to these exemptions. While it is possible that low utilization will continue to be driven by factors other than the offering limit, significant caution is warranted with respect to any prediction of future utilization under an expanded offering limit extrapolated from historical data.

The effects on aggregate capital formation will also be limited if the issuers drawn to the amended exemptions are switching from other securities offering methods;[677] however, such issuers may still benefit from optimizing their financing strategy and lowering their cost of capital.

The amendments also may lead to changes in the composition of the pool of issuers relying on these exemptions by drawing a larger and more diversified set of issuers with high growth potential and financing needs in excess of the existing limits.[678] Today such startups may forgo an exemption with an offering limit in favor of a Rule 506 offering. A broader and more diversified range of investment opportunities may benefit investors in these market segments, particularly non-accredited investors that seek exposure to private companies but are constrained from participation in private placements. The amended offering limits also may make the exemptions more attractive to a broader range of intermediaries, some of which may be deterred from participating in these markets today by fixed costs (*e.g.,* due diligence, compliance, crowdfunding platform operation, etc.) in proportion to potential compensation.[679]

Under the existing rules, Regulation A Tier 2 offerings are not subject to State registration and qualification requirements. We are not making changes to this provision, which will continue to apply to Tier 2 offerings up to the amended offering limit. Under the existing rules, Regulation Crowdfunding offerings up to $1.07 million similarly are preempted from State registration and qualification requirements under Section 4(a)(6). The amendments we are adopting in this release extend the preemption of State registration and qualification requirements to Regulation Crowdfunding offerings in excess of $1.07 million and not exceeding the amended offering limit ($5 million). This provision will benefit prospective issuers seeking above $1.07 million in a 12-month period under Regulation Crowdfunding through lower costs of compliance and a more streamlined offering process than if the offering had been subject to State review. An additional benefit to our approach is that issuers and intermediaries will potentially incur lower legal costs due to greater certainty as to the application of preemption to Regulation Crowdfunding offerings above $1.07 million.[680] Rule 504 offerings will remain subject to State registration and qualification requirements. Because issuers in small offerings continue to have a choice of securities offering exemptions, issuers that seek to avail themselves of the State review regime

[674] *See supra* note 671 for the definition of eligible issuer used in this estimate. This estimate may represent a lower bound because reliance on the provisions is not disclosed in a structured data or in a standardized format and was evaluated based on manual review of filings for mention of the temporary rules. Of the issuers in the 53 offerings, we identified 48 as first-time issuers and five as repeat Regulation Crowdfunding issuers based on having made a prior filing on Form C. Each of the five repeat Regulation Crowdfunding issuers had made a filing on Form C–U and a filing on Form C–AR (annual report), however, our review did not examine the details of these filings for specific content. In addition to the issuers in the 53 offerings discussed above (which listed dates of organization that were six months or more prior to filing), we examined all issuers using reviewed financial statement relief between May 4, 2020, and September 30, 2020, and we identified four issuers (all of which were first-time issuers) in offerings seeking above $107,000 and up to $250,000 that listed a date of organization that was less than six months prior to filing. We could not confirm, based on the filings, whether the issuers may have been organized prior to the date listed, such as in a different corporate form (*e.g.,* a limited liability company instead of a corporation). Our review of the recent Regulation Crowdfunding filings focused on the use of the relief and the small sample size on which these estimates are based limits our ability to draw systematic inference about issuers relying on the relief.

[675] *See supra* notes 363 and 365 (noting commenters supporting the benefits of an increased Regulation A limit); *supra* note 419 (noting commenters supporting the benefits of an increased Regulation Crowdfunding limit); and *supra* note 397 (noting commenters supporting the benefits of an increased Rule 504 limit). Many individual commenters recommended raising the Regulation Crowdfunding limit in light of economic concerns raised by COVID–19.

[676] *See supra* notes 370, 425, and 398.

[677] *See supra* note 427 (discussing concerns of commenters about substitution between registered offering and exempt offering markets).

[678] *See, e.g., supra* note 365 (discussing comment letters that suggested that an increase in the Regulation A offering limit could encourage development of the smaller initial public offering market, encouraging more issuers to conduct offerings and providing more investment opportunities for investors).

[679] *See, e.g., supra* note 366 (discussing commenters that suggested that the higher offering limits would improve the economics for issuers and broker dealers to participate in the Regulation A market).

[680] *See supra* Section II.E.3.c.

may continue to do so through a Regulation A Tier 1 or a Rule 504 offering.

The temporary final rules currently in effect serve as the economic baseline against which the benefits of the amendments extending the relief from certain Regulation Crowdfunding financial statement review requirements are measured. Thus, we do not expect additional significant benefits to result from the extension. Extension of the temporary relief will allow small businesses to continue to avail themselves of the benefits of the relief as they do today under the baseline,[681] particularly in the face of significant challenges facing small businesses as a result of the COVID–19 crisis.[682] While the existing temporary rule specifies that it applies to issuers affected by COVID–19, the extension of this relief under the final rules does not include this condition. Given the broad scope of the direct and indirect impact that COVID–19 has had on small business issuers and the continuing challenges they face, we do not expect this change in conjunction with the 18-month extension to have a substantial economic impact.[683] We note that several commenters supported extending the temporary relief.[684]

ii. Costs

The amendments may increase aggregate potential investor losses.[685] Increased offering limits under Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 may make it easier for smaller, higher-risk issuers to access capital through these exemptions.[686] The increased offering limits could also make the exemptions more attractive to issuers that cannot meet more restrictive requirements applicable to larger offerings today, resulting in potentially greater representation of such issuers among the issuers relying on the amended exemptions.[687] For example, some issuers seeking up to $5 million that are unable to meet State or Commission qualification requirements under Regulation A would instead be able to offer $5 million, rather than only $1.07 million, under Regulation Crowdfunding, which does not require State or Commission review prior to sales. As another example, some issuers seeking up to $75 million in an offering and also seeking to avoid the more extensive periodic reporting, beneficial ownership reporting, proxy disclosure, and 17 CFR 243.100 through 243.103 requirements associated with being a public reporting company would be able to forgo registration and offer up to $75 million, rather than $50 million, under Regulation A. Issuers seeking up to $75 million and seeking to avoid restrictions on testing the waters with individual investors, as well as unlisted issuers seeking to avoid State law restrictions on primary offers and sales, may find amended Regulation A Tier 2 to be increasingly attractive compared to a registered offering. To the extent that issuers under Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 are subject to fewer rules and requirements or fail to comply with those rules and requirements, investors may be at an increased risk of loss.[688]

The increased offering limits for Regulation A Tier 2, as well as the increased offering limit for Regulation Crowdfunding (combined with the Regulation Crowdfunding qualified purchaser amendments) also will expand the scope of offerings that are not subject to State registration and qualification requirements, potentially increasing risk of investor losses to the

[681] The relief allows issuers to raise capital without incurring costs and delays involved in an independent accountant's review of their financial statements. This incrementally enhances the efficiency of conducting the offering and yields capital formation benefits for eligible issuers. *See also* Temporary Amendments Adopting Release, at 27127. The upfront costs of obtaining a review report may be nontrivial for small issuers, particularly issuers experiencing declines in internal cash flows as a result of the COVID–19 crisis. In the Crowdfunding Adopting Release, the Commission estimated review costs to be approximately $1,500–$18,000. *See Crowdfunding Adopting Release,* at 71499. More recent information about the costs of a review report is available from commenters and industry sources. For example, one industry source estimates the cost of a review as $2,000–$2,450 for a single-owner LLC/S-Corp/Sole Proprietor issuer that has not previously had a review or audit but is in possession of full financial records and $2,400–$2,950 for a single-owner issuer that has not previously had a review or audit and instead tracks financials in a spreadsheet format. These are estimates based on a hypothetical issuer. Costs may vary depending on the accountant and the issuer's circumstances. *See* CrowdfundCPA Crowdfunding Audit/Review Cost Calculator, available at: *http://crowdfundcpa.com/cost-estimate---calculator.html* (retrieved April 22, 2020). A commenter on the Concept Release stated that it has ''interviewed dozens of CPA firms and found that the average cost of reviewing a company that has two years of financial history is at least $6,000'' and that ''[f]or a company with no history, this quote (from many CPA firms) has been in the $1,500 to $2,500 range.'' *See* Letter from Mainvest (Sep. 24, 2019), *available at: https://www.sec.gov/comments/s7-08-19/s70819-6193357-192513.pdf.*

[682] *See infra* note 695.

[683] *See id.*

[684] *See supra* note 449.

[685] *See, e.g.,* CFA Letter (expressing concern about the negative effects of increasing the use of Regulation A for non-accredited investors and increased risks of investor losses); R. Rutkowski Letter (expressing concern about risk to non-accredited investors in Regulation A and Regulation Crowdfunding offerings); and Morningstar Letter (noting a lack of investment advice such as from a broker or investment adviser that investors might have access to with regard to an investment in a public company).

[686] *See, e.g.,* Md. St. Bar Assoc. Letter (expressing concern that Regulation Crowdfunding will draw non-accredited investors to issuers that accredited investors refused to fund and further stating that companies that require more than $50 million every 12 months should be raising capital through registered offerings rather than Regulation A); B. Richardson Letter (discussing uncertainty about Regulation Crowdfunding issuer outcomes); Better Markets Letter (stating that early-stage companies have a high risk of failure and that retail investors cannot adequately diversify among such firms due to the ''dearth of investable funds''); CFA Letter (stating that ''worse deals are sold to members of the general public subject to Reg. A, Reg. CF, and Rule 504''); CFA Institute Letter (stating that increased offering limits ''may attract other high-risk issuers''); AFREF Letter and R. Rutkowski Letter (expressing concern about risk to retail investors from the expansion of offering limits under Regulation A, Regulation Crowdfunding, and Rule 504). *See also* CFA Institute Letter (noting ''the outsized role played by a single industry—real estate—in Regulation A markets''). Real estate issuers have accounted for the majority of financing under Regulation A to date. *See* Report to Congress on Regulation A/Regulation D Performance, at p. 32. We recognize that unlisted REITs, including Regulation A REITs, may pose risks to some non-accredited investors. We note that such investors already may invest in unlisted REITs that are registered under Section 12(g). *See* Investor Bulletin: Non-traded REITs, *available at https://www.sec.gov/oiea/investor-alerts-bulletins/ib_nontradedreits.html.* Although Regulation A Tier 2 REIT offerings are eligible for certain additional relief relative to unlisted REITs registered under Section 12(g) (including testing the waters and semi-annual rather than quarterly reporting), Regulation A Tier 2 offerings are subject to non-accredited investor investment limits. The ability to access unlisted real estate offerings may offer benefits—as well as risks—to investors. Real estate is associated with considerable returns among private funds (to which non-accredited investors generally lack access). *See* Report to Congress on Regulation A/Regulation D Performance, at Table 14. Real estate also accounts for the largest share of non-fund Regulation D offerings (to which non-accredited investors also rarely have access today). *See id,* at Figure 9. Non-accredited investor access to real estate private equity through Regulation A could expand their investable opportunity set and potential for diversification, allowing them to potentially construct more efficient portfolios. *See, e.g.,* IPA Letter (supporting ''increased access to investment strategies with low correlation to the equity markets, including net asset value real estate investment trusts (''REITs''), lifecycle REITs, business development companies, interval funds and direct participation programs . . . individual investor access to a wide variety of asset classes that have historically been available only to institutional investors''). *See also supra* note 654.

[687] *See, e.g.,* CFA Institute Letter (expressing concern about risks to non-accredited investors from adverse selection in Regulation A and Regulation Crowdfunding offerings); and Md. St. Bar Assoc. Letter.

[688] *See, e.g.,* CII Letter (discussing concerns about Regulation A issuer compliance); NASAA Letter (recommending strengthening corporate governance and disclosure obligations and rescinding preemption of State securities regulation to increase the regulatory oversight of these companies making them more attractive to and safer for investors); and J. Marks Letter (expressing concern about Regulation Crowdfunding issuer compliance). *See also, e.g.,* Mercer Bullard, *Crowdfunding's Culture of Noncompliance: An Empirical Analysis,* 24 Lewis & Clark L. Rev. 899 (2020).

extent not mitigated by other investor protection provisions. Rule 504 offerings will remain subject to State registration and qualification requirements.

The investor costs described above are expected to be mitigated by the investor protection provisions of each exemption. In particular, Regulation A Tier 2 offerings will remain subject to offering statement and ongoing disclosure requirements, non-accredited investor investment limits, bad actor disqualification provisions, and issuer eligibility requirements, and will continue to be required to undergo Commission qualification before sales can be made. Regulation Crowdfunding offerings will remain subject to offering statement and periodic disclosure requirements, intermediary requirements, including investor education and measures to reduce the risk of fraud, as well as non-accredited investor investment limits, bad actor disqualification provisions, and issuer eligibility requirements. Moreover, costs to investors are expected to be further mitigated by the continued application of the antifraud provisions of Federal and State securities laws and the role of reputational incentives of issuers and, if applicable, intermediaries, in these offerings. Rule 504 offerings will remain subject to issuer eligibility requirements, bad actor disqualification provisions, and State registration and qualification requirements.

As discussed above, the temporary final rules currently in effect serve as the economic baseline against which the costs of the amendments extending the relief from certain Regulation Crowdfunding review requirements are measured. Thus, we do not expect additional significant costs to result from the extension. We recognize that costs to investors associated with the temporary final rules will continue to be incurred under the amendments extending the rules, similar to the baseline.[689] Importantly, several provisions of the temporary rules are expected to continue to mitigate potential risks to investors. Issuers relying on the temporary rules must still provide prominent disclosure that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer. Moreover, temporary relief from the review report requirement does not preclude liability in instances of materially misleading financial disclosures provided at the time of the offering, and general anti-fraud provisions and liability for offers under Regulation Crowdfunding will continue to apply. Finally, the remaining investor protections of Regulation Crowdfunding continue to provide significant safeguards for investors in offerings reliant on the temporary relief from the review report requirement.

iii. Effects on Efficiency, Competition, and Capital Formation

The amendments to the Regulation A, Regulation Crowdfunding, and Rule 504 offering limits are expected to increase capital formation in those markets and to provide issuers that cannot meet their financing needs under existing exemptions with a means of raising external financing and potentially lowering their cost of capital (*e.g.,* as a result of economies of scale and fixed cost of initiating an offering), resulting in more efficient allocation of capital to growth opportunities. The capital formation effects of the amendments are expected to be more limited if issuers raise amounts of financing below the amended offering limits or if some of the capital raised under the amended exemptions would have been otherwise raised through other securities offering methods. For example, raising the Regulation Crowdfunding offering limit may draw some of the issuers that would have otherwise sought between $1.07 and $5 million under Rule 504, Rule 506, or Regulation A. Similarly, raising the Rule 504 offering limit may draw some of the issuers that would have otherwise sought between $5 and $10 million under Rule 506 or Regulation A. Those scenarios entail the switching of issuers between offering methods rather than new capital formation.

As discussed above, these amendments may enable some issuers to delay or forgo a registered offering, thereby avoiding the associated costs of Exchange Act registration and being a public reporting company. For example, the higher offering limits for the discussed exemptions may allow more issuers to raise capital from non-accredited investors without registration. This could result in less disclosure and lower liquidity for some of these investors. However, this possibility must be considered in the context of the baseline, under which those issuers otherwise might have relied on Rule 506, which significantly limits non-accredited investor access and, for non-accredited investors that do invest, restricts resales as well as limits the ability to obtain current information about the issuer. Alternatively, issuers on the margin between a Regulation A Tier 2 offering and a registered offering might have registered their securities but not listed on an exchange in a traditional public offering (due to cost, small size, lack of underwriter or institutional investor interest, etc.). As a result, their securities would have no secondary market or be quoted over-the-counter, which affords only marginal

[689] Although a review report provides a more limited level of assurance compared to an audit report, reviewed financial statements confer valuable informational benefits to investors. *See, e.g.,* Brad A. Badertscher et al., *Verification Services and Financial Reporting Quality: Assessing the Potential of Review Procedures* (Simon Bus. Sch., Working Paper No. FR 17–17, July 2018) (''[B]oth reviews and audits yield significantly better reporting quality scores and lower cost of debt than zero-verification compilations. However, model-based reporting quality scores of reviews and audits are indistinguishable statistically, on average. Regarding broader economics, we find that relative to compilations, reviews yield more than half the added interest rate benefit associated with an audit, at considerably less than half the added cost. Overall, our results suggest reviews may provide a cost-effective verification alternative to audits, and the potential of analytical procedures warrants more attention by audit researchers and regulators.''); Evisa Bogdani, Monika Causholli & W. Robert Knechel, *The Role of Assurance in Equity Crowdfunding* (Working Paper, 2019) (finding that ''firms that provide either reviewed or audited financial statements are more likely to reach their target capital, attract a greater number of investors, and raise more capital relative to firms that only provide management-certified financial statements'' in equity crowdfunding). Thus, in cases of issuers temporarily exempted from the review report requirement, particularly in an environment of heightened market uncertainty, investors may have less information in making their investor decisions and may incur additional risks. Exemptive relief from the review report requirement also may continue to weaken the incentives of some issuers to provide compliant financial statement disclosures since they no longer would be required to undergo a review by an independent accountant and to provide such a report to investors, resulting in potentially less informative financial disclosures provided to investors in affected offerings. For example, some financial statement disclosures provided by issuers below the existing review report threshold are not prepared in a U.S. GAAP-compliant manner. *See, e.g.,* Letter from CrowdCheck (Oct. 30, 2019) commenting on the Concept Release, available at: *https://www.sec.gov/comments/s7-08-19/s70819-6368811-196431.pdf.* However, to the extent that issuer financial disclosures are historical in nature, such disclosures might be relatively less meaningful for purposes of assessing the current financial condition and growth prospects of an issuer that was financially sound but has experienced significant adverse effects as a result of the COVID–19 crisis. Further, historical financial disclosures may be incrementally less meaningful for evaluating the business of a recently formed or development-stage issuer. *See, e.g.,* Letter from Mainvest (stating that ''a company with no operating history simply does not have historical financial information that can be reviewed. Issuers on our platform unfortunately are required to get CPA reviews of a balance sheet with almost no zeros [*sic*]. This adds practically no value to investor protections and significantly increases up-front costs to companies.'').

benefits, if any, of liquidity and information availability compared to a Regulation A Tier 2 offering.

If the amended offering limits draw additional issuers to these exemptions, which accept an unlimited number of non-accredited investors, the amendments could expand the set and nature of investable opportunities for non-accredited investors seeking exposure to issuers that have not yet registered an offering. The effects on competition for investor capital will depend on how the additional investor capital drawn to the affected markets compares to the amount of additional financing sought by issuers in these markets. By promoting access to external financing for smaller issuers, the amendments may increase product market competition among small issuers and between small issuers and more established issuers.

As discussed above, the temporary final rules currently in effect serve as the economic baseline against which the economic effects of the amendments extending the relief from the review report requirements are measured. Thus, we do not expect additional significant effects on efficiency, competition, or capital formation to result from the extension.

iv. Reasonable Alternatives

As an alternative, we could have adopted different offering limits. For example, we could have adopted smaller increases to the offering limits, such as an adjustment to the existing offering limits to reflect the rate of inflation since the enactment of the JOBS Act in April 2012.[690] As another alternative, we could have adopted larger increases in the offering limits, as suggested by some commenters.[691] Compared to the final amendments, a higher (lower) offering limit could make an offering under the exemption more (less) cost-effective for issuers (and if applicable, intermediaries) facing fixed offering and due diligence costs, resulting in larger (smaller) capital formation benefits. Compared to the final amendments, a higher (lower) offering limit could draw a larger (smaller) pool of additional issuers to the respective segment of the exempt market and potentially expand investment opportunities for non-accredited investors seeking exposure to issuers that have not yet registered their securities. The net impacts of these alternatives on capital formation, investor protection, and competition could be limited if most of the incremental offering activity under these alternatives is due to issuers switching between various offering methods. Even if most of the additional issuers under these alternatives would have otherwise raised financing through another offering method, such issuers might still be able to benefit from a lower cost of capital under the alternative of increased offering limits. The net impacts of the alternative would be further attenuated to the extent that the majority of issuers continue to raise amounts below the offering limits.[692] As a caveat, similar to the discussion above, existing data on issuers approaching the offering limits may not be representative of the amounts that would be raised if a different pool of issuers or investors is drawn to the respective market segment under alternative offering limits.

It is difficult to predict how many new issuers that would not have otherwise engaged in a securities offering would be drawn to the respective exempt market segment under these alternatives, compared to the amended offering limits. The table below examines the use of alternative securities offering methods that are most likely to be relied on by issuers that raise amounts above existing offering limits but below several alternative offering limit thresholds to illustrate the potential number of additional issuers that presently utilize other offering methods that do not have a cap but that might see the amended exemption as an option under these alternatives. The caveats that accompany Table 12 continue to apply.

TABLE 14—EVALUATION OF ALTERNATIVES TO THE AMENDED OFFERING LIMITS USING EVIDENCE FROM CAPITAL RAISING IN 2019 THROUGH SELECT OTHER SECURITIES OFFERING METHODS

**Evaluation of Alternative Regulation A Offering Limits**

| Number of issuers that raised above $50 million and up to: | Number of issuers in offerings under Rule 506 [a] | Number of issuers in registered offerings [b] |
|---|---|---|
| $55.845 million (inflation adjustment) | 51 | 17 |
| $60 million | 85 | 29 |
| $70 million | 144 | 46 |
| $75 million (amended offering limit) | 171 | 57 |
| $80 million | 198 | 72 |
| $90 million | 231 | 90 |
| $100 million | 270 | 122 |
| $110 million | 298 | 143 |
| $120 million | 315 | 151 |
| $125 million | 325 | 162 |

[690] The Regulation A offering limit has not been adjusted for inflation since the enactment of the JOBS Act. Between April 2012, when the JOBS Act was enacted, and December 2019, the rate of CPI inflation was 11.7 percent according to Bureau of Labor Statistics (''BLS'') data. Adjusting for inflation would yield a Regulation A limit of $55.845 million ($50 million × 1.1169). The Regulation Crowdfunding offering limit was last adjusted for inflation in April 2017. Between April 2017 and December 2019, the rate of CPI inflation was 5.09 percent, according to BLS data. Adjusting for inflation would yield a Regulation Crowdfunding offering limit of $1.124 million ($1.07 million × 1.0509). The Rule 504 offering limit was raised to $5 million in October 2016. Between October 2016 and December 2019, the rate of CPI inflation was 6.31 percent. Adjusting for inflation would yield a Rule 504 offering limit of $5.316 million ($5 million × 1.0631).

[691] For instance, some commenters have suggested raising the Regulation A offering limit to $100 million. *See supra* note 367. Some commenters have suggested raising the Regulation Crowdfunding offering limit above $5 million. *See supra* note 421.

[692] For example, the average (median) Regulation Crowdfunding offering reported proceeds of $213,678 ($106,900) between the inception of Regulation Crowdfunding (May 16, 2016) through December 31, 2019; the average (median) Regulation A issuer reported raising $13.4 million ($5.0 million) between the effective date of 2015 Regulation A amendments (June 19, 2015) and December 31, 2019.

TABLE 14—EVALUATION OF ALTERNATIVES TO THE AMENDED OFFERING LIMITS USING EVIDENCE FROM CAPITAL RAISING IN 2019 THROUGH SELECT OTHER SECURITIES OFFERING METHODS—Continued

**Evaluation of Alternative Regulation Crowdfunding Offering Limits**

| Number of issuers that raised above $1.07 million and up to: | Number of issuers in offerings under Rule 504 [c] | Number of issuers in offerings under Rule 506 [d] | Number of issuers in offerings under Regulation A [e] |
|---|---|---|---|
| $1.124 million (inflation adjustment) | 2 | 104 | 0 |
| $2 million | 31 | 1,542 | 2 |
| $3 million | 44 | 2,662 | 7 |
| $4 million | 51 | 3,388 | 10 |
| $5 million (amended offering limit) | 55 | 4,004 | 13 |
| $6 million | | 4,454 | 15 |
| $7 million | | 4,813 | 17 |
| $8 million | | 5,127 | 20 |
| $9 million | | 5,333 | 21 |
| $10 million | | 5,567 | 23 |
| $15 million | | 6,233 | 29 |
| $20 million | | 6,604 | 31 |

**Evaluation of Alternative Rule 504 Offering Limits**

| Number of issuers that raised above $5 million and up to: | | Number of issuers in offerings under Rule 506 [f] | Number of issuers in offerings under Regulation A [g] |
|---|---|---|---|
| $5.316 million (inflation adjustment) | | 152 | 0 |
| $6 million | | 464 | 2 |
| $7 million | | 834 | 4 |
| $8 million | | 1,166 | 7 |
| $9 million | | 1,377 | 8 |
| $10 million (amended offering limit) | | 1,618 | 10 |
| $15 million | | 2,315 | 16 |
| $20 million | | 2,695 | 18 |
| $25 million | | 2,974 | 19 |

[a] Regulation A eligibility criteria exclude investment companies and blank check companies and limit the exemption to U.S. and Canadian issuers, so for comparability pooled investment funds and issuers outside the U.S. and Canada are excluded from the Rule 506 proceeds used in this estimate. Reporting companies are eligible to rely on Regulation A under the 2018 amendments.

[b] Registered offering proceeds are based on gross proceeds reported in SDC Platinum for U.S. public offerings of equity, debt, and convertible securities with issue dates in 2019, excluding withdrawn, postponed, and rumored offerings, asset-backed securities offerings, blank check issuers, investment fund issuers, and issuers outside the U.S. and Canada.

[c] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through December 2019. Regulation Crowdfunding eligibility criteria limit the exemption to U.S. issuers and exclude Exchange Act reporting companies, so for comparability non-U.S. issuers and reporting companies are excluded from the Regulation A proceeds used in this estimate.

[d] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds and non-U.S. issuers are excluded from Rule 504 proceeds used in this estimate. Reporting companies are ineligible under Rule 504.

[e] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds, reporting companies, and non-U.S. issuers are excluded from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

[f] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through the end of the period. Rule 504 eligibility criteria exclude Exchange Act reporting companies, so for comparability reporting companies are excluded from the Regulation A proceeds used in this estimate.

[g] For comparability with other estimates in this table, we exclude Exchange Act reporting companies and pooled investment funds from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

After considering these alternatives and public comment, we continue to believe that the amended offering limits are most likely to provide meaningful capital formation benefits and increased access to investment opportunities to investors while representing a balanced approach to expansion of the respective offering exemptions.

We are amending the Regulation A Tier 2 offering limit but not the Tier 1 offering limit. As an alternative, we could amend the Tier 1 offering limit, as suggested by one commenter.[693] For example, we could raise the Tier 1 offering limit proportionately to the increase in the Tier 2 offering limit, by 50 percent, from $20 million to $30 million. The economic effects of this alternative are similar to the ones considered above. A higher (lower) Tier 1 offering limit could draw more (fewer) issuers to Tier 1 of Regulation A. Some of the additional issuers drawn to Tier 1 under this alternative might be switching from Tier 2 or other exempt offering methods, which might limit the net impact on capital formation.[694] Even

[693] *See* Chamber of Digital Commerce Letter. *But see* CII Letter; NASAA Letter; and CrowdCheck Letter (opposing an increase in the Tier 1 offering limit).

[694] For example, from June 2015 through December 2019, we have identified seven Tier 2 issuers that reported raising between $20 million and $30 million in financing under Regulation A and that could become newly eligible to raise the same amount of financing under Tier 1, if it were amended under this alternative. However, they also
Continued

in that case, some issuers switching from Tier 2 or other offering methods might be able to decrease their cost of capital.

We are raising the Regulation Crowdfunding offering limit to $5 million, which may create redundancies between Regulation Crowdfunding and Rule 504. The amended Rule 504 offering limit also may create redundancies between Rule 504 and Regulation A. As an alternative, we could eliminate Rule 504. Such an alternative might contribute to regulatory simplification. However, it also might be disruptive for those issuers that rely on Rule 504 and find it to be cost-effective for their financing strategy (*e.g.,* due to a lack of the intermediary and periodic reporting requirements).

We are extending temporary relief from the review report requirement for eligible issuers in Regulation Crowdfunding offerings of up to $250,000 for an additional 18 months. As an alternative, we could have amended the Regulation Crowdfunding offering limit but not extended the temporary relief from certain review requirements for eligible issuers in offerings of up to $250,000. As a general matter, the flexibility to access limited amounts of capital under Regulation Crowdfunding on an expedited basis, without incurring the cost of an independent accountant's review report, facilitates capital formation and reduces some of the barriers to accessing capital markets for the smallest issuers, allowing some issuers to raise additional capital or to optimize their financing cost through a more efficient and streamlined offering process. By providing targeted relief in a market segment that primarily attracts small businesses, which are disproportionately affected by downturns, the amendments extending the temporary relief also serve to incrementally enhance competition between small businesses and larger businesses (which tend to be less financially constrained).[695] The alternative of not extending the relief would impose costs and reduce the flexibility for small issuers adversely affected by COVID–19 seeking to meet their financing needs through Regulation Crowdfunding. It also would create competitive disparities for otherwise similar issuers that initiate offerings of this size before and after the expiration of the existing relief (February 28, 2021).

We recognize that the alternative of allowing the temporary relief to expire could incrementally decrease concerns about investor protection compared to extending the relief.[696] Generally, however, the aggregate incremental effect of the temporary rules on retail investor protection is likely limited by various factors, including the tailoring of the relief (through the eligibility requirements and the narrow scope and time-limited nature of the relief) and the modest size of the Regulation Crowdfunding market compared to other market segments that draw retail investors.[697] Further, issuers are required to disclose reliance on the temporary relief to investors, enabling more informed decisions. In addition, several essential safeguards contained in the 2015 Regulation Crowdfunding rules continue to apply, such as offering and investment limits, the use of registered crowdfunding intermediaries to conduct Regulation Crowdfunding offerings, other disclosure requirements of Form C, and annual report obligations. While we recognize that there may be somewhat greater investor protection concerns with an extension of the temporary final rules compared to an alternative of allowing the temporary relief to expire, overall we do not believe the difference to be significant in light of the other features of these offerings.

We could also extend the relief from review report requirements for eligible issuers in offerings of up to $250,000 for a shorter or longer time period than specified in these amendments. The alternative of extending the relief for a shorter (longer) time period would lead to fewer (more) potential issuers being afforded the flexibility in capital raising under the temporary rules, compared to the amendments. Because of the severe and continuing economic impact of the COVID–19 crisis, we believe that the extension of the temporary rules is appropriate.

As another alternative, we could permanently raise the financial statement requirement thresholds, for instance, in proportion to the increase in the offering limit: $500,000 for reviewed financial statements (in lieu of $107,000); $2.5 million for audited financial statements for follow-on offerings (in lieu of $535,000); and $5 million for audited financial statements for initial offerings (in lieu of $1.07 million).[698] As another alternative, we could waive certain other disclosure requirements (*e.g.,* progress updates and/or annual reports) for the lower tier of crowdfunding offerings (*e.g.,* offerings up to $250,000 or $1 million) to make crowdfunding offerings more cost-effective for the smallest issuers, many of which have not yet begun generating revenue and might not have enough liquid assets or access to loans to cover the compliance costs of a Regulation Crowdfunding offering. Scaling disclosure requirements for Regulation Crowdfunding offerings under these alternatives could attract a larger set of early stage issuers that seek to raise small amounts of capital to Regulation Crowdfunding while providing a degree of independent verification of accounting quality for larger crowdfunding offerings in a more cost-

might not choose to switch to Tier 1 if they find Tier 2 to be more attractive (*e.g.,* due to preemption of State review or an easier path to quotation on the upper tiers of the OTC market in the presence of periodic reports required by Tier 2). For example, from June 2015 through December 2019, we estimate that 112 Tier 2 issuers reported raising up to $20 million in financing under Regulation A even though that amount would have made them eligible to use Tier 1 as well. Further, some issuers might still prefer Tier 2 because it allows issuers to undertake an offering with a higher maximum offering amount, which provides issuers with flexibility to raise more capital without having to undergo a re-qualification (*e.g.,* if market conditions improve) even if the average issuer's proceeds do not reach the amount sought.

[695] Research has related small size to financing constraints, and conversely, larger size to being less financially constrained. *See, e.g.,* Nathalie Moyen, *Investment—Cash Flow Sensitivities: Constrained versus Unconstrained Firms,* 59 J. FIN. 2061 (2004); Christopher Hennessy, Amnon Levy, & Toni Whited, *Testing Q Theory with Financing Frictions,* 83 J. FIN 691 (2007). Other studies also show that diversified firms can rely on internal capital markets to mitigate financing constraints. *See, e.g.,* Venkat Kuppuswamy & Belén Villalonga, *Does Diversification Create Value in the Presence of External Financing Constraints? Evidence from the 2007–2009 Financial Crisis,* 62 MGMT. SCI. 905 (2016) (showing that ''the value of corporate diversification increased during the 2007–2009 financial crisis'' and that ''conglomerates' access to internal capital markets became more valuable''). *See also, e.g.,* several recent working papers examining impacts of the COVID–19 crisis on small businesses: Alexander W. Bartik et al., *How Are Small Businesses Adjusting to COVID–19? Early Evidence from a Survey,* (Nat'l Bureau of Econ. Research, *Working Paper* No. 26989, 2020); Jose Maria Barrero, Nicholas Bloom, & Steven J. Davis, *COVID–19 Is Also a Reallocation Shock,* (Nat'l Bureau of Econ. Research, Working Paper No. 27137, 2020); John Eric Humphries, Christopher Neilson, & Gabriel Ulyssea, *The Evolving Impacts of COVID–19 on Small Businesses Since the CARES Act,* (Cowles Foundation, Discussion Paper No. 2230, 2020); Robert W. Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence from the First Three Months after Widespread Social-Distancing Restrictions,* 29 J. Econ. Mgmt. Strategy 727 (2020).

[696] *See also* Temporary Amendments Adopting Release, at 27122; Better Markets Letter.

[697] *See also* Temporary Amendments Extension, at 54489.

[698] *See, e.g.,* Wefunder Letter (recommending a $1 million threshold for reviewed financial statements and a $5 million threshold for audited financial statements); CCA Letter (recommending increasing the reviewed financial statements threshold to $500,000 and the audited financial statements threshold to $5 million for initial offerings).

effective manner than with an audit.[699] Scaling disclosure requirements under this alternative, however, would result in information loss to investors, potentially contributing to less well informed investment decisions, greater risk of investment losses, and less efficient allocation of capital. Moreover, this alternative could attract high-risk issuers to the lower crowdfunding tier, which could undermine future capital raising in that market tier.

b. Investment Limits Under Regulation Crowdfunding

The final amendments revise Regulation Crowdfunding investment limits.[700] As proposed, the amended limits will be based on the greater of, rather than the lower of, an investor's annual income or net worth. Further, as proposed, the amended limits will only apply to non-accredited investors.

i. Benefits

The amendments will increase the maximum amount that can be invested across all Regulation Crowdfunding offerings by the subset of non-accredited investors whose net worth and annual income diverge. This may benefit issuers by increasing the amount of capital formation and/or by lowering the overall costs of soliciting non-accredited investors. Relaxing the investment limitation may also benefit the affected subset of non-accredited investors by enabling them to achieve more efficient portfolio allocations and enhanced upside from investing in early-stage companies. Because crowdfunding issuers commonly set investment minimums, relaxing the investment limitation may allow the affected investors to invest in a larger number of crowdfunding issuers, holding invested amounts constant, which may result in greater diversification within the crowdfunding category of the investor's portfolio. However, a larger aggregate investment in the crowdfunding category may reduce the diversification of the investor's overall portfolio, holding portfolio size constant. The effect of the amendments on portfolio diversification will also depend on how much investors allocate to different crowdfunding securities, out of the allowable limit, relative to non-crowdfunding securities, and on the correlations between crowdfunding and non-crowdfunding securities chosen by investors for their portfolios.

The amendments will also remove the investment limitation for accredited investors in Regulation Crowdfunding, harmonizing the treatment of accredited investors across Regulation Crowdfunding, Regulation A, Regulation D, and private placements not reliant on Regulation D.[701] Accredited investors are expected to possess the capability to evaluate larger crowdfunding investments and the resulting financial risk. Removing the investment constraint may benefit such investors by allowing them to allocate their capital more efficiently within their overall investment portfolio. It may also create stronger incentives to perform due diligence, screen, and monitor crowdfunding issuers, which may have positive spillovers for non-accredited investors in Regulation Crowdfunding. It is possible that accredited investors will simply reallocate capital between exemptions (*e.g.,* in cases of side-by-side Regulation Crowdfunding/Rule 506(c) offerings). Accredited investors may also continue to favor private placements, which do not cap offering size and allow them to capitalize more fully on their due diligence, with fewer spillovers to the rest of the market (because information about investments is private, there is less free riding on large investors' due diligence) and more bargaining power to negotiate offering terms.

We lack the data to assess how many investors may be affected by the described amendments to investment limits because investor information generally is not available and is not required to be disclosed. Based on a subset of data made available by one crowdfunding intermediary,[702] among non-accredited investors with available information on annual income and net worth, revising the investment limits as described can increase the investment limit by 98 percent for the median non-accredited investor in that subset. In addition, approximately nine percent of investors in the examined subset of data were accredited and thus will no longer be subject to investment limits under the amendments. The economic effects of the amendments will be mitigated to the extent that investors may invest amounts below the investment limits.[703] We cannot determine whether these results are representative of the distribution of investors on other funding portals or during other time periods, or how that distribution may change under the amendments if new investors and issuers are drawn to Regulation Crowdfunding.

ii. Costs

The final amendments to Regulation Crowdfunding investment limits may increase the magnitude of investor losses, particularly if some investors inefficiently under-diversify their portfolios and take on too much risk from crowdfunding investments.[704] For example, relaxing investment limits may enable some non-accredited investors to make larger investments in crowdfunding offerings based on an incomplete assessment of information about the securities offered, with the resulting potential for increased investor losses that they may be less able to bear. However, other investor protection provisions of Regulation Crowdfunding, such as issuer disclosure requirements and investor education and other intermediary requirements, may partly mitigate these risks. The potential costs of the amendments should be considered in the context of the baseline, under which non-accredited investors are permitted to invest unlimited amounts in both listed and unlisted registered securities and in

[699] *See supra* note 689.

[700] *See supra* Section II.E.3.

[701] *See also supra* note 431 (discussing commenters that supported the amendments).

[702] *See* 2019 Regulation Crowdfunding Report, at notes 91–93 and accompanying text. Information on amounts invested by an average investor or the number of investors per offering is not available for the full sample of Regulation Crowdfunding offerings. Information on offerings from one intermediary from May 2016 through September 2018 provides some insight into the typical investment size, investor composition, and number of investors in crowdfunding offerings. For purposes of these estimates, we exclude investments redirected to a Rule 506(c) offering; offerings that were not funded (*i.e.,* were either canceled or ongoing) or had missing data; observations where an investor made but subsequently withdrew the commitments, yielding a cumulative investment of zero; and investor observations with missing accredited investor status.

[703] *See* 2019 Regulation Crowdfunding Report, at 40 (''For most investors with available data on annual income and net worth (approximately 30% of investors in offerings funded on the platform), cumulative amounts invested during the entire considered period (almost 2.5 years) through this intermediary's platform did not reach the investment limit, with fewer than 10% of investors on the platform investing amounts exceeding their 12-month investment limit over the entire 2.5-year period. According to information provided by another intermediary respondent to the lookback survey, the median (average) crowdfunding investment through its platform was $1,335 ($500), with investors making an average of 2.7 investments and approximately 40% of investors making two or more investments. According to information provided by a different intermediary respondent, the average investment was approximately $992, and investors made an average of 1.5 investments. Based on available data, we are unable to determine whether these investors also invested in crowdfunding offerings through other crowdfunding platforms; thus, these estimates are likely to represent a lower bound on average investment amounts.'').

[704] *See, e.g.,* CII Letter (opposing increasing investment limits for non-accredited investors); Morningstar Letter (opposing increasing investment limits for non-accredited investors due to a lack of investment advice and the difficulty of detected scams); NASAA Letter; and CFA Letter.

Regulation A Tier 1 securities,[705] as well as up to ten percent of the higher of income or net worth in each offering of Regulation A Tier 2 securities, and thus they already may be in a position of making investments which also may result in considerable risk to investor portfolios.

The final amendments removing investment limits for accredited investors in Regulation Crowdfunding offerings are not expected to result in a negative effect on investor protection given that accredited investors generally have the capacity to fend for themselves and greater ability to withstand financial losses. Because accredited investors are not subject to investment limitations in offerings under Regulation A, in offerings under Regulation D, in other private placements, or in registered offerings, they may simply reallocate capital between holdings of securities issued under other exemptions. It is also possible that accredited investors investing large amounts may continue to prefer private placements, as discussed above.

iii. Effects on Efficiency, Competition, and Capital Formation

The described amendments to Regulation Crowdfunding investment limits may incrementally promote capital formation through Regulation Crowdfunding, particularly for issuers that may attract accredited investors or non-accredited investors who have a greater disparity between income and net worth. The revised investment limits may allow some investors that were constrained by existing investment limits to attain a more efficient portfolio allocation. For other investors, relaxing investment limits may enable an inefficiently high exposure to crowdfunding investments, resulting in under-diversification. If the amendments increase accredited investor participation in Regulation Crowdfunding offerings, the average intensity of monitoring and screening of issuers by investors may increase, with potential positive spillovers for small investors that lack the expertise and incentives to engage in comparable monitoring and screening. This may lead to greater efficiency of capital allocation in the Regulation Crowdfunding market. Removing accredited investor investment limits may lead to a reallocation of investment opportunities in that market segment from non-accredited investors to accredited investors, as indicated by one commenter.[706]

Depending on how the additional investor capital drawn to Regulation Crowdfunding compares to the amount of additional financing sought by issuers in these markets after the amendments, the amendments may affect competition among issuers for investor capital.

The net impacts of the amendments may be attenuated if the additional capital is reallocated from other offerings that either do not have investment limits or that have less stringent investment limits (*e.g.,* Rule 506, other private placements, or Regulation A).

iv. Reasonable Alternatives

As an alternative, we could align Regulation Crowdfunding investment limits with those of Regulation A Tier 2—apply the ten-percent limit on a per-offering basis to all non-accredited investors—rather than apply a two-tier limit (five percent for non-accredited investors with a lower income and net worth and ten percent for other non-accredited investors) across all Regulation Crowdfunding offerings in a twelve-month period. Compared to the final amendments, this alternative would have expanded investment limits, particularly for non-accredited investors with lower income and net worth and for investors that participate in multiple Regulation Crowdfunding offerings, yielding potential increases in capital formation benefits and non-accredited investor access to startup investment opportunities. However, this alternative also might have increased investor losses per investor and decreased diversification for some non-accredited investors, compared to the final amendments.

As another alternative, we could have increased or lowered the numerical thresholds in investment limits under Regulation Crowdfunding. For example, we could scale up the $2,200 numerical threshold in the investment limit in proportion to the increase in the offering limit (from $2,200 to $11,000). This alternative would increase (decrease) capital formation benefits while increasing (decreasing) the magnitude of potential investor losses per non-accredited investor, particularly for non-accredited investors with lower income and net worth, compared to the final amendments.

As another alternative, we could require verification of accredited investor status under Regulation Crowdfunding, similar to Rule 506(c).[707] Under this alternative, the likelihood of non-accredited investors that could have been mistakenly identified as accredited investors without verification incurring losses from a large investment under Regulation Crowdfunding would be decreased compared to the amendments. However, issuers would incur additional costs of verification of investor status under this alternative (whether in the form of the cost passed along to the issuer by an intermediary, or the cost incurred by the issuer directly). While such additional costs would be smaller for issuers with a prior or concurrent Rule 506(c) offering, for the typical Regulation Crowdfunding issuer that is small, with limited internal cash flows and no prior offering experience, such costs may serve as a significant barrier to accepting accredited investors in a Regulation Crowdfunding offering.

6. Eligibility Requirements in Regulation Crowdfunding and Regulation A

a. Eligibility Requirements Under Regulation Crowdfunding

The final rules will allow crowdfunding issuers to raise capital through a crowdfunding vehicle, substantially as proposed. Such crowdfunding vehicles will be formed by or on behalf of the underlying crowdfunding issuer to serve merely as a conduit for investors to invest in the crowdfunding issuer and will not have a separate business purpose. This approach is designed to allow investors in the crowdfunding vehicle to achieve the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the underlying crowdfunding issuer in an offering made under Regulation Crowdfunding. As discussed in Section II.F.2 above, after considering public comment, we are not adopting the proposal to limit the types of securities that may be offered and sold in reliance on Regulation Crowdfunding.

i. Benefits

The final rules will benefit issuers by allowing them to reduce the

[705] In contrast to Regulation Crowdfunding securities, sales and offers of unlisted registered securities and Regulation A Tier 1 securities are subject to State registration requirements, including, in some states, merit review.

[706] *See* J. Pampena Letter (suggesting the change may eliminate investment opportunities for non-accredited investors). According to the commenter, if accredited investors are permitted to invest under Regulation Crowdfunding without an investment limit, investment from accredited investors will rapidly satisfy the offering limits of these mostly small offerings.

[707] *See, e.g.,* J. Clarke Letter; Raise Green & New Haven Comm. Solar Letter; and Honeycomb Letter (supporting self-verifications).

administrative complexities associated with a large and diffuse shareholder base.[708] Commenters generally supported permitting crowdfunding issuers to use crowdfunding vehicles.[709] As discussed in Section II.F.1.c above, under the final rules, natural person investors in the crowdfunding vehicle will be excluded from the number of holders of record for purposes of Section 12(g). We expect this provision to significantly increase the utility of the crowdfunding vehicle structure to issuers, especially in offerings that attract small investors, and potentially make it easier for Regulation Crowdfunding issuers to raise capital from venture capitalists and other large investors in the future. However, the effect on all except the largest crowdfunding issuers may be limited due to the availability of the conditional exemption in Exchange Act Rule 12g–6.

Currently, some early-stage issuers with high growth potential that have a chance of attracting VC funding in the future may avoid conducting an offering under Regulation Crowdfunding due to concerns about a large and unwieldy capitalization table. By potentially alleviating some of these concerns, the final rule may encourage additional issuers with high growth potential to consider pursuing an offering under Regulation Crowdfunding. Because these issuers might presently offer securities only to accredited investors or a few non-accredited investors through offerings under Rule 506 or through other private placement offerings, the final rule may benefit non-accredited investors by expanding their access to investment opportunities in startups with high growth potential that are early in their lifecycle.

As discussed in Section II.F.1 above, the use of a crowdfunding vehicle will be subject to certain conditions designed to ensure that investors achieve the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer in an offering made under Regulation Crowdfunding, thereby minimizing any potential adverse effects for investors of investing in a crowdfunding issuer through such an offering structure. The crowdfunding vehicle and the crowdfunding issuer also will be co-issuers in the offering, with the resulting joint liability for offers and sales, and the offering must comply with Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.

The required transparency and single-purpose nature of the crowdfunding vehicle, combined with the continued application of the substantive and disclosure requirements of Regulation Crowdfunding and the antifraud provisions of the Federal and State securities laws, are expected to provide significant investor protections for crowdfunding vehicle investors under the final rules.

ii. Costs

The use of crowdfunding vehicles may result in additional offering costs. The costs of forming and operating the crowdfunding vehicle will be incurred by the crowdfunding issuer, which may decrease the overall economic benefits of the offering for all investors in the crowdfunding issuer, including investors in the crowdfunding vehicle. However, to the extent that the crowdfunding vehicle yields benefits for the crowdfunding issuer, including expanded potential for future funding rounds due to the treatment of the crowdfunding vehicle under Section 12(g), reduced capitalization table concerns and greater efficiency of administration of a large and diffuse investor base, these economic benefits of a crowdfunding vehicle may offset the additional costs. The balance of these tradeoffs is likely to vary depending on the issuer's offering experience, potential for raising follow-on financing from a large investor, costs associated with the formation and operation of the crowdfunding vehicle, and the number of investors participating in the crowdfunding offering. Because the use of the crowdfunding vehicle structure will be voluntary, we expect issuers to use a crowdfunding vehicle only when the issuers determine that the benefits justify the costs.

If the crowdfunding vehicle is administered by an external entity on behalf of the issuer, the associated fees may depend on other business between the external administrator and the issuer. On the one hand, administration fees may be reduced in instances where an issuer obtains a bundle of other services related to the offering from the external administrator or where an administrator seeks future business of the issuer related to other offerings. On the other hand, administration fees may be increased to compensate for discounted fees for other services related to this or other offerings. Several factors are expected to mitigate concerns about administration fees. Competition among external service providers is expected to put downward pressure on such fees. The requirement that crowdfunding vehicle costs be incurred by the crowdfunding issuer rather than the crowdfunding vehicle will ensure a degree of alignment of interests of crowdfunding vehicle investors and the crowdfunding issuer with respect to crowdfunding vehicle costs. The highly limited scope of permissible activities of the crowdfunding vehicle will further limit potential discretion related to fees.

As discussed above, the conditions for the use of crowdfunding vehicles are expected to minimize any potential conflicts of interest incremental to a crowdfunding vehicle.[710] The crowdfunding vehicle structure is not expected to significantly affect information processing costs for investors, compared to a direct crowdfunding offering, because of the transparency and single-purpose nature of the crowdfunding vehicle, as well as the provisions designed to ensure that crowdfunding vehicle investors receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer.

iii. Effects on Efficiency, Competition, and Capital Formation

The final rules are expected to enhance capital formation by making Regulation Crowdfunding more attractive to issuers. If the incremental financing is largely due to issuers switching from other offering methods to Regulation Crowdfunding, the net impact on capital formation may be minimal. However, if that is the case, the final rules may reduce the cost of capital. By giving crowdfunding issuers the flexibility to conduct a crowdfunding offering via a crowdfunding vehicle, the final rules may make crowdfunding offerings more attractive to a broader range of issuers, enabling such issuers to diversify their financing strategy at an early stage of their operation and in some cases potentially obtain a lower cost of capital or greater amounts of capital than they would otherwise. The final rules may be especially beneficial for crowdfunding issuers with high growth potential by helping them attract institutional investors or other large investors in the future, thus enabling a potentially more efficient financing and growth strategy.

Further, the ability to use a crowdfunding vehicle may expand investment opportunities available to non-accredited investors and, as a

[708] *See also* Proposing Release, at note 420.

[709] *See supra* note 480. *But see* CFA Letter and CII Letter.

[710] Small investors in a direct crowdfunding offering might face agency conflicts today. However, we do not expect the amendments to result in significant additional agency conflicts for investors in direct crowdfunding vehicle offerings.

result, potentially affect the efficiency of their capital allocation. If the final rules draw additional issuers to Regulation Crowdfunding, broader access to those investment opportunities may enable non-accredited investors to allocate their capital more efficiently.

The final rules may promote competition. By making Regulation Crowdfunding attractive to a broader subset of small issuers, they may incrementally broaden access to funding for small and early stage issuers, many of which have not participated in other securities offerings and are otherwise highly financially constrained. Expanding access to capital for small and early stage issuers may, on the margin, encourage new entry and promote competition between small issuers and more established competitors. The aggregate effects on competition for investor capital are difficult to predict and will depend on the relative effects of the final rules on issuer and investor willingness to participate in Regulation Crowdfunding.

iv. Reasonable Alternatives

As an alternative, we could require that a registered investment adviser or ERA manage the crowdfunding vehicle, as suggested by some commenters and the 2017 Treasury Report.[711] Under this alternative, investors in crowdfunding vehicles could benefit because an investment adviser is a fiduciary subject to the requirements of the Advisers Act and regulations thereunder. The final rule's conditions, however, are designed to limit the crowdfunding vehicle's activities to that of acting as a conduit to directly hold the securities of the crowdfunding issuer without the ability for independent investment decisions to be made on behalf of the crowdfunding vehicle. Moreover, investors in the crowdfunding vehicles remain protected by the provisions of Regulation Crowdfunding as well as the antifraud protections of the Federal securities laws more broadly. Any incremental benefits of this alternative to investors therefore could be limited. In addition, such a requirement would likely deter issuers, particularly small issuers, from using the crowdfunding vehicle structure. Given the relatively small amount of capital that can be raised through Regulation Crowdfunding, particularly in offerings by smaller issuers, it may not be economically feasible to require a registered investment adviser or an ERA to manage the crowdfunding vehicle.[712] Further, small issuers may lack access to investment advisory expertise.

As another alternative, we could remove some of the requirements in the final rule,[713] such as the restrictions on the permissible activities and other provisions intended to provide the investor with the same economic exposure, rights, and disclosures as they would have if they invested in a direct Regulation Crowdfunding offering or the requirement that crowdfunding vehicle costs be borne by the crowdfunding issuer. Removing these restrictions would increase the flexibility for issuers in structuring their crowdfunding offering and potentially make Regulation Crowdfunding more attractive as a capital raising option. However, it also could lead to agency conflicts and weaken investor protections for crowdfunding vehicle investors, compared to the final rule's conditions. Some of these additional costs to investors might be partly mitigated by the substantive and disclosure requirements of Regulation Crowdfunding.

Similarly, we could modify some of the conditions in the final rule so that an investor in a crowdfunding vehicle would still achieve the same economic exposure, and receive the same disclosures, as if he or she had invested in the crowdfunding issuer directly, while providing greater flexibility for crowdfunding vehicles and their investors to determine other aspects of the crowdfunding vehicle's operations. For example, rather than requiring a crowdfunding vehicle to vote and participate in tender or exchange offers or similar transactions only in accordance with the instructions it receives from its investors, we could allow a crowdfunding vehicle and its investors to determine these matters. A crowdfunding vehicle, for example, could disclose to its investors at the time of its initial offering that the vehicle will vote automatically with the majority of its security holders. Another example would be to permit a crowdfunding vehicle and its investors to determine how the crowdfunding vehicle will exercise any rights under State or Federal law, rather than providing each investor the ability to assert those rights.

These and similar modifications would provide additional flexibility for crowdfunding vehicles and the crowdfunding issuers using the vehicles to raise capital. If this greater flexibility would result in additional offerings under Regulation Crowdfunding, this could provide capital formation benefits to issuers and benefit investors by providing additional investment options. These and similar modifications could, however, result in offering terms that may be less advantageous for investors. The net benefits and costs to investors would therefore depend on the extent to which a more flexible approach would result in additional Regulation Crowdfunding offerings relative to the final rule and the terms of those offerings. However, these alternatives would go against the purpose of the crowdfunding vehicle, which is to act solely as a conduit.

As discussed above, under the final rules, natural persons investing in the crowdfunding vehicle will be excluded from the number of holders of record for purposes of Section 12(g). As an alternative, the final rules could treat all investors in the crowdfunding vehicle and investors in the crowdfunding issuer similarly for purposes of Section 12(g) by requiring all investors to be included in the number of holders of record. This alternative would increase the risk to Regulation Crowdfunding issuers of having to incur registration and Exchange Act reporting costs before they are ready to enter public markets. This alternative could make it harder for Regulation Crowdfunding issuers to raise capital from venture capitalists and other large investors in the future, compared to the final rules. This alternative would significantly decrease the utility of the crowdfunding vehicle structure to issuers, especially in offerings that attract small individual investors, compared to the final rules. However, this alternative could decrease the risk that crowdfunding issuers with a substantial number of individual investors through the crowdfunding vehicle structure would not exceed the thresholds in Section 12(g)(1) of the Exchange Act and become subject to the more extensive periodic reporting requirements under the Exchange Act, compared to the final rules. Nevertheless, the discussed effects could be mitigated for all except the largest Regulation Crowdfunding issuers, to the extent that such issuers may already avail themselves of the existing conditional exemption under Exchange Act Rule 12g–6.

We are not adopting the proposed changes to the types of securities eligible under Regulation Crowdfunding. As an alternative, we could narrow the eligible security types to those eligible under Regulation A

[711] *See supra* note 489. *See also* 2017 Treasury Report.

[712] *See also supra* notes 528, 530 and accompanying text.

[713] *See supra* note 484 and accompanying text (discussing commenters in favor of a less restrictive crowdfunding vehicle structure).

(debt, equity, and debt convertible or exchangeable into equity, including guarantees of such securities), as proposed,[714] which was supported by several commenters.[715] This alternative could strengthen investor protection in some instances, to the extent that Regulation Crowdfunding investors may lack resources to analyze novel security types with complex payoff structures.[716] This alternative could also make it easier for investors to compare different offerings under Regulation Crowdfunding and Regulation A, potentially facilitating better informed investment decisions. Such benefits would be limited to the extent that Regulation Crowdfunding disclosures already require a description of the terms of securities and the valuation method used, along with the continued application of other Regulation Crowdfunding investor protections (including other offering circular and periodic disclosure requirements, investment limits, investor education, and other crowdfunding intermediary requirements). At the same time, the alternative could impose costs on issuers by limiting the flexibility to offer the types of securities that are most compatible with their desired capital structure, financing needs, and assessment of market conditions.[717] A significant share of Regulation Crowdfunding issuers rely on security types other than debt and equity. From inception of Regulation Crowdfunding in May 2016 through December 2019,[718] we estimate that equity and debt accounted for 77 percent of the number of offerings and 74 percent of the aggregate target amount sought. The alternative could also impose costs on some investors that found securities with payoff structures other than equity or debt optimal for their investment strategy and relied on existing disclosures to accurately value such securities.

b. Excluding Delinquent Reporting Companies From Eligibility Under Regulation A

The final amendments exclude reporting companies that are not current in periodic reports required under Section 13 or 15(d) of the Exchange Act from using Regulation A, consistent with the existing exclusion of issuers that are not subject to Exchange Act reporting and that have not filed required Regulation A periodic reports for the last two years.

i. Benefits

The amendments are expected to promote investor protection and benefit investors by ensuring the availability of information about issuers required in periodic Exchange Act reports to Regulation A investors and thus enabling better informed investment decisions, which was supported by several commenters.[719] Excluding issuers that are subject to, but not current in, Exchange Act reporting obligations from eligibility under Regulation A may reduce the average level of information asymmetry about Regulation A issuers and to the extent investors did not already consider a reporting company's failure to remain current in its reporting obligations in assessing a Regulation A offering may incrementally increase investor confidence and interest in securities offered in this market.

As a caveat, the use of Regulation A by reporting companies has been modest to date,[720] which may attenuate the effects of changes to reporting company eligibility under Regulation A. By extending similar requirements regarding being current in periodic reports that presently apply in follow-on Regulation A offerings to reporting companies in initial Regulation A offerings, the amendments will increase uniformity in eligibility requirements across different categories of Regulation A issuers and may reduce potential for investor confusion.

ii. Costs

The amendments may lead to higher financing costs or reduced ability to raise the required financing under Regulation A for issuers that are not current in periodic reports required under Section 13 or 15(d) of the Exchange Act.

iii. Effects on Efficiency, Competition, and Capital Formation

The amendments may, on the margin, limit capital formation by affected issuers. At the same time, by ensuring more timely availability of information in periodic reports to prospective Regulation A investors, the amendments are expected to facilitate better informed decisions and more efficient allocation of investor capital in Regulation A offerings, and, for Regulation A securities with a secondary market, more informationally efficient security prices. In turn, if the amendments help alleviate investor concerns about adverse selection in the Regulation A market, they may promote greater investor interest in Regulation A securities, increasing aggregate capital formation in the Regulation A market. These effects on capital formation and efficiency of capital allocation may be modest if the amendments mainly result in a reallocation of delinquent reporting company issuers between Regulation A and other offering methods. We lack the ability to quantify the extent of such potential switching between offering methods as a result of the amendments.

iv. Reasonable Alternatives

As an alternative, we could have required filers to have filed in a timely manner all reports required to be filed during the prior 12 months, consistent with Form S–3 and F–3 requirements.[721] This alternative may

[714] For a discussion of the costs and benefits of other alternative security type eligibility criteria, *see* Proposing Release, at 18032.

[715] *See supra* notes 548 and 549.

[716] *See supra* note 549; U.S. Securities and Exchange Commission Office of the Investor Advocate, *Report on Activities for Fiscal Year 2016, available at https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2016.pdf;* Jamie Ostrow, *Buyer Beware: Securities Are Not Always What They Seem . . . ,* CrowdCheck Blog (Aug. 27, 2018), *available at https://www.crowdcheck.com/blog/buyer-beware-securities-are-not-always-what-they-seem;* and Joseph M. Green & John F. Coyle, *Crowdfunding and the Not-So-Safe SAFE,* 102 Va. L. Rev. 168 (2016). *See also* U.S Securities and Exchange Commission, *Investor Bulletin: Be Cautious of SAFEs in Crowdfunding, available at https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_safes;* Andrew Stephenson, *Compliance with Reg CF: When Failure Becomes Fraud,* CrowdCheck Blog (Apr. 23, 2018), *available at https://www.crowdcheck.com/blog/compliance-reg-cf-when-failure-becomes-fraud;* and FINRA, *Be Safe—5 Things You Need to Know About SAFE Securities and Crowdfunding, available at http://www.finra.org/investors/highlights/5-things-you-need-know-about-safe-securities-and-crowdfunding. But see* Jack Wroldsen, *Crowdfunding Investment Contracts,* 11 Va. L. & Bus. Rev. 543 (2017).

[717] *See supra* notes 551 and 553 (opposing the restriction on security types eligible under Regulation Crowdfunding).

[718] These estimates are based on data from Form C or the latest amendment to it, excluding withdrawn offerings. Equity is comprised of common and preferred equity (including partnership/membership units and interests). Approximately a third of Regulation Crowdfunding offerings were by issuers organized as limited liability companies or as partnerships. Debt is comprised of straight and convertible debt. Analysis of XML data from Form C does not allow a granular breakdown of debt security types. Other security types include SAFEs and securities not elsewhere classified (*e.g.,* revenue participation agreements and miscellaneous tokens. Some of the revenue share agreements remaining in the ''other security type'' category may have quasi-debt features. SAFEs are identified by keyword from ''other security type description.'' Anecdotal review suggests that some equity and debt offerings were denoted as ''other'' in the form. Where detected, such instances were re-classified manually based on the ''other security type description'' field. Examples of ''other'' are, for instance, tokens, simple agreement for future tokens (''SAFTs''), and revenue participation agreements.

[719] *See supra* note 560. *But see* J. Clarke Letter.

[720] *See supra* note 667.

[721] *See* General Instruction I.A.3 to Form S–3; and General Instruction I.A.2 to Form F–3.

benefit investors by incentivizing reporting companies that use Regulation A to provide timely periodic disclosures. However, we continue to believe that this alternative might increase costs and decrease the ability of reporting companies that have failed to timely file Exchange Act reports during the lookback period to raise follow-on Regulation A Tier 2 financing.[722] Further, such conditions are not imposed on issuers that are not subject to Exchange Act reporting obligations and that seek to offer Regulation A securities. Overall, relative to the final amendments, we do not expect the effects of this alternative to be significant given the other incentives that reporting companies have to remain current in their Exchange Act reports (*e.g.,* greater secondary market liquidity, not being delisted from an exchange or losing quote eligibility in the OTC market, future eligibility for a streamlined registration process, reduced legal liability, and a reputation for transparency).

7. Bad Actor Disqualification Provisions

The disqualification provisions of Regulation A and Regulation Crowdfunding currently differ from the disqualification provisions in Rule 506(d) in defining the lookback period for the disqualification event through the time of the filing, rather than through the time of sale. As a result, in certain circumstances, periods of time may exist during Regulation A and Regulation Crowdfunding offerings where an offering continues despite an event that would have constituted a disqualifying event at the time of filing.[723] In order to harmonize the disqualification provisions of Regulation A and Regulation Crowdfunding with those of Rule 506(d) of Regulation D, the amendments specify that a disqualifying event that occurs at any time during an offering, not only prior to the filing, would disqualify the bad actor from further involvement in the offering. However, to reduce the cost for issuers of monitoring disqualification events that may affect beneficial owners during an ongoing offering, differently from the disqualification provision of Rule 506(d), we are retaining the disqualification lookback period through the time of filing, rather than through the time of sale, for disqualification events affecting beneficial owners.

a. Benefits

By providing greater uniformity in the bad actor disqualification provisions across Rule 506(d), Rule 262(a), and Rule 503(a), the amendments may facilitate compliance for issuers, particularly issuers that undertake different types of exempt offerings over time. The amendments may further benefit issuers by reducing or even eliminating the need to undergo a potentially lengthy and costly Rule 258 suspension process in the event of a disqualifying event occurring after the filing. By preserving the existing ''through date of filing'' lookback period provision with respect to disqualifying events involving beneficial owners, the amendments are expected to give issuers leeway to raise capital while managing disqualification monitoring costs.

The amendments are expected to strengthen investor protection in cases of disqualifying events occurring after the initiation of an offering.[724] This benefit is expected to be most salient for issuers in continuous offerings, which may span multiple months and years. For example, from June 2015 (when the 2015 Regulation A amendments raising the offering limit to $50 million took effect) through December 2019, based on the analysis of Form 1–A data, we estimate that approximately 80 percent of qualified Regulation A offerings were conducted on a continuous basis. Based on the analysis of Form C data from inception of Regulation Crowdfunding through December 2019, we estimate that the average (median) duration of a Regulation Crowdfunding offering was approximately four months (three months).

b. Costs

The amended disqualification provisions may impose costs on issuers and covered persons. The amendments may lead issuers to incur additional due diligence and monitoring costs and potentially modify their policies and procedures to reduce the odds of a disqualifying event during an ongoing offering (*e.g.,* replacing personnel or avoiding the participation of covered persons, other than beneficial owners, who are subject, or might become subject, to disqualifying events after filing).[725] These additional costs of monitoring disqualification events in ongoing offerings are expected to be somewhat mitigated by the carve-out for events affecting the beneficial owner category of covered persons, which will remain subject to the existing lookback period (defined based on the date of filing). In addition, issuers might incur costs related to seeking disqualification waivers from the Commission. Alternatively, issuers that are disqualified from an ongoing Regulation A or Regulation Crowdfunding offering as a result of a disqualification event occurring after filing might experience an increased cost of capital or a reduced availability of capital. By subjecting additional issuers to the potential for disqualification in the event of a disqualification event affecting a covered person (other than a beneficial owner) after the offering has commenced, the amendments may cause some issuers to discontinue an offering, resulting in a failure to raise the required capital after some costs of preparing an offering statement or marketing an offering have already been incurred.

c. Effects on Efficiency, Competition, and Capital Formation

As discussed above, the amendments may cause some issuers whose covered persons (other than beneficial owners) become subject to a disqualification event after filing to discontinue an offering, resulting in decreased capital formation for such issuers. Additional costs of monitoring disqualification events might incrementally increase the compliance costs associated with conducting an offering under Regulation A or Regulation Crowdfunding. For Regulation Crowdfunding issuers, intermediaries might incur incrementally higher due diligence costs as well, insofar as the monitoring of disqualification triggers is not already a part of the intermediary's measures to reduce the risk of fraud.

We expect the incrementally more stringent bad actor disqualification

[722] *See* 2018 Regulation A Release, at Section IV.B.c.2.

[723] As discussed in Section II.G above, under Regulation A, if a covered person triggers one of the disqualifying events in Rule 262, the Commission is able to suspend reliance on the Regulation A exemption through Rule 258, which requires a notice and hearing opportunity for the covered person. Furthermore, if a covered person triggers one of the disqualifying events, the issuer may need to consider whether it must suspend the offering until it files a post-qualification amendment to reflect a fundamental change in the information set forth in the most recent offering statement or post-qualification amendment. Regulation Crowdfunding, which similarly measures the lookback from the time of filing of the offering statement, does not have a suspension provision, similar to Regulation A, but similarly requires an issuer to amend the offering statement to disclose material changes, additions, or updates to information that it provides to investors for offerings that have not been completed or terminated.

[724] *See supra* note 570.

[725] *See* NextSeed Letter (stating that the additional monitoring cost will prevent issuers from relying on Regulation Crowdfunding) and CrowdCheck Letter (acknowledging the potential for significant monitoring costs, especially in Regulation Crowdfunding offerings).

provisions to lead most issuers to take additional steps to monitor disqualification events after filing and restrict the participation of covered persons (other than beneficial owners) in ongoing Regulation A and Regulation Crowdfunding offerings, which could incrementally help reduce the potential for fraud in these types of offerings and thus strengthen investor protection. To the extent that more stringent bad actor disqualification requirements increase investor interest in these offerings, on the margin, overall capital formation in the Regulation A and Regulation Crowdfunding markets may increase. If the amendments to the disqualification lookback period alleviate some of the concerns about adverse selection in the Regulation A and Regulation Crowdfunding markets and thus lower the risk premium associated with the risk of fraud due to the presence of bad actors in these markets, they may also reduce the cost of capital for issuers that rely on these offering exemptions.

d. Reasonable Alternatives

As an alternative, instead of disqualifying Regulation A or Regulation Crowdfunding issuers affected by disqualifying events during an ongoing offering, we could allow such issuers to continue the offering but require the disclosure of a disqualifying event and the option for investors to cancel their investment commitments and obtain a refund of invested funds.[726] This alternative might reduce costs for some issuers affected by a disqualification trigger in the course of an ongoing offering. However, it also might result in costs to investors if investors fail to review the disclosure of a disqualifying event occurring after commencement of an offering. This alternative also would not be consistent with the disqualification provisions in Rule 506(d), which might introduce confusion for issuers and investors that participate in multiple offerings conducted pursuant to different securities exemptions.

The amendments preserve the definition of the lookback period (using the time of filing as a basis) with respect to disqualification events affecting covered persons that are beneficial owners. As an alternative, we could extend the amended lookback period definition (continuing through the time of sale) with respect to disqualification events affecting all covered persons, including beneficial owners. Compared to the final amendments, this alternative might incrementally strengthen investor protection to the extent that the types of disqualification events that affect beneficial owners after filing in continuous Regulation A or Regulation Crowdfunding offerings pose conflicts of interest or other significant risks to investors. However, compared to the proposal, this alternative might result in the exclusion of some issuers whose beneficial owners become subject to a disqualification trigger after filing from eligibility to conduct an offering. To minimize this risk, issuers might incur increased costs of monitoring potential disqualification events affecting beneficial owners under this alternative. Issuers also might incur costs to restructure their share ownership to avoid beneficial ownership of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, by individuals that may become subject to disqualifying events after filing.

## V. Paperwork Reduction Act

### *A. Summary of the Collection of Information*

Certain provisions of our rules and forms affected by the amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[727] The Commission is submitting the amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[728] The hours and costs associated with preparing and filing the forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are: [729]

- ''Regulation A (Form 1–A)'' (OMB Control No. 3235–0286);
- ''Regulation D'' (a new collection of information);
- ''Regulation D Rule 504(b)(3)—Felons and Other Bad Actors Disclosure Statement'' (OMB Control No. 3235–0746);
- ''Regulation D Rule 506(e) Felons and Other Bad Actors Disclosure Statement'' (OMB Control No. 3235–0704);
- ''Form D'' (OMB Control No. 3235–0076); and
- ''Form C'' (OMB Control No. 3235–0716).

We are combining the existing collections of information for 17 CFR 230.504(b)(3) (''Rule 504(b)(3)''), 17 CFR 230.506(e) (''Rule 506(e)''), and Form D in a new collection of information that covers all of the PRA compliance burdens for Regulation D. [730] The regulations and forms listed above were adopted under the Securities Act and set forth filing and disclosure requirements associated with exempt offerings. A description of the amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the amendments can be found in Section IV above.

### *B. Summary of the Effects on the Collections of Information*

PRA Table 1 [731] summarizes the estimated effects of the amendments on

[726] *See supra* note 573.

[727] *See* 44 U.S.C. 3501 *et seq.*

[728] 44 U.S.C. 3507(d); and 5 CFR 1320.11.

[729] As discussed in Section II.D.3 above, we are revising the confidential information standard used in our exhibit filing requirements to provide that information may be redacted if it is both not material and the type that the registrant treats as private or confidential. A number of collections of information could be affected by this amendment, including 17 CFR 249.310 (OMB Control No. 3235–0063), 17 CFR 249.308a (OMB Control No. 3235–0070), Form 8–K (OMB Control No. 3235–0060), Form S–1 (OMB Control No. 3235–0065), and 17 CFR 249.210 (OMB Control No. 3235–0064); as well as Form S–6 (OMB Control No. 3235–0184); Form N–14 (OMB Control No. 3235–0336); Form 20–F (OMB Control No. 3235–0288); 17 CFR 239.31 (OMB Control No. 3235–0258); Form N–1A (OMB Control No. 3235–0307); Form N–2 (OMB Control No. 3235–0026); Form N–3 (OMB Control No. 3235–0316); Form N–4 (OMB Control No. 3235–0318); Form N–5 (OMB Control. No. 3235–0169); Form N–6 (OMB Control No. 3235–0503); and Form N–8B–2 (OMB Control No. 3235–0186). We believe that the standard will not change the paperwork burden associated with these collections of information because the revised standard will be applied in similar circumstances and in a similar way as the current standard.

[730] Since the new collection of information for Regulation D will cover the existing compliance burdens, we are eliminating the separate collections of information for Rule 504(b)(3), Rule 506(e), and Form D.

[731] We do not believe that the amendments with respect to the use of general solicitation in exempt offerings, the integration framework, harmonization of bad actor disqualification provisions in Regulation A and Regulation Crowdfunding with those in Regulation D, excluding Exchange Act registrants that are delinquent filers from relying on Regulation A, revising the non-exclusive list of methods for verifying accredited investor status, permitting the use of crowdfunding vehicles (other than Form C disclosure when a crowdfunding vehicle is used), increasing the Rule 504 offering limit, or increasing the investment limits under Regulation Crowdfunding will substantially or materially modify the number of new filings or the burdens for those filings. In addition, as discussed in Section II.E.3 above, we are extending certain provisions of the Commission's temporary relief

Continued

the paperwork burdens associated with the affected collections of information listed in Section V.A.

the affected collections of information listed in Section V.A.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE AMENDMENTS

| Final amendments and effects | Affected collections of information | Estimated net effect |
|---|---|---|
| Regulation D: | | |
| • Provide a new collection of information to encompass disclosure required by Regulation D, including the following:<br>○ Financial statement and non-financial statement information and delivery requirements, including the proposed requirement to provide the purchaser with generic solicitation of interest materials (Rule 502(b)); and<br>○ Felon and bad actor disclosure requirements (Rules 504(b)(3)) and 506(e). | • Regulation D (including Form D, Rule 502(b), Rule 504(b)(3), and Rule 506(e)). | • 5 hour compliance burden per response to the new collection of information. |
| Regulation A: | | |
| • Requiring the filing of generic solicitation of interest materials. Estimated burden increase: 0.5 hours per form.<br>• Simplifying compliance with Regulation A by conforming certain requirements with similar requirements for registered offerings (including permitting the redaction of confidential information in certain exhibits; permitting incorporation by reference of financial statements in the offering circular; and simplifying the requirements for making non-public documents available to the public on EDGAR). Estimated burden decrease: 2.5 hours per form.<br>• We estimate that the increase in offering limit would increase the number of filings on Form 1–A by 25. | • Form 1–A | • 2 hour net decrease in compliance burden per form.<br>• 25 additional responses. |
| Regulation Crowdfunding: | | |
| • Requiring the filing of generic solicitation of interest materials and solicitations of interest under Rule 206; and requiring disclosure about a co-issuer on Form C when an SPV is used. Estimated burden increase: 1 hour per form.<br>• We believe that increasing the offering limits under Regulation Crowdfunding would not affect the burden estimate per form, but we estimate that the increase in the offering limit would increase the number of filings on Form C by 55. | • Form C | • 1 hour net increase in compliance burden per form.<br>• 55 additional responses. |

Although we estimate that the amendments to Regulation D that we are adopting will not have a net effect on the current burdens relating to Regulation D, we are changing how we allocate those burdens to an information collection for PRA purposes. In particular, as discussed above, we are establishing a new, single collection of information for Regulation D to encompass all of the associated paperwork burdens. The estimates for this new collection of information include the existing burdens associated with Form D, Rule 504(b)(3), and Rule 506(e), as well as other burdens resulting from the implementation of Regulation D. As a result, the new collection of information for Regulation D reflects an increase from the aggregated burdens for the existing Form D, Rule 504(b)(3) and Rule 506(e) collections of information. See PRA Table 6 below.

Although it is not possible to predict with certainty the increase in the number of Regulation A and Regulation Crowdfunding offerings following the amendments, we estimate for purposes of the PRA an approximate 20 percent increase in the number of new Regulation A offerings resulting in 25 additional respondents, and an approximate 10 percent increase in the number of new Regulation Crowdfunding offerings resulting in 55 additional respondents.[732] It is possible that the increase in the offering limit may also increase the number of Form 1–K, 17 CFR 239.92 (Form 1–SA), 17 CFR 239.93 (Form 1–U), and Form 1–Z filings. However, due to uncertainties regarding whether any increase in Tier 2 offerings would be conducted by Exchange Act reporting companies, we are not increasing in the number of responses for the associated collections of information at this time.

*C. Incremental and Aggregate Burden and Cost Estimates*

Below we estimate the incremental and aggregate changes in paperwork burden as a result of the amendments. These estimates represent the average burden for all issuers, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the nature of their business. We believe that the amendments will change the frequency of responses to the existing collections of information and the burden per response.

The burden estimates were calculated by adding the estimated additional responses to the existing estimated responses and multiplying the estimated number of responses by the estimated average amount of time it takes an issuer to prepare and review disclosure required under the amendments. For purposes of the PRA, the burden is to be allocated between internal burden

from certain financial information requirements of Regulation Crowdfunding. The temporary relief also requires issuers relying on the temporary relief to provide certain additional disclosures, the burden of which is expected to be minimal. As discussed in the Temporary Amendments Adopting Release, we believe that the net change in paperwork burden as a result of the temporary relief will be minimal and are not adjusting the burden or cost estimates for Form C.

[732] We derived these estimates based on 125 Regulation A offerings filed in 2019 and 552 Regulation Crowdfunding offerings conducted in the second full year since effectiveness of those rules.

hours and outside professional costs. PRA Table 2 [733] sets forth the percentage estimates we typically use for the burden allocation for each collection of information and the estimated burden allocation for the new collection of information for Regulation D. We also estimate that the average cost of retaining outside professionals is $400 per hour.[734]

PRA TABLE 2—ESTIMATED BURDEN ALLOCATION FOR SPECIFIED COLLECTIONS OF INFORMATION

| Collection of information | Internal (percent) | Outside professionals (percent) |
|---|---|---|
| Forms 1–A, C | 75 | 25 |
| Regulation D | 25 | 75 |

PRA Table 3 [735] below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the amendments' estimated effect on the paperwork burden per response. The number of estimated affected responses shown in PRA Table 3 is based on the number of responses in the Commission's current OMB PRA filing inventory plus the number of additional responses we estimate as a result of the amendments (25 responses for Form 1–A, and 55 responses for Form C).[736]

PRA TABLE 3—CALCULATION OF THE INCREMENTAL CHANGE IN BURDEN ESTIMATES OF CURRENT RESPONSES RESULTING FROM THE AMENDMENTS

| Collection of information | Number of estimated affected responses (A) | Burden hour affect per current affected response (B) | Change in burden hours for current affected responses (C) = (A) × (B) | Change in company hours for current affected responses (D) = (C) × 0.75 | Change in professional hours for current affected responses (E) = (C) × 0.25 | Change in professional costs for current affected responses (F) = (E) × $400 |
|---|---|---|---|---|---|---|
| Form 1–A | 204 | (2) | (408) | (306) | (102) | ($40,800) |
| Form C | 5,907 | 1 | 5907 | 4,430 | 1,477 | $590,800 |

The table below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the amendments' estimated effect on the number of responses.

PRA TABLE 4—CALCULATION OF THE CHANGE IN BURDEN ESTIMATES AS A RESULT OF CHANGE IN NUMBER OF RESPONSES RESULTING FROM THE AMENDMENTS

| Collection of information | Current burden | | | Program change | | |
|---|---|---|---|---|---|---|
| | Current annual responses (A) | Current burden hours (B) | Current cost burden (C) | Estimated additional responses (D) | Change in company hours (E) = ((B)/(A)) × (D) | Change in professional costs (F) = ((C)/(A)) × (D) |
| Form 1–A | 179 | 98,396 | $13,111,912 | 25 | 13,742 | $1,932,390 |
| Form C | 5,852 | 214,928 | 28,500,000 | 55 | 2,020 | 267,857 |

The following tables summarize the requested paperwork burden, including the estimated total reporting burdens and costs, under the amendments. To estimate the new burdens for Form 1–A and Form C resulting from the amendments, we add the estimated burden and cost changes in PRA Table 3 and PRA Table 4 and have incorporated them into PRA Table 5. For example, Column (E) of PRA Table 5 represents the sum of column (D) in PRA Table 3 and column (E) in PRA Table 4.

PRA TABLE 5—REQUESTED PAPERWORK BURDEN UNDER THE AMENDMENTS

| Collection of information | Current burden | | | Program change | | | Revised burden | | |
|---|---|---|---|---|---|---|---|---|---|
| | Current annual responses (A) | Current burden hours (B) | Current cost burden (C) | Number of affected responses (D) | Change in company hours (E) | Change in professional costs (F) | Annual responses (G) | Burden hours (H) = (B) + (E) | Cost burden (I) = (C) + (F) |
| Form 1–A | 179 | 98,396 | $13,111,912 | 204 | 13,436 | $1,891,590 | 204 | 111,832 | $15,003,502 |
| Form C | 5,852 | 214,928 | 28,500,000 | 5,907 | 6,450 | 858,657 | 5,907 | 221,378 | 29,358,657 |

PRA Table 6 summarizes the requested paperwork burden for the new Regulation D collection of information, including the estimated total reporting burdens and costs, under the amendments. The estimates for this

733 Here and in the tables below, we derived current estimated burdens and burden allocations for Regulation D using the estimates for Form D, Rule 504(b)(3), and Rule 506(e).

734 We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

735 The estimated reductions in Columns (C), (D), and (E) are rounded to the nearest whole number.

736 The OMB PRA filing inventory represents a three-year average.

new collection of information include the existing burden estimated for Form D, Rule 504(b)(3), and Rule 506(e), as well as other burdens resulting from the implementation of Regulation D. For purposes of the PRA, we estimate that the new Regulation D collection of information will entail a 5 hour compliance burden per response with 26,000 annual responses (derived from the current 26,000 annual responses for Form D).[737]

PRA TABLE 6—REQUESTED PAPERWORK BURDEN FOR THE NEW COLLECTION OF INFORMATION

| Collection of information | Requested paperwork burden | | |
|---|---|---|---|
| | Annual responses<br>(A) | Burden hours<br>(A) × 5 × (0.25) | Cost burden<br>(A) × 5 × (0.75) × $400 |
| Regulation D | 26,000 | 32,500 | $39,000,000 |

## VI. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA'') [738] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act,[739] to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Act Analysis (''FRFA'') in accordance with Section 604 of the RFA.[740] An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Proposing Release. This FRFA relates to the amendments or additions to the rules and forms described in Section II above.

### *A. Need for, and Objectives of, the Final Amendments*

The amendments to the exempt offering framework are intended to close gaps and reduce complexities that may impede access to capital for issuers and thereby limit investment opportunities, while preserving or enhancing important investor protections. The need for, and objectives of, the amendments are discussed in more detail in Sections II and IV above.

### *B. Significant Issues Raised by Public Comment*

In the Proposing Release, we requested comment on all aspects of the IRFA, including how the proposed amendments could further lower the burden on small entities, the number of small entities that would be affected by the proposed amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive any comments specifically addressing the IRFA. However, we received a number of comments on the proposed amendments generally,[741] and have considered these comments in developing the FRFA.

### *C. Small Entities Subject to the Final Amendments*

The final amendments will affect issuers that are small entities. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [742] For purposes of the RFA, under 17 CFR 230.157, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities not exceeding $5 million. Under 17 CFR 270.0–10, an investment company, including a business development company, is considered to be a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.

The amendments are expected to promote capital formation through exempt offerings and create additional flexibility for issuers. Because the amendments will affect all issuers conducting offerings exempt from registration under the Securities Act, which includes companies not subject to ongoing reporting obligations under the Exchange Act, Regulation A, or Regulation Crowdfunding, it is difficult to estimate the number of issuers that qualify as small entities that would be eligible to rely on the amendments.[743]

### *D. Projected Reporting, Recordkeeping and Other Compliance Requirements*

As noted above, the amendments to the exempt offering framework are intended to close gaps and reduce complexities that may impede access to capital for issuers. The final amendments apply to small entities to the same extent as other entities, irrespective of size, and we expect that the nature of any associated benefits and costs to be similar. Accordingly, we refer to the discussion of the economic effects on all affected parties, including small entities, in Section IV above.[744] Consistent with that discussion, we anticipate that the economic benefits and costs likely could vary widely among small entities based on a number of factors, such as the nature and conduct of their businesses, including their capital raising decisions, which makes it difficult to project the economic impact on small entities with precision. Compliance with the final amendments may require the use of professional skills, including accounting and legal skills.

Many of the final amendments are expected to be of greatest benefit to the

[737] We expect the amendments providing an additional method to verify an investor's accredited investor status and increasing the offering limit under Rule 504 could lead to additional Rule 506(c) or Rule 504 offerings. However, as discussed in Section IV above, some of these offerings may be conducted by issuers switching from other Regulation D exemptions. Additionally, some of the issuers conducting the additional Regulation A or Regulation Crowdfunding offerings may be switching from Regulation D offerings. Because it is difficult to predict the net impact of the proposed amendments on the overall number of Regulation D responses, we are not adjusting the current estimate of 26,000 responses at this time.

[738] 5 U.S.C. 601 *et seq.*

[739] 5 U.S.C. 553.

[740] 5 U.S.C. 604.

[741] *See* Section II above.

[742] 5 U.S.C. 601(6).

[743] In particular, as discussed in Section IV above, due to the large number of offerings in reliance on the offering exemptions in Regulation D relative to other offering exemptions affected by the amendments, most of which are conducted by issuers that are not subject to Exchange Act, Regulation A, or Regulation Crowdfunding reporting requirements, Regulation D issuers are likely to continue to comprise a significant share of the small entities affected by the amendments. However, we do not have information on the assets of such issuers, which is required for an estimate of small entities for purposes of the RFA definition, because this information is not required by Form D and because such issuers may not be subject to ongoing reporting requirements.

[744] We also discuss the estimated compliance burden associated with the proposed amendments for purposes of the PRA in Section V above.

capital raising efforts of small entities that may lack an existing network of angel and VC funders and appear to face the greatest constraints in obtaining external financing. Examples of this include: Amendments to integration principles that are intended to facilitate multiple offerings, including offerings with general solicitation; amendments expanding investment limits and issuer eligibility under Regulation Crowdfunding; amendments tailoring the requirements for non-accredited investor sales under Rule 506(b); and amendments expanding the offering limits for Regulation Crowdfunding, Rule 504, and Regulation A. In addition, certain of the rules that we are amending, such as Regulation Crowdfunding and Rule 504, have eligibility requirements and other restrictions that increase the likelihood that such rules will be relied on by small businesses that are seeking to raise relatively small amounts of capital without incurring the costs of conducting a registered offering.

Although many of the final amendments are expected to be of greatest benefit to the capital raising efforts of small entities, we acknowledge that any costs of the amendments borne by the affected entities, such as those related to compliance with the amendments, or the implementation or restructuring of internal systems needed to adjust to the amendments, could have a proportionally greater effect on small entities, as they may be less able to bear such costs relative to larger entities. For example, the final amendments to the bad actor disqualification provisions [745] could cause some small entities to incur additional due diligence costs or modify their offerings to reduce the possibility of a disqualifying event (*e.g.,* replacing personnel or avoiding the participation of covered persons, other than beneficial owners, who are subject, or might become subject, to disqualifying events after filing). Similarly, small entities electing to use the generic or Regulation Crowdfunding testing-the-waters provisions [746] might incur costs, such as those related to preparing the testing-the-waters materials. These potential costs would be borne equally by all issuers, regardless of size.

### *F. Agency Action To Minimize Effect on Small Entities*

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Accordingly, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The final amendments generally simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation, including for offering exemptions used by and designed primarily for small entities. Thus, we do not think it is necessary to exempt small entities from all or part of these requirements. As discussed in more detail in Sections II and IV above, commenters offered, and we considered, various alternatives to the final amendments.

Several of the offering exemptions that we are amending (*e.g.,* Regulation A and Regulation Crowdfunding) already contain different compliance or reporting requirements that take into account the resources of the smaller entities that are likely to use these exemptions. In addition, certain amendments clarify, consolidate, or simplify compliance and reporting requirements under our rules, which should benefit small entities in particular. For example, we are amending the financial statement information requirements in Regulation D to align them with the disclosure requirements in Regulation A. We are also amending Regulation A to simplify compliance, such as by providing for the redaction of confidential information in certain exhibits, harmonizing the procedures for publicly filing draft Regulation A offering statements with those for draft Securities Act registration statements, and permitting issuers to incorporate previously-filed financial statements by reference into a Regulation A offering statement. Finally, we are amending Regulation Crowdfunding and rules under the Investment Company Act to help reduce administrative complexities that some issuers may encounter under Regulation Crowdfunding.

With respect to using performance rather than design standards, we note that several of the amendments concern rules that use principles-based approaches that are more akin to performance standards. For example, we are adopting a general principle of integration that requires an issuer to consider the particular facts and circumstances of each offering, including whether the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or that an exemption from registration is available for the particular offering.

## VII. Statutory Authority

The final amendments contained in this release are being adopted under the authority set forth in the Securities Act (15 U.S.C. 77a *et seq.*), particularly, Sections 3, 4, 4A, 19, and 28 thereof; the Exchange Act (15 U.S.C. 78a *et seq.*), particularly, Sections 3, 10(b), 12, 15, 17, 23(a), and 36 thereof; the Investment Company Act (15 U.S.C. 80a-1 *et seq.*), particularly Sections 6(c), 8, 24, 30, 38, and 45; and Pub. L. 112–106, secs. 301–305, 126 Stat. 306 (2012).

## List of Subjects

*17 CFR Part 227*

Crowdfunding, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 229*

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 230*

Advertising, Administrative practice and procedure, Confidential business information, Investment companies, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 239*

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 240*

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 249*

Administrative practice and procedure, Brokers, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 270*

Administrative practice and procedure, Confidential business information, Fraud, Investment companies, Life insurance, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 274*

Administrative practice and procedure, Electronic funds transfer, Investment companies, Reporting and recordkeeping requirements, Securities.

[745] *See supra* Section II.G.

[746] *See supra* Section II.B.

**Text of Rule Amendments**

In accordance with the foregoing, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

## PART 227—REGULATION CROWDFUNDING, GENERAL RULES AND REGULATIONS

■ 1. The authority citation for part 227 continues to read as follows:

**Authority:** 15 U.S.C. 77d, 77d-1, 77s, 77z-3, 78c, 78*o,* 78q, 78w, 78mm, and Pub. L. 112–106, secs. 301–305, 126 Stat. 306 (2012).

■ 2. Effective January 14, 2021, to March 1, 2023, amend § 227.201 by revising paragraph (b)(7) to read as follows:

### § 227.100 Crowdfunding exemption and requirements.

* * * * *

(b) * * *

(7) Seeks to rely on § 227.201(aa) to conduct an offering on an expedited basis due to circumstances relating to coronavirus disease 2019 (COVID–19), where such offering is initiated between May 4, 2020, and February 28, 2021, or seeks to rely on § 227.201(bb), where such offering is initiated between March 1, 2021, and August 28, 2022, and:

(i) Was organized and had operations less than six months prior to the commencement of the offering; or

(ii) Sold securities in reliance on section 4(a)(6) of the Securities Act and has not complied with the requirements in section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) and the related requirements in this part.

* * * * *

■ 3. Effective March 15, 2021, further amend § 227.100 by:

■ a. Revising paragraphs (a)(1), (a)(2) introductory text, and paragraphs (a)(2)(i) and (ii);

■ b. Revising paragraph (d); and

■ c. Adding paragraph (e).

The revisions and additions read as follows:

### § 227.100 Crowdfunding exemption and requirements.

(a) * * *

(1) The aggregate amount of securities sold to all investors by the issuer in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) during the 12-month period preceding the date of such offer or sale, including the securities offered in such transaction, shall not exceed $5,000,000;

(2) Where the purchaser is not an accredited investor (as defined in Rule 501 (§ 230.501 of this chapter)), the aggregate amount of securities sold to such an investor across all issuers in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) during the 12-month period preceding the date of such transaction, including the securities sold to such investor in such transaction, shall not exceed:

(i) The greater of $2,200, or 5 percent of the greater of the investor's annual income or net worth, if either the investor's annual income or net worth is less than $107,000; or

(ii) Ten percent of the greater of the investor's annual income or net worth, not to exceed an amount sold of $107,000, if both the investor's annual income and net worth are equal to or more than $107,000;

* * * * *

(d) *Investor.* For purposes of this part, investor means any investor or any potential investor, as the context requires. A crowdfunding vehicle (as defined in § 270.3a–9 of this chapter) is not considered an investor for the purposes of this part.

(e) *Integration with other offerings.* To determine whether offers and sales should be integrated, see § 230.152 of this chapter.

■ 4. Effective January 14, 2021, to September 1, 2021, amend § 227.201 by:

■ a. Redesignating paragraph (z) as paragraph (aa) and revising it; and

■ b. Adding new reserved paragraph (z).

The revision reads as follows:

### § 227.201 Disclosure requirements.

* * * * *

(aa) Between May 4, 2020, and February 28, 2021, an issuer may initiate an offering intended to be conducted on an expedited basis due to circumstances relating to COVID–19. Such issuer:

(1) Must prominently provide the following information:

(i) A statement that the offering is being conducted on an expedited basis due to circumstances relating to COVID–19 and pursuant to the Commission's temporary regulatory COVID–19 relief set out in this part;

(ii) If the issuer is relying on paragraph (aa)(2) of this section to omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1), a statement that:

(A) The financial information that has been omitted is not currently available and will be provided by an amendment to the offering materials;

(B) The investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and

(C) No investment commitments will be accepted until after such financial information has been provided; and

(iii) If the issuer is relying on paragraph (aa)(3) of this section to provide financial statement information required by paragraph (t)(1) of this section, a statement that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer; and

(iv) In lieu of the information required by paragraph (j) of this section, a description of the process to complete the transaction or cancel an investment commitment, including a statement that:

(A) Investors may cancel an investment commitment for any reason within 48 hours from the time of his or her investment commitment (or such later period as the issuer may designate);

(B) The intermediary will notify investors when the target offering amount has been met;

(C) The issuer may close the offering at any time after it has aggregate investment commitments for which the right to cancel pursuant to paragraph (aa)(1)(iv)(A) of this section has lapsed that equal or exceed the target offering amount (absent a material change that would require an extension of the offering and reconfirmation of the investment commitment); and

(D) If an investor does not cancel an investment commitment within 48 hours from the time of the initial investment commitment, the funds will be released to the issuer upon closing of the offering and the investor will receive securities in exchange for his or her investment;

(2) May omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1) if such information is unavailable at the time of filing, but the intermediary may not accept any investment commitments until complete information required under paragraph (t) of this section is provided through an amendment to the Form C in accordance with § 227.203(a)(2); and

(3) May comply with the requirements of paragraph (t)(1) of this section instead of paragraph (t)(2) of this section for an offering or offerings that, together with all other amounts sold under section 4(a)(6) of the Securities Act (15 U.S.C.

77d(a)(6)) within the preceding 12-month period, have, in the aggregate, a target offering amount of more than $107,000, but not more than $250,000, and financial statements of the issuer that have either been reviewed or audited by a public accountant that is independent of the issuer are unavailable at the time of filing.

* * * * *

■ 5. Effective January 14, 2021, to March 1, 2023, further amend § 227.201 by adding paragraph (bb) to read as follows:

**§ 227.201 Disclosure requirements.**

* * * * *

(bb) Between March 1, 2021, and August 28, 2022, an issuer may comply with the requirements of paragraph (t)(1) of this section instead of paragraph (t)(2) of this section for an offering or offerings that, together with all other amounts sold under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) within the preceding 12-month period, have, in the aggregate, a target offering amount of more than $107,000, but not more than $250,000, and financial statements of the issuer that have either been reviewed or audited by a public accountant that is independent of the issuer are unavailable at the time of filing. Such issuer must prominently provide a statement that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer.

* * * * *

■ 6. Effective March 15, 2021, further amend § 227.201 by:

■ a. Revising the introductory text;

■ b. Removing the word ''and'' from the end of paragraph (x);

■ c. Removing the period from the end of paragraph (y) and adding in its place ''; and'';

■ d. Removing the ''*Instruction to § 227.201*'' from where it appears after paragraph (y) and adding it to the end of the section; and

■ e. Adding paragraph (z).

The revisions and addition read as follows:

**§ 227.201 Disclosure requirements.**

An issuer offering or selling securities in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and in accordance with section 4A of the Securities Act (15 U.S.C. 77d–1) and this part, and any co-issuer jointly offering or selling securities with such an issuer in reliance on the same, must file with the Commission and provide to investors and the relevant intermediary the following information:

* * * * *

(z) Any written communication or broadcast script provided in accordance with § 227.206 or, if within 30 days of the initial filing of the offering statement, § 230.241 of this chapter.

(aa) Between May 4, 2020, and February 28, 2021, an issuer may initiate an offering intended to be conducted on an expedited basis due to circumstances relating to COVID–19. Such issuer:

(1) Must prominently provide the following information:

(i) A statement that the offering is being conducted on an expedited basis due to circumstances relating to COVID–19 and pursuant to the Commission's temporary regulatory COVID–19 relief set out in this part;

(ii) If the issuer is relying on paragraph (aa)(2) of this section to omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1), a statement that:

(A) The financial information that has been omitted is not currently available and will be provided by an amendment to the offering materials;

(B) The investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and

(C) No investment commitments will be accepted until after such financial information has been provided; and

(iii) If the issuer is relying on paragraph (aa)(3) of this section to provide financial statement information required by paragraph (t)(1) of this section, a statement that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer; and

(iv) In lieu of the information required by paragraph (j) of this section, a description of the process to complete the transaction or cancel an investment commitment, including a statement that:

(A) Investors may cancel an investment commitment for any reason within 48 hours from the time of his or her investment commitment (or such later period as the issuer may designate);

(B) The intermediary will notify investors when the target offering amount has been met;

(C) The issuer may close the offering at any time after it has aggregate investment commitments for which the right to cancel pursuant to paragraph (aa)(1)(iv)(A) of this section has lapsed that equal or exceed the target offering amount (absent a material change that would require an extension of the offering and reconfirmation of the investment commitment); and

(D) If an investor does not cancel an investment commitment within 48 hours from the time of the initial investment commitment, the funds will be released to the issuer upon closing of the offering and the investor will receive securities in exchange for his or her investment;

(2) May omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1) if such information is unavailable at the time of filing, but the intermediary may not accept any investment commitments until complete information required under paragraph (t) of this section is provided through an amendment to the Form C in accordance with § 227.203(a)(2); and

(3) May comply with the requirements of paragraph (t)(1) of this section instead of paragraph (t)(2) of this section for an offering or offerings that, together with all other amounts sold under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) within the preceding 12-month period, have, in the aggregate, a target offering amount of more than $107,000, but not more than $250,000, and financial statements of the issuer that have either been reviewed or audited by a public accountant that is independent of the issuer are unavailable at the time of filing.

* * * * *

■ 7. Effective March 15, 2021, amend § 227.203 by revising paragraph (a)(1) to read as follows:

**§ 227.203 Filing requirements and form.**

(a) * * *

(1) *Offering statement.* Except as allowed by § 227.206, an issuer offering or selling securities in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and in accordance with section 4A of the Securities Act (15 U.S.C. 77d–1) and this part, and any co-issuer jointly offering or selling securities with such an issuer in reliance on the same, must file with the Commission and provide to investors and the relevant intermediary a Form C: Offering Statement (Form C) (§ 239.900

of this chapter) prior to the commencement of the offering of securities. An issuer that is both offering or selling securities with a co-issuer and separately offering or selling securities on its own must file with the Commission and provide to investors and the relevant intermediary a separate Form C for such offering. Every Form C must include the information required by § 227.201.

* * * * *

■ 8. Effective March 15, 2021, amend § 227.204 by:

■ a. Revising paragraphs (a) and (b)(1);

■ b. Adding paragraph (d); and

■ c. Redesignating the Instruction to § 227.204 as paragraph (e) and revising it.

The revisions and addition read as follows:

**§ 227.204 Advertising.**

(a)(1) An issuer may not, directly or indirectly, advertise the terms of an offering made in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)), except for oral or written communications that meet the requirements of paragraph (b) of this section or of § 227.206.

(2) *Instruction to paragraph (a).* For purposes of this paragraph (a), issuer includes persons acting on behalf of the issuer.

(b) * * *

(1) A statement that the issuer is conducting an offering pursuant to section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)), the name of the intermediary through which the offering is being conducted, and information (including a link in any written communications) directing the potential investor to the intermediary's platform;

* * * * *

(d) Notwithstanding the requirement that a notice advertising any of the terms of an issuer's offering made in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) include no more than the information specified in paragraph (b) of this section, an issuer conducting an offering in reliance on Regulation Crowdfunding concurrently with another offering that discloses the terms of the Regulation Crowdfunding offering in the disclosure document for the other offering will not be deemed to have exceeded these disclosure limitations if the disclosure document for the other offering satisfies all the other requirements of this section. If the disclosure document for the other offering is filed on the Commission's Electronic Data Gathering and Retrieval System (EDGAR), the link required by paragraph (b)(1) may not be a live hyperlink.

(e) *Instruction to § 227.204.* For purposes of this section, terms of the offering means the amount of securities offered, the nature of the securities, the price of the securities, the closing date of the offering period, the planned use of proceeds and the issuer's progress toward meeting its funding target.

■ 9. Effective March 15, 2021, add § 227.206 to subpart B to read as follows:

**§ 227.206 Solicitations of interest and other communications.**

(a) *Solicitation of interest.* At any time before the filing of an offering statement, an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated securities offering. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the Federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the offering statement is filed.

(b) *Conditions.* The communications must:

(1) State that no money or other consideration is being solicited, and if sent in response, will not be accepted;

(2) State that no offer to buy the securities can be accepted and no part of the purchase price can be received until the offering statement is filed and only through an intermediary's platform; and

(3) State that a person's indication of interest involves no obligation or commitment of any kind.

(c) *Indications of interest.* Any written communication under this section may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. This issuer may require the name, address, telephone number, and/or email address in any response form included pursuant to this paragraph (c).

■ 10. Effective January 14, 2021, to March 1, 2023, add paragraph (e) to § 227.301 to read as follows:

**§ 227.301 Measures to reduce risk of fraud.**

* * * * *

(e) Have a reasonable basis for believing that an issuer seeking to initiate an offering of securities between March 1, 2021, and August 28, 2022, in reliance on section 4(a)(6) of the Securities Act through the intermediary's platform that is relying on § 227.201(bb) and that has previously sold securities in reliance on section 4(a)(6) of the Securities Act has complied with the requirements in section 4A(b) of the Act (15 U.S.C. 77d1(b)) and the related requirements in this part. In satisfying the requirement in this paragraph (e), an intermediary may rely on the representations of the issuer concerning compliance with the requirements in this paragraph (e) unless the intermediary has reason to question the reliability of those representations.

**§ 227.303 [Amended]**

■ 11. Effective January 14, 2021, until September 1, 2021, amend § 227.303 by:

■ a. Removing "§ 227.201(z)(1)" from paragraph (g)(1)(i) and adding in its place "§ 227.201(aa)(1)"; and

■ b. Removing "§ 227.201(z)(3)" from paragraph (g)(1)(iii) and adding in its place "§ 227.201(aa)(3)".

**§ 227.304 [Amended]**

■ 12. Effective January 14, 2021, until September 1, 2021, amend § 227.304 by removing "§ 227.201(z)" from paragraph (e)(2)(i) and adding in its place "§ 227.201(aa)".

■ 13. Effective March 15, 2021, amend § 227.503 by revising paragraphs (a), adding an Instruction to paragraph (a), and revising paragraph (b)(3) to read as follows:

**§ 227.503 Disqualification provisions.**

(a) *Disqualification events.* No exemption under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, officer, general partner or managing member of the issuer; any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; or any general partner, director, officer or managing member of any such solicitor:

(1) Has been convicted, within 10 years before the filing of the offering statement or such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser, funding portal or paid solicitor of purchasers of securities;

(2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) or such sale that, at the time of such filing or sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser, funding portal or paid solicitor of purchasers of securities;

(3) Is subject to a final order of a State securities commission (or an agency or officer of a State performing like functions); a State authority that supervises or examines banks, savings associations or credit unions; a State insurance commission (or an agency or officer of a state performing like functions); an appropriate Federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(i) At the time of the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) or such sale, bars the person from:

(A) Association with an entity regulated by such commission, authority, agency or officer;

(B) Engaging in the business of securities, insurance or banking; or

(C) Engaging in savings association or credit union activities; or

(ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative or deceptive conduct entered within ten years before such filing of the offering statement or such sale;

(iii) *Instruction to paragraph (a)(3). Final order* shall mean a written directive or declaratory statement issued by a Federal or State agency, described in this paragraph (a)(3), under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that Federal or State agency.

(4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Exchange Act (15 U.S.C. 78*o*(b) or 78*o*–4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e) or (f)) that, at the time of the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) or such sale:

(i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer, investment adviser or funding portal;

(ii) Places limitations on the activities, functions or operations of such person; or

(iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(5) Is subject to any order of the Commission entered within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) or such sale that, at the time of such filing or sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(i) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act (15 U.S.C. 77q(a)(1)), section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) and 17 CFR 240.10b–5, section 15(c)(1) of the Exchange Act (15 U.S.C. 78*o*(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)) or any other rule or regulation thereunder; or

(ii) Section 5 of the Securities Act (15 U.S.C. 77e);

(6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A (17 CFR 230.251 through 230.263) offering statement filed with the Commission that, within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) or such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing or sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) or such sale, or is, at the time of such filing or sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

*Instruction to paragraph (a):* With respect to any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, the issuer is required to determine whether a disqualifying event has occurred only as of the time of filing of the offering statement and not from the time of such sale.

(b) * * *

(3) If, before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d–1(b)) or such sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (a) of this section should not arise as a consequence of such order, judgment or decree; or

* * * * *

■ 14. Effective March 15, 2021, add § 227.504 to read as follows:

**§ 227.504 Definition of "qualified purchaser".**

For purposes of section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to an offering under §§ 227.100 through 227.504 (Regulation Crowdfunding).

## PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 15. The authority citation for part 229 continues to read in part as follows:

**Authority:** 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j–3, 78*l*, 78m, 78n, 78n–1, 78*o*, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11 and 7201 *et seq.;* 18 U.S.C. 1350; sec. 953(b), Pub. L. 111–203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012).

* * * * *

■ 16. Effective March 15, 2021, amend § 229.601 by revising paragraph (b)(2)(ii) and paragraph (b)(10)(iv), to read as follows:

**§ 229.601 (Item 601) Exhibits.**

* * * * *

(b) * * *

(2) * * *

(ii) The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (b)(2) of this section if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this paragraph (b)(2)(ii) pursuant to § 200.83 of this chapter while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in § 230.418 or 240.12b–4 of this chapter.

* * * * *

(10) * * *

(iv) The registrant may redact specific provisions or terms of exhibits required to be filed by this paragraph (b)(10) if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this paragraph (b)(10)(iv) pursuant to § 200.83 of this chapter while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in § 230.418 or 240.12b–4 of this chapter.

* * * * *

## PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 17. The authority citation for part 230 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78*o,* 78*o*–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

Section 230.502 is also issued under 15 U.S.C. 80a–8, 80a–29, 80a–30.

* * * * *

■ 18. Effective March 15, 2021, amend § 230.147 by revising paragraph (g), removing the Instruction to paragraph (g), and removing paragraph (h).

The revisions read as follows:

**§ 230.147 Intrastate offers and sales.**

* * * * *

(g) *Integration with other offerings.* To determine whether offers and sales should be integrated, refer to § 230.152.

■ 19. Effective March 15, 2021, amend § 230.147A by revising paragraph (g), removing the Instruction to paragraph (g), and removing paragraph (h).

The revisions read as follows:

**§ 230.147A Intrastate sale exemption.**

* * * * *

(g) *Integration with other offerings.* To determine whether offers and sales should be integrated, refer to § 230.152.

■ 20. Effective March 15, 2021, add § 230.148 to read as follows:

**§ 230.148 Exemption from general solicitation or general advertising.**

(a) A communication will not be deemed to constitute general solicitation or general advertising if made in connection with a seminar or meeting in which more than one issuer participates that is sponsored by a college, university, or other institution of higher education, State or local government or instrumentality thereof, nonprofit organization, or angel investor group, incubator, or accelerator, provided that:

(1) No advertising for the seminar or meeting references a specific offering of securities by the issuer;

(2) The sponsor of the seminar or meeting does not:

(i) Make investment recommendations or provide investment advice to attendees of the event;

(ii) Engage in any investment negotiations between the issuer and investors attending the event;

(iii) Charge attendees of the event any fees, other than reasonable administrative fees;

(iv) Receive any compensation for making introductions between event attendees and issuers or for investment negotiations between such parties; and

(v) Receive any compensation with respect to the event that would require registration of the sponsor as a broker or a dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*);

(3) The type of information regarding an offering of securities by the issuer that is communicated or distributed by or on behalf of the issuer in connection with the event is limited to a notification that the issuer is in the process of offering or planning to offer securities, the type and amount of securities being offered, the intended use of proceeds of the offering, and the unsubscribed amount in an offering; and

(4) If the event allows attendees to participate virtually, rather than in person, online participation in the event is limited to:

(i) Individuals who are members of, or otherwise associated with the sponsor organization;

(ii) Individuals that the sponsor reasonably believes are accredited investors; or

(iii) Individuals who have been invited to the event by the sponsor based on industry or investment-related experience reasonably selected by the sponsor in good faith and disclosed in the public communications about the event.

(5) For purposes of this paragraph, the term ''angel investor group'' means a group of accredited investors that holds regular meetings and has defined processes and procedures for making investment decisions, either individually or among the membership of the group as a whole, and is neither associated nor affiliated with brokers, dealers, or investment advisers.

(b) [Reserved]

■ 21. Effective March 15, 2021, revise § 230.152 to read as follows:

**§ 230.152 Integration.**

This section provides a general principle of integration and non-exclusive safe harbors from integration of registered and exempt offerings. Because of the objectives of this section and the policies underlying the Act, the provisions of this section will not have the effect of avoiding integration for any transaction or series of transactions that, although in technical compliance with the section, is part of a plan or scheme to evade the registration requirements of the Act.

(a) *General principle of integration.* If the safe harbors in paragraph (b) of this section do not apply, in determining whether two or more offerings are to be treated as one for the purpose of registration or qualifying for an exemption from registration under the Act, offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Act, or that an exemption from registration is available for the particular offering. In making this determination:

(1) For an exempt offering prohibiting general solicitation, the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either:

(i) Did not solicit such purchaser through the use of general solicitation; or

(ii) Established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation; and

(2) For two or more concurrent exempt offerings permitting general solicitation, in addition to satisfying the requirements of the particular exemption relied on, general solicitation offering materials for one offering that includes information about the material terms of a concurrent offering under another exemption may constitute an offer of securities in such other offering, and therefore the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any legend requirements and communications restrictions.

(b) *Safe harbors.* No integration analysis under paragraph (a) of this section is required, if any of the following non-exclusive safe harbors apply:

(1) Any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, will not be integrated with such other offering, *provided that* for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of § 230.152(a)(1) shall apply.

(2) Offers and sales made in compliance with § 230.701, pursuant to an employee benefit plan, or in compliance with §§ 230.901 through 230.905 (Regulation S) will not be integrated with other offerings;

(3) An offering for which a registration statement under the Act has been filed will not be integrated if it is made subsequent to:

(i) A terminated or completed offering for which general solicitation is not permitted;

(ii) A terminated or completed offering for which general solicitation is permitted made only to qualified institutional buyers and institutional accredited investors; or

(iii) An offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the commencement of the registered offering; or

(4) Offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated if made subsequent to any terminated or completed offering.

(c) *Commencement of an offering.* For purposes of this section, an offering of securities will be deemed to be commenced at the time of the first offer of securities in the offering by the issuer or its agents. The following non-exclusive list of factors should be considered in determining when an offering is deemed to be commenced. Pursuant to the requirements for registered and exempt offerings, an issuer or its agents may commence an offering in reliance on:

(1) Section 230.241, on the date the issuer first made a generic offer soliciting interest in a contemplated securities offering for which the issuer had not yet determined the exemption under the Act under which the offering of securities would be conducted;

(2) Section 15 U.S.C. 77d(a)(2) (Section 4(a)(2)), §§ 230.501 through 230.508 (Regulation D), or § 230.147, or § 230.147A (Rules 147 or 147A), on the date the issuer first made an offer of its securities in reliance on these exemptions;

(3) Sections 230.251 through 230.263 (Regulation A), on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on § 230.255, or the public filing of a Form 1–A offering statement;

(4) Sections 227.100 through 227.503 of this chapter (Regulation Crowdfunding), on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on § 227.206 of this chapter, or the public filing of a Form C offering statement; and

(5) A registration statement filed under the Act, in the case of:

(i) A continuous offering that will commence promptly on the date of initial effectiveness, on the date the issuer first filed its registration statement for the offering with the Commission; or

(ii) A delayed offering, on the earliest date on which the issuer or its agents commenced public efforts to offer and sell the securities, which could be evidenced by the earlier of:

(A) The first filing of a prospectus supplement with the Commission describing the delayed offering; or

(B) The issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

**Note 1 to paragraph (c)(5):** Offers by the issuer, or persons acting on behalf of the issuer, limited exclusively to qualified institutional buyers and institutional accredited investors, including those that would qualify for the safe harbor in § 230.163B, will not be considered the commencement of a registered offering for purposes of this section.

(d) *Termination or completion of an offering.* For purposes of this section, the termination or completion of an offering is deemed to have occurred when the issuer and its agents cease efforts to make further offers to sell the issuer's securities under such offering. The following non-exclusive list of factors should be considered in determining when an offering is deemed to be terminated or completed including for offerings made in reliance on:

(1) Section 4(a)(2), Regulation D, or Rules 147 or 147A, on the later of the date:

(i) The issuer entered into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the investor's control); or

(ii) The issuer and its agents ceased efforts to make further offers to sell the issuer's securities under such offering;

(2) Regulation A, on:

(i) The withdrawal of an offering statement under § 230.259(a);

(ii) The filing of a § 239.94 of this chapter (Form 1–Z) with respect to a Tier I offering under § 230.257(a);

(iii) The declaration by the Commission that the offering statement has been abandoned under § 230.259(b); or

(iv) The date, after the third anniversary of the date the offering statement was initially qualified, on which § 230.251(d)(3)(i)(F) prohibits the issuer from continuing to sell securities using the offering statement, or any earlier date on which the offering terminates by its terms;

(3) Regulation Crowdfunding, on the deadline of the offering identified in the offering materials pursuant to § 227.201(g) of this chapter, or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under § 227.304(b) of this chapter; and

(4) A registration statement filed under the Act:

(i) On the withdrawal of the registration statement after an application is granted or deemed granted under § 230.477;

(ii) On the filing of a prospectus supplement or amendment to the registration statement indicating that the offering, or particular delayed offering in the case of a shelf registration statement, has been terminated or completed;

(iii) On the entry of an order of the Commission declaring that the registration statement has been abandoned under § 230.479;

(iv) On the date, after the third anniversary of the initial effective date of the registration statement, on which § 230.415(a)(5) prohibits the issuer from continuing to sell securities using the registration statement, or any earlier date on which the offering terminates by its terms; or

(v) Any other factors that indicate that the issuer has abandoned or ceased its public selling efforts in furtherance of the offering, or particular delayed offering in the case of a shelf registration statement, which could be evidenced by:

(A) The filing of a Current Report on Form 8–K; or

(B) The issuance of a widely disseminated public disclosure by the issuer, or its agents, informing the market that the offering, or particular delayed offering, in the case of a shelf registration statement, has been terminated or completed.

**Note 2 to paragraph (d)(4):** A particular delayed offering may be deemed terminated or completed, even though the issuer's shelf registration statement may still have an aggregate amount of securities available to offer and sell in a later delayed offering.

**§ 230.155 [Removed and reserved]**

■ 22. Effective March 15, 2021, remove and reserve § 230.155.

■ 23. Effective March 15, 2021, add § 230.241 before the undesignated center heading ''Regulation A—Conditional Small Issues Exemption'' to read as follows:

**§ 230.241 Solicitations of interest.**

(a) *Solicitation of interest.* At any time before making a determination as to the exemption from registration under the Act under which an offering of securities will be conducted, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated offering of securities exempt from registration under the Act. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the Federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the issuer makes a determination as to the exemption to be relied on and the offering, meeting the requirements of the exemption, is commenced.

(b) *Conditions.* The communications must state that:

(1) The issuer is considering an offering of securities exempt from registration under the Act, but has not determined a specific exemption from registration the issuer intends to rely on for the subsequent offer and sale of the securities;

(2) No money or other consideration is being solicited, and if sent in response, will not be accepted;

(3) No offer to buy the securities can be accepted and no part of the purchase price can be received until the issuer determines the exemption under which the offering is intended to be conducted and, where applicable, the filing, disclosure, or qualification requirements of such exemption are met; and

(4) A person's indication of interest involves no obligation or commitment of any kind.

(c) *Indications of interest.* Any written communication under this section may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. The issuer may require the name, address, telephone number, and/or email address in any response form included pursuant to this paragraph (c).

■ 24. Effective March 15, 2021, amend § 230.251 by revising paragraphs (a)(2), (b)(7), and (c), and removing the Instruction to paragraph (c) to read as follows:

**§ 230.251 Scope of exemption.**

* * * * *

(a) * * *

(2) *Tier 2.* Offerings pursuant to §§ 230.251 through 230.263 (Regulation A) in which the sum of the aggregate offering price and aggregate sales does not exceed $75,000,000, including not more than $22,500,000 offered by all selling securityholders that are affiliates of the issuer (''Tier 2 offerings'').

* * * * *

(b) * * *

(7) Has filed with the Commission all reports required to be filed, if any, pursuant to § 230.257 or pursuant to section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78*o*) during the two years before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports); and

* * * * *

(c) *Integration with other offerings.* To determine whether offers and sales should be integrated, see § 230.152.

* * * * *

**§ 230.255 [Amended]**

■ 25. Effective March 15, 2021, amend § 230.255 by removing paragraph (e).

■ 26. Effective March 15, 2021, amend § 230.259 by revising paragraph (b) to read as follows:

**§ 230.259 Withdrawal or abandonment of offering statements.**

* * * * *

(b) *Abandonment.* When an offering statement, or a post-qualification amendment to such statement, has been on file with the Commission for nine months without amendment and has not become qualified, the Commission may, in its discretion, declare the offering statement or post-qualification amendment abandoned. If the offering statement has been amended, or if the post-qualification amendment has been amended, the nine-month period shall be computed from the date of the latest amendment.

■ 27. Effective March 15, 2021, amend § 230.262 by revising paragraph (a), adding an Instruction to paragraph (a), and revising paragraph (b)(3) to read as follows:

**§ 230.262 Disqualification provisions.**

(a) *Disqualification events.* No exemption under §§ 230.251 through 230.263 (Regulation A) shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after qualification, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such solicitor; or any director, executive officer or other officer participating in the offering of any such solicitor or general partner or managing member of such solicitor:

(1) Has been convicted, within 10 years before the filing of the offering statement or such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the offering statement or such sale that, at the time of such filing or such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(3) Is subject to a final order (as defined in § 230.261) of a State securities commission (or an agency or officer of a State performing like functions); a State authority that supervises or examines banks, savings associations, or credit unions; a State insurance commission (or an agency or officer of a State performing like functions); an appropriate Federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(i) At the time of the filing of the offering statement or such sale, bars the person from:

(A) Association with an entity regulated by such commission, authority, agency, or officer;

(B) Engaging in the business of securities, insurance or banking; or

(C) Engaging in savings association or credit union activities; or

(ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such filing of the offering statement or such sale;

(4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(b) or 78*o*–4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e) or (f)) that, at the time of the filing of the offering statement or such sale:

(i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(ii) Places limitations on the activities, functions or operations of such person; or

(iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(5) Is subject to any order of the Commission entered within five years before the filing of the offering statement or such sale that, at the time of such filing or sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(i) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b–5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)), or any other rule or regulation thereunder; or

(ii) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or offering statement filed with the Commission that, within five years before the filing of the offering statement or such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing or such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the offering statement or such sale, or is, at the time of such filing or such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

*Instruction to paragraph (a):* With respect to any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, the issuer is required to determine whether a disqualifying event has occurred only as of the time of filing of the offering statement and not from the time of such sale.

(b) * * *

(3) If, before the filing of the offering statement or the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (a) of this section should not arise as a consequence of such order, judgment or decree; or

* * * * *

■ 28. Effective March 15, 2021, amend § 230.500 by revising paragraph (g) to read as follows:

**§ 230.500 Use of Regulation D.**

* * * * *

(g) Securities offered and sold outside the United States in accordance with §§ 230.901 through 230.905 (Regulation S) need not be registered under the Act. See Release No. 33–6863. Regulation S may be relied on for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. See § 230.152(b)(2). Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this paragraph (g), however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States. See §§ 230.502(a) and 230.152.

■ 29. Effective March 15, 2021, amend § 230.502 by:
■ a. Revising paragraph (a);
■ b. Removing the Note following paragraph (a);
■ c. Revising paragraph (b)(2)(i)(B); and
■ d. Adding paragraph (b)(2)(viii).

The revisions and addition read as follows:

**§ 230.502 General conditions to be met.**

* * * * *

(a) *Integration.* To determine whether offers and sales should be integrated, see § 230.152.

(b) * * *

(2) * * *

(i) * * *

(B) *Financial statement information*—(*1*) *Offerings up to $20,000,000.* The financial statement information required by paragraph (b) of Part F/S of Form 1–A. Such financial statement information must be prepared in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a foreign private issuer, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). If the financial statements comply with IFRS, such compliance must be explicitly and unreservedly stated in the notes to the financial statements and if the financial statements are audited, the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

(*2*) *Offerings over $20,000,000.* The financial statement information required by paragraph (c) of Part F/S of Form 1–A (referenced in § 239.90 of this chapter). If the issuer is a foreign private issuer, such financial statements must be prepared in accordance with either US GAAP or IFRS as issued by the IASB. If the financial statements comply with IFRS, such compliance must be explicitly and unreservedly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

* * * * *

(viii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.506(b), the issuer shall provide the purchaser with any written communication or broadcast script used under the authorization of § 230.241 within 30 days prior to such sale.

* * * * *

■ 30. Effective March 15, 2021, amend § 230.504 by:
■ a. Revising the section heading;
■ b. Revising paragraph (b)(2); and
■ c. Revising Instruction to paragraph (b)(2).

The revisions read as follows:

**§ 230.504 Exemption for limited offerings and sales of securities not exceeding $10,000,000.**

* * * * *

(b) * * *

(2) *Offering limit.* The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $10,000,000, less the aggregate offering price for all securities sold within the 12 months before the start of and during the offering of securities under this § 230.504 or in violation of section 5(a) of the Securities Act.

*Instruction to paragraph (b)(2):* If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $10,000,000 of its securities on June 1, 2021, under this § 230.504 and an additional $500,000 of its securities on December 1, 2021, this § 230.504 would not be available for the later sale, but would still be applicable to the June 1, 2021, sale.

* * * * *

■ 31. Effective March 15, 2021, amend § 230.506 by:
■ a. Revising paragraph (b)(2)(i) and republishing the note to paragraph (b)(2)(i);
■ b. Amending paragraph (c)(2)(ii)(B)(*2*) by removing the word ''or'' from the end of the paragraph;
■ c. Revising paragraph (c)(2)(ii)(C)(*4*) by removing the period from the end of paragraph and adding in its place a semicolon;
■ d. Revising paragraph (c)(2)(ii)(D) by removing the period from the end of the paragraph and adding ''; or'' in its place;
■ e. Adding paragraph (c)(2)(ii)(E) before the *Instructions to paragraph (c)(2)(ii)(A) through (D) of this section;* and
■ f. Removing the text ''(A) through (D) of this section'' from the heading to *Instructions to paragraph (c)(2)(ii)(A) through (D) of this section,* and republishing it.

The revisions and addition read as follows:

**§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.**

* * * * *

(b) * * *

(2) * * *

(i) *Limitation on number of purchasers.* There are no more than, or the issuer reasonably believes that there are no more than, 35 purchasers of securities from the issuer in offerings under this section in any 90-calendar-day period.

**Note 1 to paragraph (b)(2)(i):** See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under paragraph (b) of this section.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(E) In regard to any person that the issuer previously took reasonable steps to verify as an accredited investor in accordance with this paragraph (c)(2)(ii), so long as the issuer is not aware of information to the contrary, obtaining a written representation from such person at the time of sale that he or she qualifies as an accredited investor. A written representation under this method of verification will satisfy the issuer's obligation to verify the person's accredited investor status for a period of five years from the date the person was previously verified as an accredited investor.

*Instructions to paragraph (c)(2)(ii):* * * *

* * * * *

## PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 32. The authority citation for part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m,78n, 78*o*(d), 78*o*–7 note, 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Pub. L. 112–106, 126 Stat. 312, unless otherwise noted.

* * * * *

■ 33. Amend Form S–6 (referenced in § 239.16) by revising Additional Instruction 3 of ''Instructions as to Exhibits'' to read as follows:

**Note:** The text of Form S–6 does not, and this amendment will not, appear in the Code of Federal Regulations.

## Form S–6

* * * * *

## Instructions as to Exhibits

* * * * *

*Additional Instructions:*

* * * * *

3. The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (9) of section IX of Form N–8B–2 (Exhibits) if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

■ 34. Amend Form N–14 (referenced in § 239.23) by revising Instruction 3 to Item 16 to read as follows:

**Note:** The text of Form N–14 does not, and this amendment will not, appear in the Code of Federal Regulations.

## Form N–14

* * * * *

## Item 16. Exhibits

* * * * *

*Instructions:*

* * * * *

3. The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (13) of this Item if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

■ 35. Amend Form 1–A (referenced in § 239.90) by:

■ a. Revising General Instruction I;

■ b. Revising General Instruction III(a);

■ c. Revising paragraph 13 of Part III, Item 17;

■ d. Removing and reserving paragraph 16 of Part III, Item 17;

■ e. Adding paragraph 99 of Part III, Item 17; and

■ f. Adding an instruction at the end of Part III, Item 17.

The revisions and additions read as follows:

**Note:** The text of Form 1–A does not, and this amendment will not, appear in the Code of Federal Regulations.

## Form 1–A

## Regulation A Offering Statement Under the Securities Act of 1933

## General Instructions

## I. Eligibility Requirements for Use of Form 1–A.

This Form is to be used for securities offerings made pursuant to Regulation A (17 CFR 230.251 *et seq.*). Careful attention should be directed to the terms, conditions and requirements of Regulation A, especially Rule 251, because the exemption is not available to all issuers or for every type of securities transaction. Further, the aggregate offering price and aggregate sales of securities in any 12-month period is strictly limited to $20 million for Tier 1 offerings and $75 million for Tier 2 offerings, including no more than $6 million offered by all selling securityholders that are affiliates of the issuer for Tier 1 offerings and $22.5 million by all selling securityholders that are affiliates of the issuer for Tier 2 offerings. Please refer to Rule 251 of Regulation A for more details.

* * * * *

## III. Incorporation by Reference and Cross-Referencing

* * * * *

(a) The use of incorporation by reference and cross-referencing in Part II of this Form:

(1) Is limited to the following items:

(A) Items 2–14 of Part II and Part F/S if following the Offering Circular format;

(B) Items 3–11 of Form S–1 if following the Part I of Form S–1 format; or

(C) Items 3–28, and 30 of Form S–11 if following the Part I of Form S–11 format;

(2) May only incorporate by reference previously submitted or filed financial statements if the issuer meets the following requirements:

(A) the issuer has filed with the Commission all reports and other materials required to be filed, if any, pursuant to Rule 257 (§ 230.257) or by Sections 13(a), 14 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and other materials);

(B) the issuer makes the financial statement information that is incorporated by reference pursuant to this item readily available and accessible on a website maintained by or for the issuer; and

(C) the issuer must state that it will provide to each holder of securities, including any beneficial owner, a copy of the financial statement information that have been incorporated by reference in the offering statement upon written or oral request, at no cost to the requester, and provide the issuer's website address, including the uniform resource locator (URL) where the incorporated financial statements may be accessed.

* * * * *

**Part III—Exhibits**

* * * * *

**Item 17. Description of Exhibits**

* * * * *

13. ''*Testing-the-waters*'' *materials*—Any written communication or broadcast script used under the authorization of Rule 241 within 30 days of the initial filing of the offering statement, and any written communication or broadcast script used under the authorization of Rule 255. Materials used under the authorization of Rule 255 need not be filed if they are substantively the same as materials previously filed with the offering statement.

* * * * *

16. RESERVED

* * * * *

99. *Additional exhibits*—Any additional exhibits which the issuer may wish to file, which must be so marked as to indicate clearly the subject matters to which they refer.

* * * * *

*Instruction to Item 17:*

*The issuer may redact information from exhibits required to be filed by this Item if disclosure of such information would constitute a clearly unwarranted invasion of personal privacy (e.g., disclosure of bank account numbers, social security numbers, home addresses, and similar information). In addition, the issuer may redact specific provisions or terms of exhibits required to be filed by paragraph 6 or 7 of this Item, if the issuer customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the issuer should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The issuer also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the issuer must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the issuer's supplemental materials, the Commission or its staff may require the issuer to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the issuer's analyses. The issuer may request confidential treatment of the supplemental material submitted under paragraphs 6 or 7 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in Rule 418 (§ 230.418 of this chapter).*

* * * * *

■ 36. Amend Form C (referenced in § 239.900) by:

■ a. Adding items to the Cover Page after ''website of the Issuer,''

■ b. Revising General Instruction I;

■ c. Revising Instruction 1 to the Signature;

■ d. Revising the introductory paragraphs in the Optional Question and Answer Format for an Offering Statement; and

■ e. Revising Question 11 in the Optional Question and Answer Format for an Offering Statement.

The addition and revisions read as follows:

**Note:** The text of Form C does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form C**

**Under the Securities Act of 1933**

* * * * *

Is there a co-issuer? ____ yes ____ no. If yes,
Name of co-issuer: ______
Legal status of co-issuer:
Form: ______
Jurisdiction of Incorporation/Organization: ______
Date of organization: ______
Physical address of co-issuer: ______
Website of co-issuer: ______

* * * * *

**General Instructions**

**I. Eligibility Requirements for Use of Form C**

This Form shall be used for the offering statement, and any related amendments and progress reports, required to be filed by any issuer offering or selling securities in reliance on the exemption in Securities Act Section 4(a)(6) and in accordance with Section 4A and Regulation Crowdfunding (§ 227.100 *et seq.*). The term ''issuer'' includes any co-issuer jointly offering or selling securities with an issuer in reliance on the exemption in Securities Act Section 4(a)(6) and in accordance with Securities Act Section 4A and Regulation Crowdfunding (§ 227.100 *et seq.*). This Form also shall be used for an annual report required pursuant to Rule 202 of Regulation Crowdfunding (§ 227.202) and for the termination of reporting required pursuant to Rule 203(b)(2) of Regulation Crowdfunding (§ 227.203(b)(2)). Careful attention should be directed to the terms, conditions and requirements of the exemption.

* * * * *

**Signatures**

* * * * *

*Instructions.* The form shall be signed by the issuer, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer and at least a majority of the board of directors or persons performing similar functions. If there is a co-issuer, the form shall also be signed by the co-issuer, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer and at least a majority of the board of directors or persons performing similar functions.

* * * * *

**Optional Question and Answer Format for an Offering Statement**

Respond to each question in each paragraph of this part. Set forth each question and any notes, but not any instructions thereto, in their entirety. If disclosure in response to any question is responsive to one or more other questions, it is not necessary to repeat the disclosure. If a question or series of questions is inapplicable or the response is available elsewhere in the Form, either State that it is inapplicable, include a cross-reference to the responsive disclosure, or omit the question or series of questions. The term ''issuer'' in these questions and answers includes any ''co-issuer'' jointly offering or selling securities with the issuer in reliance on the exemption in Securities

Act Section 4(a)(6) and in accordance with Securities Act Section 4A and Regulation Crowdfunding (§ 227.100 *et seq.*). Any information provided with respect to the issuer should also be separately provided with respect to any co-issuer. If you are seeking to rely on the Commission's temporary rules to initiate an offering between May 4, 2020, and February 28, 2021, intended to be conducted on an expedited basis due to circumstances relating to coronavirus disease 2019 (COVID–19), you will likely need to provide additional or different information than described in questions 2, 12, and 29. If you are seeking to rely on the Commission's temporary Rule 201(bb) for an offering initiated between March 1, 2021, and August 28, 2022, you will likely need to provide additional or different information than described in questions 2 and 29. When preparing responses to such questions, please carefully review temporary Rules 100(b)(7), 201(aa), 201(bb), and 304(e) and tailor your responses to those requirements as applicable.

Be very careful and precise in answering all questions. Give full and complete answers so that they are not misleading under the circumstances involved. Do not discuss any future performance or other anticipated event unless you have a reasonable basis to believe that it will actually occur within the foreseeable future. If any answer requiring significant information is materially inaccurate, incomplete or misleading, the Company, its management and principal shareholders may be liable to investors based on that information.

* * * * *

11. (a) Did the issuer make use of any written communication or broadcast script for testing the waters either (i) under the authorization of Rule 241 within 30 days of the initial filing of the offering statement, or (ii) under the authorization of Rule 206? If so, provide copies of the materials used.

(b) How will the issuer complete the transaction and deliver securities to the investors?

* * * * *

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 37. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78*o*, 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.;* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, secs. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 38. Effective March 15, 2021, amend § 240.12g–6 by

■ a. Revising the section heading; and

■ b. Revising paragraph (a) introductory text.

The revisions read as follows:

### § 240.12g–6 Exemption for securities issued pursuant to section 4(a)(6) of the Securities Act of 1933 or Regulation Crowdfunding.

(a) For purposes of determining whether an issuer is required to register a security with the Commission pursuant to section 12(g)(1) of the Act (15 U.S.C. 78l(g)(1)), the definition of held of record shall not include securities issued pursuant to the offering exemption under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) or §§ 227.100 through 227.504 (Regulation Crowdfunding) by an issuer that:

* * * * *

■ 39. Effective March 15, 2021, amend § 240.12g5–1 by

■ a. Revising paragraph (a)(2); and

■ b. Adding paragraph (a)(9).

The revision and addition read as follows:

### § 240.12g5–1 Definition of securities "held of record".

(a) * * *

(2) Except as specified in paragraph (a)(9) of this section, securities identified as held of record by a corporation, a partnership, a trust whether or not the trustees are named, or other organization shall be included as so held by one person.

* * * * *

(9) For purposes of determining whether a crowdfunding issuer, as defined in § 270.3a–9(b)(1) of this chapter, or a crowdfunding vehicle, as defined in § 270.3a–9(b)(2) of this chapter, is required to register a class of equity securities with the Commission pursuant to section 12(g)(1) of the Act, both the crowdfunding issuer and the crowdfunding vehicle:

(i) May exclude securities issued by a crowdfunding vehicle, as defined in § 270.3a–9(b)(2) of this chapter, in an offering under §§ 227.100 through 227.504 (Regulation Crowdfunding) in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act (15 U.S.C. 77a *et seq.*) and that are held by natural persons; and

(ii) Shall include securities issued by a crowdfunding vehicle, as defined in § 270.3a–9(b)(2) of this chapter, in an offering under Regulation Crowdfunding in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act and that are held by investors that are not natural persons.

* * * * *

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 40. The authority citation for part 249 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

Section 240.220f is also issued under secs. 3(a), 202, 208, 302, 306(a), 401(a), 401(b), 406 and 407, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 249.308 is also issued under 15 U.S.C. 80a–29 and 80a–37.

* * * * *

■ 41. Amend Form 20–F (referenced in § 249.220f) by revising the second, third, and fourth paragraphs following instruction 4.(a)(ii) under "Instructions as to Exhibits," and prior to the note, to read as follows:

**Note:** The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 20–F**

* * * * *

**Instructions as to Exhibits**

* * * * *

4. (a) * * *

(ii) completes a transaction that had the effect of causing it to cease being a public shell company.

The only contracts that must be filed are those to which the registrant or a subsidiary of the registrant is a party or has succeeded to a party by assumption or assignment or in which the registrant or such subsidiary has a beneficial interest.

The registrant may redact specific provisions or terms of exhibits required to be filed by this Form 20–F if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this instruction pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in Rules 418 or 12b–4 (§ 230.418 or § 240.12b–4).

* * * * *

■ 42. Amend Form 8–K (referenced in § 249.308) by revising Instruction 6 under Item 1.01 to read as follows:

**Note:** The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 8–K**

* * * * *

**Information To Be Included in the Report**

**Section 1—Registrant's Business and Operations**

**Item 1.01 Entry Into a Material Definitive Agreement**

* * * * *

*Instructions.*

* * * * *

6. To the extent a material definitive agreement is filed as an exhibit under this Item 1.01, the registrant may redact specific provisions or terms of the exhibit if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material, provided that the registrant intends to incorporate by reference this filing into its future periodic reports or registration statements, as applicable, in satisfaction of Item 601(b)(10) of Regulation S–K. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this instruction pursuant to Rule 83 (§ 200.83) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in Rules 418 or 12b–4 (§ 230.418 or § 240.12b–4).

* * * * *

## PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 43. The authority citation for part 270 continues to read in part as follows:

**Authority:** 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2020), unless otherwise noted.

* * * * *

■ 44. Effective March 15, 2021, add § 270.3a–9 to read as follows:

**§ 270.3a–9 Crowdfunding vehicle.**

(a) Notwithstanding section 3(a) of the Act, a crowdfunding vehicle will be deemed not to be an investment company if the vehicle:

(1) Is organized and operated for the sole purpose of directly acquiring, holding, and disposing of securities issued by a single crowdfunding issuer and raising capital in one or more offerings made in compliance with §§ 227.100 through 227.504 (Regulation Crowdfunding);

(2) Does not borrow money and uses the proceeds from the sale of its securities solely to purchase a single class of securities of a single crowdfunding issuer;

(3) Issues only one class of securities in one or more offerings under Regulation Crowdfunding in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act (15 U.S.C. 77a *et seq.*);

(4) Receives a written undertaking from the crowdfunding issuer to fund or reimburse the expenses associated with its formation, operation, or winding up, receives no other compensation, and any compensation paid to any person operating the vehicle is paid solely by the crowdfunding issuer;

(5) Maintains the same fiscal year-end as the crowdfunding issuer;

(6) Maintains a one-to-one relationship between the number, denomination, type and rights of crowdfunding issuer securities it owns and the number, denomination, type and rights of its securities outstanding;

(7) Seeks instructions from the holders of its securities with regard to:

(i) The voting of the crowdfunding issuer securities it holds and votes the crowdfunding issuer securities only in accordance with such instructions; and

(ii) Participating in tender or exchange offers or similar transactions conducted by the crowdfunding issuer and participates in such transactions only in accordance with such instructions;

(8) Receives, from the crowdfunding issuer, all disclosures and other information required under Regulation Crowdfunding and the crowdfunding vehicle promptly provides such disclosures and other information to the investors and potential investors in the crowdfunding vehicle's securities and to the relevant intermediary; and

(9) Provides to each investor the right to direct the crowdfunding vehicle to assert the rights under State and Federal law that the investor would have if he or she had invested directly in the crowdfunding issuer and provides to each investor any information that it receives from the crowdfunding issuer as a shareholder of record of the crowdfunding issuer.

(b) For purposes of this section:

(1) *Crowdfunding issuer* means a company that seeks to raise capital as a co-issuer with a crowdfunding vehicle in an offering that complies with all of the requirements under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and Regulation Crowdfunding.

(2) *Crowdfunding vehicle* means an issuer formed by or on behalf of a crowdfunding issuer for the purpose of conducting an offering under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) as a co-issuer with the

crowdfunding issuer, which offering is controlled by the crowdfunding issuer.

(3) *Regulation Crowdfunding* means the regulations set forth in §§ 227.100 through 227.504 of this chapter.

## PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1934

■ 45. The authority citation for part 274 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78*o*(d), 80a–8, 80a–24, 80a–26, 80a–29, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 46. Amend Form N–5 (referenced in §§ 239.24 and 274.5) by revising Instruction 3 in ''Instructions as to Exhibits'' to read as follows:

**Note:** The text of Form N–5 does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–5**

**Registration Statement of Small Business Investment Company Under the Securities Act of 1933 and the Investment Company Act of 1940 ***

* * * * *

**Instructions as to Exhibits**

* * * * *

*Instructions:*

* * * * *

3. The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph 9 of this Item if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in Rule 418 under the Securities Act of 1933 [17 CFR 230.418].

* * * * *

■ 47. Amend Form N–1A (referenced in §§ 239.15A and 274.11A) by:

■ a. Amending the last sentence of Instruction 2 to Item 28 by removing ''registrant'' and adding in its place ''Registrant'';

■ b. Amending Instruction 3 to Item 28 by removing ''registrant'' and adding in its place ''Registrant''; and

■ c. Revising Instruction 4 to Item 28.

The revision reads as follows:

**Note:** The text of Form N–1A does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–1A**

* * * * *

**Item 28. Exhibits**

* * * * *

**Instructions**

* * * * *

4. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (h) of this Item if the Registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 4 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

■ 48. Amend Form N–2 (referenced in §§ 239.14 and 274.11a–1) by:

■ a. Amending the last sentence of Instruction 4 to Item 25.2 by removing ''registrant'' and adding in its place ''Registrant'';

■ b. Amending Instruction 5 to Item 25.2 by removing ''registrant'' and adding in its place ''Registrant''; and

■ c. Revising Instruction 6 to Item 25.2.

The revision reads as follows:

**Note:** The text of Form N–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–2**

* * * * *

**Item 25. Financial Statements and Exhibits**

* * * * *

2. Exhibits:

* * * * *

**Instructions**

* * * * *

6. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraph k. of this Item if the Registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and

privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 6 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

■ 49. Amend Form N–3 (referenced in §§ 239.17a and 274.11b) by revising Instruction 5 to Item 29(b) to read as follows:

**Note:** The text of Form N–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–3**

* * * * *

**Item 29. Financial Statements and Exhibits**

* * * * *

(b) Exhibits:

* * * * *

**Instructions**

* * * * *

5. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraphs (9) and (11) of this Item if the Registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 5 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

■ 50. Amend Form N–4 (referenced in §§ 239.17b and 274.11c) by revising Instruction 5 to Item 24(b) to read as follows:

**Note:** The text of Form N–4 does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–4**

* * * * *

**Item 24. Financial Statements and Exhibits**

* * * * *

(b) Exhibits:

* * * * *

*Instructions*

* * * * *

5. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraphs (7) and (8) of this Item if the Registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 5 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

■ 51. Amend Form N–6 (referenced in §§ 239.17c and 274.11d) by revising Instruction 3 to Item 26 to read as follows:

**Note:** The text of Form N–6 does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–6**

* * * * *

**Item 26. Exhibits**

* * * * *

*Instructions:*

* * * * *

3. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraphs (g) and (j) of this Item if the Registrant customarily and actually treats that information as private. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to rule 83 of the Commission's

Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

■ 52. Amend Form N–8B–2 (referenced in § 274.12) by revising Instruction 3 to ''IX Exhibits'' to read as follows:

**Note:** The text of Form N–8B–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–8B–2**

**Registration Statement of Unit Investment Trusts Which Are Currently Issuing Securities**

* * * * *

**IX**

**Exhibits**

* * * * *

*Instructions:*

* * * * *

3. The registrant may redact specific provisions or terms of exhibits required to be filed by A(9) if the registrant customarily and actually treats that information as private. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

By the Commission.

Dated: November 2, 2020.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2020–24749 Filed 1–13–21; 8:45 am]

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Part IV

## Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States; Final Rule

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Parts 655 and 656**

**[DOL Docket No. ETA–2020–0006]**

**RIN 1205–AC00**

# Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Department of Labor (the Department or DOL) adopts with changes an Interim Final Rule (IFR) that amended Employment and Training Administration (ETA) regulations governing the prevailing wages for employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H–1B, H–1B1, or E–3 nonimmigrant visas. Specifically, the IFR amended the Department's regulations governing permanent (PERM) labor certifications and Labor Condition Applications (LCAs) to incorporate changes to the computation of wage levels under the Department's four-tiered wage structure based on the Occupational Employment Statistics (OES) wage survey administered by the Bureau of Labor Statistics (BLS). The primary purpose of these changes is to update the computation of prevailing wage levels under the existing four-tier wage structure to better reflect the actual wages earned by U.S. workers similarly employed to foreign workers. This final rule will allow the Department to more effectively ensure the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the above-referenced programs does not adversely affect the wages and job opportunities of U.S. workers.

**DATES:** This final rule is effective March 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** For further information, contact Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N–5311, Washington, DC 20210, telephone: (202) 693–8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Immigration and Nationality Act (INA or Act), as amended, assigns responsibilities to the Secretary of Labor (Secretary) relating to the entry and employment of certain categories of immigrants and nonimmigrants.[1] This final rule concerns the calculation of the prevailing wage for job opportunities in the PERM, H–1B, H–1B1, and E–3 programs for which employers seek labor certification from the Secretary.[2]

### *A. Permanent Labor Certifications*

The INA prohibits the admission of certain employment-based immigrants unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (2) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.[3]

This ''labor certification'' requirement does not apply to all employment-based immigrants. The INA provides for five ''preference'' categories or immigrant visa classes, only two of which—the second and third preference employment categories (commonly called the EB–2 and EB–3 immigrant visa classifications)—require a labor certification.[4] An employer seeking to sponsor a foreign worker for an immigrant visa under the EB–2 or EB–3 immigrant visa classifications generally must file a visa petition with the Department of Homeland Security (DHS) on the worker's behalf, which must include a labor certification from the Secretary of Labor.[5] Further, the Department of State (DOS) may not issue a visa unless the Secretary of Labor has issued a labor certification in conformity with the relevant provisions of the INA.[6] If the Secretary determines both that there are not sufficient able, willing, qualified, and available U.S. workers and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers, the Secretary so certifies to DHS and DOS by issuing a permanent labor certification. If the Secretary cannot make one or both of the above findings, the application for permanent employment certification is denied.

Under the INA, the EB–2 classification applies to individuals who are ''members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.'' [7] United States Citizenship and Immigration Services (USCIS) regulations, in turn, define an ''advanced degree'' as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree customarily is required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.[8] The regulation goes on to define ''exceptional ability'' as ''a

[1] There are two general categories of U.S. visas: Immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the U.S. Nonimmigrant visas are for foreign nationals who enter the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons.

[2] 8 U.S.C. 1101(a)(15)(E)(iii), (H)(i)(b), (H)(i)(b1).

[3] 8 U.S.C. 1182(a)(5)(A). Although this provision references the Attorney General, the authority to adjudicate immigrant visa petitions was transferred to the Director of the Bureau of Citizenship and Immigration Services (an agency within the Department of Homeland Security) by the Homeland Security Act of 2002, Public Law 107–296, 451(b) (codified at 6 U.S.C. 271(b)). Under 6 U.S.C. 557, references in federal law to any agency or officer whose functions have been transferred to the Department of Homeland Security shall be deemed to refer to the Secretary of Homeland Security or other official or component to which the functions were transferred.

[4] *See* 8 U.S.C. 1153(b)(2), (3), 1182(a)(5)(D). Section 1153(b)(2) governs the EB–2 classification of immigrant work visas granted to foreign workers who are either professionals holding advanced degrees (master's degree or above) or foreign equivalents of such degrees, or persons of ''exceptional ability'' in the sciences, arts, or business. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, unless the work he or she is seeking admission to perform is in the ''national interest,'' such as to qualify for a waiver of the job offer (and hence, the labor certification) requirement under 8 U.S.C. 1153(b)(2)(B). Section 1153(b)(3), governs the EB–3 classification of immigrant work visas granted to foreign workers who are either ''skilled workers,'' ''professionals,'' or ''other'' (unskilled) workers, as defined by the statute. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, without exception.

[5] 8 U.S.C. 1154(a)(1)(F), 1182(a)(5)(A) and (D).

[6] 8 U.S.C. 1153(b)(2), (b)(3)(C), 1201(g).

[7] 8 U.S.C. 1153(b)(2)(A).

[8] 8 CFR 204.5(k)(2).

degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.'' [9]

The EB–3 program consists of three discrete classifications: ''skilled workers,'' defined as aliens who are ''capable . . . of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States;'' ''professionals,'' defined as aliens ''who hold baccalaureate degrees and who are members of the professions;'' and ''other workers,'' defined as aliens who are ''capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.'' [10]

*B. Labor Condition Applications*

The Secretary must certify an LCA filed by an U.S. employer before the employer may file a petition with DHS on behalf of a foreign worker for H–1B, H–1B1, or E–3 nonimmigrant classification.[11] The LCA contains various attestations from the employer about the wages and working conditions that it will provide for the foreign worker.[12] Most importantly, for the purposes of this final rule, the INA requires employers to pay H–1B workers the greater of ''the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,'' or the ''the prevailing wage level for the occupational classification in the area of employment.'' [13]

The H–1B program allows U.S. employers to employ foreign workers temporarily in specialty occupations. ''Specialty occupation'' is defined as an occupation that requires the theoretical and practical application of a body of ''highly specialized knowledge,'' and a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the U.S.[14] Similar to the H–1B visa classification, the H–1B1 and E–3 nonimmigrant visa classifications also allow U.S. employers to temporarily employ foreign workers in specialty occupations, except that these classifications specifically apply to the nationals of certain countries: The H–1B1 visa classification applies to foreign workers in specialty occupations from Chile and Singapore,[15] and the E–3 visa classification applies to foreign workers in specialty occupations from Australia.[16]

*C. The Permanent Labor Certification Process*

The Department's regulations at 20 CFR part 656 govern the labor certification process and set forth the responsibilities of employers who desire to employ, on a permanent basis, foreign nationals covered by the INA's labor certification requirement.[17] The Department processes labor certification applications for employers seeking to sponsor foreign workers for permanent employment under the EB–2 and EB–3 immigrant visa preference categories. Aliens seeking admission or adjustment of status under the EB–2 or EB–3 preference categories are inadmissible ''unless the Secretary of Labor has determined and certified . . . that—(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' [18]

The Secretary makes this determination in the PERM programs by, among other things, requiring the foreign worker's sponsoring employer to recruit U.S. workers by offering a wage that equals or exceeds the prevailing wage and to assure that the employer will pay the foreign worker a wage equal to or exceeding the prevailing wage.[19] Prior to filing a labor certification application, the employer must obtain a Prevailing Wage Determination (PWD) for its job opportunity from the Office of Foreign Labor Certification's (OFLC) National Prevailing Wage Center (NPWC).[20] The standards and procedures governing the PWD process in connection with the permanent labor certification program are set forth in the Department's regulations at 20 CFR 656.40 and 656.41. If the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between a union and the employer, the wage rate set forth in the CBA agreement is considered the prevailing wage for labor certification purposes.[21] In the absence of a prevailing wage rate derived from an applicable CBA, the employer may elect to use an applicable wage determination under the Davis-Bacon Act (DBA) or McNamara-O'Hara Service Contract Act (SCA), or provide a wage survey that complies with the Department's standards governing employer-provided wage data.[22] In the absence of any of the above sources, the NPWC will use the BLS OES survey to determine the prevailing wage for the employer's job opportunity.[23] After reviewing the employer's application, the NPWC will determine the prevailing wage and specify the validity period, which may be no less than 90 days and no more than one year from the determination date. Employers must either file the labor certification application or begin the recruitment process, required by the regulation, within the validity period of the PWD issued by the NPWC.[24]

Once the U.S. employer has received a PWD, the process for obtaining a permanent labor certification generally begins with the U.S. employer filing an *Application for Permanent Employment Certification,* Form ETA–9089, with OFLC.[25] As part of the standard application process, the employer must describe, among other things, the labor or services it needs performed; the wage it is offering to pay for such labor or services and the actual minimum requirements of the job opportunity; the geographic location(s) where the work is expected to be performed; and the efforts it made to recruit qualified and available U.S. workers. Additionally, the employer must attest to the conditions listed in its labor certification application, including that

[9] *Id.*

[10] 8 U.S.C. 1153(b)(3); 8 CFR 204.5(l).

[11] 8 U.S.C. 1101(a)(15)(E)(iii), (H)(i)(b), (H)(i)(b1); 8 CFR 214.2(h)(2)(i)(E).

[12] *See generally* 8 U.S.C. 1182(n), (t); 20 CFR part 655, subpart H.

[13] 8 U.S.C. 1182(n)(1)(A).

[14] *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1184(i).

[15] 8 U.S.C. 1101(a)(15)(H)(i)(b1).

[16] 8 U.S.C. 1101(a)(15)(E)(iii).

[17] The current regulations were issued through a final rule implementing the streamlined permanent labor certification program through revisions to 20 CFR part 656. The final rule was published on December 27, 2004, and took effect on March 28, 2005. *See Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 69 FR 77326 (Dec. 27, 2004). The Department published a final rule on May 17, 2007, to enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to permanent labor certification, commonly known as ''the fraud rule.'' *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,* 72 FR 27904 (May 17, 2007).

[18] 8 U.S.C. 1182(a)(5)(A)(i).

[19] 20 CFR 656.10(c)(1).

[20] 20 CFR 656.15(b)(1), 656.40(a).

[21] *See* 20 CFR 656.40(b)(1).

[22] *See* 20 CFR 656.40(b), (g).

[23] *See* 20 CFR 656.40(b)(2).

[24] 20 CFR 656.40(c).

[25] Applications for Schedule A occupations are eligible to receive pre-certification and bypass the standard applications review process. In those cases, employers file the appropriate documentation directly with DHS. *See* 20 CFR 656.5, 656.15.

''[t]he offered wage equals or exceeds the prevailing wage determined pursuant to [20 CFR 656.40 and 656.41] and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment.'' [26]

Through the requisite test of the labor market, the employer also attests, at the time of filing the Form ETA–9089, that the job opportunity has been and is clearly open to any U.S. worker and that all U.S. workers who applied for the job opportunity were rejected for lawful, job-related reasons. OFLC performs a review of the Form ETA–9089 and may either grant or deny a permanent labor certification. Where OFLC grants a permanent labor certification, the employer must submit the certified Form ETA–9089 along with an *Immigrant Petition for Alien Worker* (Form I–140 petition) to DHS. A permanent labor certification is valid only for the job opportunity, employer, foreign worker, and area of intended employment named on the Form ETA–9089 and must be filed in support of a Form I–140 petition within 180 calendar days of the date on which OFLC granted the certification.[27]

### *D. The Temporary Labor Condition Application Process*

The Department's regulations at 20 CFR part 655, subpart H, govern the process for obtaining a certified LCA and set forth the responsibilities of employers who desire to temporarily employ foreign nationals in H–1B, H–1B1, and E–3 nonimmigrant classifications.

A prospective employer must attest on the LCA that (1) it is offering to and will pay the nonimmigrant, during the period of authorized employment, wages that are at least the actual wage level paid by the employer to all other employees with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of intended employment, whichever is greater (based on the best information available at the time of filing the attestation); (2) it will provide working conditions for the nonimmigrant worker that will not adversely affect working conditions for similarly employed U.S. workers; (3) there is no strike or lockout in the course of a labor dispute in the occupational classification at the worksite; and (4) it has provided notice of its filing of an LCA to its employee's bargaining representative for the occupational classification affected or, if there is no bargaining representative, it has provided notice to its employees in the affected occupational classification by posting the notice in a conspicuous location at the worksite or through other means such as electronic notification.[28]

As relevant here, the prevailing wage must be determined as of the time of the filing of the LCA.[29] In contrast to the permanent labor certification process, an employer is not required to obtain a PWD from the NPWC.[30] However, like the permanent labor certification process, if there is an applicable CBA that was negotiated at arms-length between a union and the employer that contains a wage rate applicable to the occupation, the CBA must be used to determine the prevailing wage.[31] In the absence of an applicable CBA, an employer may base the prevailing wage on one of several sources: A PWD from the NPWC; an independent authoritative source that satisfies the requirements in 20 CFR 655.731(b)(3)(iii)(B); or another legitimate source of wage data that satisfies the requirements in 20 CFR 655.731(b)(3)(iii)(C).[32]

An employer may not file an LCA more than six months prior to the beginning date of the period of intended employment. 20 CFR 655.730. Unless the LCA is incomplete or obviously inaccurate, the Secretary must certify it within seven working days of its filing.[33] Once an employer receives a certified LCA, it must file the *Petition for Nonimmigrant Worker,* Form I–129 (''Form I–129 Petition'') with DHS if seeking classification of the alien as an H–1B worker.[34] Upon petition, DHS then determines, among other things, whether the employer's position qualifies as a specialty occupation and, if so, whether the nonimmigrant worker is qualified for the position.

## II. Prevailing Wage Background

### *A. The Department's Prevailing Wage Determination Methodology*

The Department has long relied on BLS OES data to establish prevailing wage levels. The OES is a comprehensive, statistically valid survey that, in many respects, is the best source of wage data available for satisfying the Department's purposes in setting wages in most immigrant and nonimmigrant programs. The OES wage survey is among the largest continuous statistical survey programs of the Federal Government. BLS produces the survey materials and selects the nonfarm establishments to be surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over one million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be ascertained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. These features are unique to the OES survey, which make it a valuable source for use in many of the Department's foreign labor programs.[35]

The Department incorporated the wage component of the OES survey into its prevailing wage guidance in 1997.[36] At the time, the Department divided OES wage data into two skill levels: A Level I wage for ''beginning level employees'' and a Level II wage for ''fully competent employees.'' Because the OES survey does not provide data about skill differentials within Standard Occupational Classification (SOC) codes, the Department established the entry and experienced skill levels mathematically.[37] Specifically, under an Memorandum of Understanding (MOU), BLS computed a Level I wage calculated as the mean of the lowest paid one-third of workers in a given occupation (approximately the 17th percentile of the OES wage distribution) [38] and a

[26] 20 CFR 656.10(c)(1).

[27] 20 CFR 656.30(b)(1).

[28] 8 U.S.C. 1182(n)(1)(A)–(C), (t)(1)(A)–(C); 20 CFR 655.705(c)(1), 655.730(d).

[29] 20 CFR 655.731(a)(2).

[30] *Id.*

[31] *Id.*

[32] 20 CFR 655.731(a)(2)(ii)(A) through (C).

[33] 8 U.S.C. 1182(n)(1), (t)(2)(C); 20 CFR 655.740(a)(1).

[34] For aliens seeking H–1B1 or E–3 classification, the alien may apply directly to the State Department for a visa once the LCA has been certified.

[35] *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3463 (Jan. 19, 2011).

[36] *Prevailing Wage Policy for Nonagricultural Immigration Programs,* General Administration Letter No. 2–98 (GAL 2–98) (Oct. 31, 1997), *available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942.*

[37] GAL 2–98 at 5.

[38] By way of clarification, the Department notes that, because the old wage methodology took the mean of a portion of the OES wage distribution, the precise wage it produced will not always fall at

Level IV wage calculated as the mean wage of the highest paid upper two-thirds of workers (approximately the 67th percentile).[39] This two-tier wage structure was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage, but the Department did not previously conduct any meaningful economic analysis to test its validity, or otherwise explain how these levels were consistent with the INA's wage provisions.[40]

In order to implement the INA's four-tier prevailing wage provision, the Department published comprehensive Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (2005 Guidance), which expanded the two-tier OES wage level system to provide four ''skill levels'': Level I ''entry level,'' Level II ''qualified,'' Level III ''experienced,'' and Level IV ''fully competent.''[41] The Department applied the formula in the INA to its two existing wage levels to set Levels I through IV, respectively, at approximately the 17th percentile, the 34th percentile, the 50th percentile, and the 67th percentile.[42] In 2010, the Department centralized the prevailing wage determination process for nonagricultural labor certification programs within OFLC's NPWC.[43] In preparation for this transition, the Department issued new Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (2009 Guidance).[44] This guidance currently governs OFLC's PWD process for the PERM, H–1B, H–1B1, and E–3 visa programs and will continue to govern OFLC's PWD process for these programs. No rulemaking to codify the old wage levels was ever undertaken, nor the public given an opportunity to comment on them.

When assigning a prevailing wage using OES data, the NPWC examines the nature of the job offer, the area of intended employment, and job duties for workers that are similarly employed.[45] In particular, the NPWC uses the SOC taxonomy to classify the employer's job opportunity into an occupation by comparing the employer's job description, title, and requirements to occupational information provided in sources like the Department's Occupational Information Network (O*Net).[46] Once the NPWC identifies the applicable SOC code, it determines the appropriate wage level for the job opportunity by comparing the employer's job description, title, and requirements to those normally required for the occupation, as reported in sources like O*Net. This determination involves a step-by-step process in which each job opportunity begins at Level I (entry level) and may progress to Level II (experienced), Level III (qualified), or Level IV (fully competent) based on the NPWC's comparison of the job opportunity to occupational requirements, including the education, training, experience, skills, knowledge, and tasks required in the occupation.[47] After determining the prevailing wage level, the NPWC issues a PWD to the employer using the OES wage for that level in the occupation and area of intended employment.

### *B. The Interim Final Rule*

On October 8, 2020, the Department published an Interim Final Rule (IFR) in the **Federal Register**, 85 FR 63872, revising the methodology the Department uses to determine prevailing wage levels for the H–1B, H–1B1, E–3, and PERM programs. As explained in the IFR, the Department concluded the existing wage levels were not consistent with the relevant statutory requirement that a government survey employed to determine the prevailing wage provide four wage levels commensurate with experience, education, and level of supervision.[48] The Department also determined that the existing wage levels were artificially low and provided an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts earn, creating an incentive to prefer foreign workers to U.S. workers, an incentive that is at odds with the statutory scheme and causes downward pressure on the wages of the domestic workforce. Therefore, the Department revised wage provisions at 20 CFR 655.731 and 656.40 to adjust the existing wage levels to ensure the wage levels reflect the wages paid to U.S. workers with similar experience, education, and responsibility to those possessed by similarly employed foreign workers.

In particular, the IFR amended paragraphs (a), (b)(2), and (b)(3) of 20 CFR 656.40, codifying the four-tier wage practice and revising the wage level computation methodology. A new § 656.40(b)(2)(i) specified the four new levels (Levels I through IV) to be applied. Paragraph (b)(2)(i)(A) explained the Level I wage would be calculated as the mean of the fifth decile of the wage distribution for the most specific occupation and geographic area available, rather than calculated as the mean of the bottom third of the OES wage distribution, as was the case prior to the IFR. Paragraph (b)(2)(i)(D) provided that the Level IV wage would be calculated as the mean of the upper decile of the wage distribution for the most specific occupation and geographic area available, rather than using the mean of the upper two-thirds of the distribution. As a result of these changes, the wage levels were increased, respectively, from approximately the 17th, 34th, 50th, and 67th percentiles to approximately the 45th, 62nd, 78th, and 95th percentiles. The IFR also made minor technical and clarifying amendments to sections 656.40 and 655.731, which the Department has adopted in this final rule with only a minor change to the location of one of the amended provisions, as explained further in section IV below.

17th percentile. Rather, the 17th percentile is the midpoint or median of the distribution for which a mean was produced, and is therefore only an approximation for what the actual wage rates would be. The same is true of the old wage methodology for calculating the Level IV wage, which used the mean of the upper two thirds of the OES distribution, the midpoint of which is the 67th percentile.

[39] Intra-Agency Memorandum of Understanding executed by Mr. John R. Beverly, III, Director, U.S. Employment Service, ETA, and Ms. Katharine Newman, Chief, Division of Financial Planning and Management, Office of Administration, BLS (Sept. 30, 1998).

[40] GAL 2–98, *available at https://oui.doleta.gov/dmstree/gal/gal98/gal_02-98.htm. See also Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76FR 3452, 3453 (Jan. 19, 2011); *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[41] ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs 7 (May 2005), *available at https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf; See also* 85 FR at 63874—63876 for a discussion of the development of the prevailing wage determination process.

[42] *Id.* at 1.

[43] *See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes,* 73 FR 78020 (Dec. 19, 2008); *Prevailing Wage Determinations for Use in the H–1B, H–1B1 (Chile/Singapore), H–1C, H–2B, E–3 (Australia), and Permanent Labor Certification Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands,* 74 FR 63796 (Dec. 4, 2009).

[44] Employment and Training Administration; Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Revised Nov. 2009) (*hereinafter* 2009 Guidance), *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[45] *Id.* at 1.

[46] *Id.* at 1–7; *see also* Occupational Information Network, *available at http://online.onetcenter.org.* O*Net provides information on skills, abilities, knowledge, tasks, work activities, and specific vocational preparation levels associated with occupations and stratifies occupations based on shared skill, education, and training indicators.

[47] 2009 Guidance at 6.

[48] *See* 8 U.S.C. 1182(p)(4).

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' [49] The good cause exception for forgoing notice and comment rulemaking ''excuses notice and comment in emergency situations, or where delay could result in serious harm.'' [50] The Department published the IFR with an immediate effective date, bypassing notice and comment due to exigent circumstances created by the coronavirus public health emergency that threatened immediate harm to the wages and job prospects of U.S. workers, as well as the need to avoid evasion by employers of the new wage rates.[51] However, the Department requested public input on all aspects of the IFR during a post-promulgation 30-day public comment period and explained it would review and consider these comments before issuing a final rule. The public comment period ended on November 9, 2020, and resulted in receipt of more than two thousand comments. Most of the comments were not relevant and/or not substantive, but 148 relevant and substantive comments were received and are discussed further below.

*C. Litigation*

Four groups of plaintiffs separately challenged the Department's IFR. These groups of plaintiffs, which included academic institutions, businesses, and trade associations, claimed the Department lacked good cause to issue the IFR without undergoing notice and comment procedures under the APA and that the IFR was arbitrary and capricious and in violation of the INA. These plaintiffs further requested that the IFR be enjoined and the Department prevented from implementing it. In three of the four cases, the district court approved the parties' stipulation to convert plaintiffs' preliminary injunction motion to a motion for partial summary judgment on the notice and comment claim. In *Chamber of Commerce,* the district court issued a decision on December 1, 2020, granting plaintiffs' motion for partial summary judgment on their notice and comment claim and setting aside the Department's IFR.[52] In *Purdue University* and *Stellar IT* (which were consolidated), the district court issued a decision on December 14, 2020, granting partial summary judgment to the plaintiffs on the basis that the Department lacked good cause to issue the IFR, and ordered the Department to re-issue prevailing wage determinations issued under the IFR on a mutually agreeable schedule.[53] In the fourth case, *ITServe Alliance,* the district court issued a preliminary injunction on December 3, 2020, prohibiting the Department from enforcing the IFR against the plaintiffs in that case.[54] In discussing plaintiffs' likelihood of success on the merits in that case, the court limited its analysis to plaintiffs' claim that the Department lacked good cause to forgo advance notice and comment.[55] Following the district court's decisions in *Chamber of Commerce* and *ITServe Alliance,* OFLC took immediate action to comply with the courts' directives, including issuing a public announcement on its website on December 3, 2020, outlining the steps it was taking in response to the courts' orders.

Notwithstanding the district courts' orders to set aside the IFR on procedural grounds, the U.S. Supreme Court has acknowledged and affirmed the proposition that a procedurally flawed IFR does not taint a final rule relying upon an IFR as a proposed rule.[56] The Department is satisfied that it meets the APA's objective requirements necessary for the promulgation of a final rule in this case. Specifically, the Department's IFR provided sufficient notice to the public by allowing for a 30 day comment period; [57] ''gave interested persons an opportunity to participate in the rule making through submission of written data, views or arguments''; [58] the rule contained a ''concise general statement of their basis and purpose''; [59] and the rule will be published more than 30 days before it becomes effective.[60] Accordingly, the Department maintains the legal authority to pursue this final rule based upon its compliance with the APA's procedural requirements satisfied in the IFR.

## III. Discussion of Final Rule, Comments, and Responses

*A. Overview*

The IFR provided for the submission of public comments during a prescribed 30-day public comment period that closed on November 9, 2020. During this time, the Department received 2,340 comments. The Department received input from a broad range of commenters, including labor unions; employers; law firms; academic and research institutions; healthcare providers; public policy organizations; professional and trade associations; a federal agency; foreign workers, students, attorneys, and other individuals; and a significant number of anonymous commenters. Some commenters supported the new wage level computation methodology in the IFR generally or in concept as a necessary change to prevent abuse of the H–1B program, particularly its four-tier wage level system, by employers seeking to hire foreign workers at below market wages. However, the overwhelming majority of commenters opposed the new wage level computation methodology. Notably, however, commenters generally did not offer justifications or data to support the continued use of the old wage methodology.

Commenters opposed to the substantive changes in the IFR generally asserted that the revised wage levels do not correspond with wages paid to U.S. workers with similar qualifications or those employed in job opportunities with similar requirements, that the IFR wages do not reflect market wages as evidenced by comparisons to private wage surveys and wage data on various websites, and that the wage increases are arbitrary and unsustainable for most employers, especially given the immediate effective date of the IFR. Commenters expressed concern that the IFR would negatively impact the economy broadly by reducing labor demand, reducing American competitiveness in innovative industries, and encouraging outsourcing. A number of commenters asserted the IFR would disproportionately impact small businesses and start-ups; nonprofits; and academic, research, and healthcare institutions. Many commenters claimed that there is no need to raise wages to protect U.S. workers, asserting that foreign workers are not underpaid and employment of foreign workers creates,

[49] 5 U.S.C. 553(b)(B).

[50] *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004).

[51] *See* 85 FR 63872, 63898–63902 (Oct. 8, 2020).

[52] Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Cross-Motion, *Chamber of Commerce, et al.* v. *DHS, et al.,* 20–cv–07331 (N.D. Cal. Dec. 1, 2020). The plaintiffs in this case also challenged an interim final rule issued by DHS, *Strengthening the H–1B Nonimmigrant Visa Classification Program,* 85 FR 63, 918 (Oct. 8, 2020), that published on October 8, 2020.

[53] Memorandum Opinion, *Purdue University, et al.* v. *Scalia, et al.,* 20–cv–03006 (D.D.C. Dec. 14, 2020); Memorandum Opinion, *Stellar IT, et al.* v. *Scalia, et al.,* 20–cv–03175 (D.D.C.).

[54] Opinion, *ITServe Alliance, et al.* v. *Scalia, et al.,* 20–cv–14604 (D.N.J. Dec. 3, 2020).

[55] *Id.* at 8–20.

[56] *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania,* 140 S.Ct. 2367, 2385–86 (2020).

[57] 5 U.S.C. 553(b).

[58] 5 U.S.C. 553(c).

[59] *Id.*

[60] 5 U.S.C. 553(d).

rather than reduces, employment opportunities for U.S. workers and benefits the economy broadly. Many commenters also expressed concern the IFR would harm currently employed foreign workers and their families, especially foreign workers with significant ties to the U.S. and for whom immigrant visa petitions have been filed but for whom visas are unavailable due to per country visa caps.

After careful and thorough consideration of the comments, the Department has adopted a number of modifications in this final rule to the wage methodology established by the IFR. In particular, the Department has adjusted the Level I wage and the Level IV wage downward to the 35th percentile and 90th percentile, respectively. The Department is also implementing in this rule a number of changes to how it uses data from BLS in the H–1B and PERM programs that will further reduce the incidence of inappropriately inflated wages identified by commenters. Finally, the Department is adopting a phase-in approach to how the new wage levels will be applied to give employers and workers time to adapt to the change. In combination, the Department believes these measures appropriately address commenters' concerns and will ensure that, going forward, the prevailing wage rates provided by the Department fully protect the wages and job opportunities of U.S. workers.

As the Department explained in the IFR, a primary purpose of the restrictions on immigration created by the INA, both numerical and otherwise, is ''to preserve jobs for American workers.'' [61] Safeguards for American labor, and the Department's role in administering them, have been a foundational element of the statutory scheme since the INA was enacted in 1952.[62] For the reasons set forth below, the Department has determined that the way it previously regulated the wages of certain immigrant and nonimmigrant workers in the H–1B, H–1B1, E–3, and PERM programs is inconsistent with the text of the INA. A substantial body of evidence examined by the Department, and discussed at length in the IFR, also suggests that the existing prevailing wage rates used by the Department in these foreign labor programs are causing adverse effects on the wages and job opportunities of U.S. workers and are therefore at odds with the purpose of the INA's labor safeguards. The current wage levels were also promulgated through guidance, without providing the public with any notice or an opportunity to comment, and without any meaningful economic justification. Accordingly, the Department is acting to adjust the wage levels to ensure they are codified and consistent with the factors the INA dictates must govern the calculation of foreign workers' wages. In so doing, the Department expects to reduce the dangers posed by the existing levels to U.S. workers' wages and job opportunities and thereby advance a primary purpose of the statute. While some commenters disagreed with the Department's conclusions about the effects of the old wage levels on U.S. workers, the Department continues to believe that the reasoning put forward in the IFR on this point is sound.

The modern H–1B program was created by the enactment of the Immigration Act of 1990 (IMMACT 90). Among other reforms, IMMACT 90 established ''various labor protections for domestic workers'' in the program.[63] These protections were primarily designed ''to prevent displacement of the American workforce'' by foreign labor.[64] In general, the purpose of the H–1B program is to ''allow[ ] an employer to reach outside of the U.S. to fill a temporary position because of a special need, presumably one that cannot be easily fulfilled within the U.S.'' [65] Using a foreign worker as a substitute for a U.S. worker who is already working in or could work in a given job is therefore inconsistent with the broad aims of the program. Congress has recognized that repeatedly, both in enacting IMMACT 90 and in making subsequent changes to the H–1B program.[66]

Wage requirements are central to the H–1B program's protections for U.S. workers.[67] Under the INA, employers must pay H–1B workers the greater of ''the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question'' or the ''the prevailing wage level for the occupational classification in the area of employment.'' [68] By ensuring that H–1B workers are offered and paid wages that are no less than what U.S. workers similarly employed in the occupation are being paid, the wage requirements are meant to guard against both wage suppression and the replacement of U.S. workers by lower-cost foreign labor.[69]

The OES prevailing wage levels that the Department uses in the H–1B program—as well as the related H–1B1 and E–3 ''specialty occupation'' programs for foreign workers from Chile, Singapore, and Australia—are the same as those it uses in its PERM program. Through the PERM program, the Department processes labor certification applications for employers seeking to sponsor foreign workers for permanent employment under the EB–2 and EB–3 immigrant visa preference categories. Aliens seeking admission or adjustment of status under the EB–2 or EB–3 preference categories are inadmissible ''unless the Secretary of Labor has determined and certified . . . that—(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for

[61] *Sure-Tan, Inc.* v. *N.L.R.B.,* 467 U.S. 883, 893 (1984).

[62] H.R. Rep. No. 1365, 82d Cong., 2d Sess., 50–51 (1952) (discussing the INA's ''safeguards for American labor'').

[63] *Washington All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.,* 156 F. Supp. 3d 123, 142 (D.D.C. 2015), judgment vacated, appeal dismissed sub nom. *Washington All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.,* 650 F. App'x 13 (D.C. Cir. 2016).

[64] *Cyberworld Enter. Techs., Inc.* v. *Napolitano,* 602 F.3d 189, 199 (3d Cir. 2010).

[65] *Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187 (N.D. Cal. 2014).

[66] *See, e.g.,* Public Law 105–277 § § 412–13, 112 Stat. 2681, 2981–642 to –650 (1998). *See also* H.R. Rep. No. 101–723(I), 101st Cong., 2d Sess. 44, 66–67 (1990) (''[IMMACT 90] recognizes that certain entry-level workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available. At the same time, heavy use and abuse of the H–1 category has produced undue reliance on alien workers.''); 144 Cong. Rec. S12741, S12749 (daily ed. October 21, 1998) (statement of Sen. Abraham) (describing the purpose of the H–1B provisions of the American Competiveness and Workforce Improvement Act as being to ensure ''that companies will not replace American workers with foreign born professionals, including increased penalties and oversight, as well as measures eliminating any economic incentive to hire a foreign born worker if there is an American available with the skills needed to fill the job.'').

[67] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models,* 59 FR 65646, 65655 (December 20, 1994) (describing the ''Congressional purposes of protecting the wages of U.S. workers'' in the H–1B program); H.R. REP. 106–692, 12 (*quoting* Office of Inspector General, U.S. Department of Labor, Final Report: The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs to Be Fixed 21 (May 22, 1996) (''The employer's attestation to . . . pay the prevailing wage is the only safeguard against the erosion of U.S. worker's [sic.] wages.'').

[68] 8 U.S.C. 1182(n)(1)(A).

[69] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80110, 80110 (Dec. 20, 2000) (''The [INA], among other things, requires that an employer pay an H–1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.''); *Panwar* v. *Access Therapies, Inc.,* 975 F. Supp. 2d 948, 952 (S.D. Ind. 2013) (''The wage requirements are designed to prevent . . . the influx of inexpensive foreign labor for professional services.'').

a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' [70]

The Secretary makes this determination in the PERM program by, among other things, requiring the foreign worker's sponsoring employer to recruit U.S. workers by offering a wage that equals or exceeds the prevailing wage and to assure that the employer will pay the foreign worker a wage equal to or exceeding the prevailing wage.[71] In this way, similar to its role in the H–1B program, the prevailing wage requirement in the PERM program furthers the statute's purpose of protecting the interests of, and preserving job opportunities for, American workers.[72] Effectuating this purpose is the principle objective of the Department's regulatory scheme in the PERM program.[73]

While the prevailing wage levels the Department sets in the H–1B, H–1B1, E–3, and PERM programs are meant to protect against the adverse effects the entry of immigrant and nonimmigrant workers can have on U.S. workers, they do not accomplish that goal—and have not for some time. For starters, the Department has never offered any explanation or economic justification for the way it currently calculates the prevailing wage levels it uses in these foreign labor programs.[74] The INA requires that a government survey employed to determine the prevailing wage provide wage levels commensurate with experience, education, and level of supervision.[75] However, it is clear that the Department's current wage levels are not sufficiently set in accordance with the relevant statutory factors. In setting the wage levels, the Department did not engage in an effort to tether them to the statutory factors, identify sources of wage data that would inform an analysis of how the levels should be calibrated so as to protect U.S. workers' wages and job opportunities, or otherwise articulate an analytical framework to guide and explain how the levels were established. It also set the levels outside the rulemaking process, instead promulgating them solely through a memorandum of understanding between departmental components.

Further, the Department's analysis of the likely effects of H–1B and PERM workers on U.S. workers' wages and job opportunities shows that the existing wage levels are not advancing the purposes of the INA's wage provisions. As explained below, under the existing wage levels, artificially low prevailing wages provide an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts—meaning U.S. workers in the same labor market, performing similar jobs, and possessing similar levels of education, experience, and responsibility—make, creating an incentive—entirely at odds with the statutory scheme—to prefer foreign workers to U.S. workers, and causing downward pressure on the wages of the domestic workforce. The Department is therefore acting to adjust the existing wage levels to ensure the levels reflect the wages paid to U.S. workers with levels of experience, education, and responsibility comparable to those possessed by similarly employed foreign workers.

To accomplish this, the Department articulated an analytical framework in the IFR to govern how it adjusted the prevailing wage levels. In doing so, the Department considered, among other things, the statutory context in which the INA's prevailing wage provisions are found. In particular, because the prevailing wage levels are used primarily for high-skilled workers, most of whom are H–1B workers, the Department took into account the INA's definition of ''specialty occupation,'' which establishes the baseline minimum qualification requirements that foreign workers must possess to obtain an H–1B visa, and also looked to the qualification requirements for obtaining an EB–2 visa. From its review of these qualification requirements, the Department drew a number of conclusions about the least-skilled, or entry-level workers employed in the PERM and H–1B programs. Specifically, the Department determined that such workers often possess greater skills than many of the least qualified workers in the most common occupational classifications in which H–1B and PERM workers are found. For that reason, the Department concluded that the lower end of the wage distribution reported by the OES survey for those classifications should be discounted in setting an entry-level wage. Because wages for H–1B and PERM workers are, under the INA, to be based on the wages paid to U.S. workers with comparable education, experience, and responsibility, looking to the wage data of workers at the lowest points of the wage distributions for these occupations who likely would not be considered as working in a ''specialty occupation'' would therefore be inconsistent with the statute. Because the old wage methodology made such wage data a central element of the prevailing wage calculation, it did not, in the Department's judgment, comport with the INA.

The Department's review of the INA's qualification requirements for H–1B and EB–2 workers, in combination with an analysis of the demographic characteristics of workers in the H–1B program, led the Department to determine that, for purposes of identifying an entry-level wage, it should look to the wages paid to U.S. workers who possess a master's degree and limited work experience. Using such workers as wage comparators for entry-level H–1B and PERM workers, in the Department's judgment, is an appropriate way of determining what U.S. workers similarly employed and with comparable education and experience to such H–1B and PERM workers are paid. In analyzing wage data on such workers, the Department also determined that it was appropriate

[70] 8 U.S.C. 1182(a)(5)(A)(i).

[71] 20 CFR 656.10(c)(1).

[72] *Pai* v. *U.S. Citizenship & Immigration Servs.,* 810 F. Supp. 2d 102, 110 (D.D.C. 2011) (''The plain language of [8 U.S.C. 1182(a)(5)(A) and 1153(b)(3)] reflects a concern to protect the interests of workers in the United States.''); *Fed'n for Am. Immigration Reform, Inc.* v. *Reno,* 93 F.3d 897, 903 (D.C. Cir. 1996) (explaining that the INA's various limits on immigration, such as in the allocation of visas in the EB–2 and EB–3 preference categories, ''reflect a clear concern about protecting the job opportunities of United States citizens.''). *See generally Texas* v. *United States,* 809 F.3d 134, 181 (5th Cir. 2015) (quoting *I.N.S.* v. *Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 194 (1991) (''The INA's careful employment-authorization scheme 'protect[s] against the displacement of workers in the United States,' and a 'primary purpose in restricting immigration is to preserve jobs for American workers.' '').

[73] *See, e.g., Durable Mfg. Co.* v. *U.S. Dep't of Labor,* 578 F.3d 497, 502 (7th Cir. 2009) (''The point remains that the new § 656.30(b) advances, to some degree, the congressional purpose of protecting American workers.''); *Rizvi* v. *Dep't of Homeland Sec. ex rel. Johnson,* 627 F. App'x 292, 294–95 (5th Cir. 2015) (unpublished) (''Viewed in the proper context, the challenged regulation serves purposes in accord with the statutory duty to grant immigrant status only where the interests of American workers will not be harmed; showing the employer's ongoing ability to pay the prevailing wage is one reasonable way to fulfill this goal.'').

[74] *See Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013) (''Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a reasonable proxy for the entry-level wage. DOL did not conduct any meaningful economic analysis to test the validity of that assumption . . .'').

[75] 8 U.S.C. 1182(p)(4).

to focus its analysis on those occupations that account for one percent or more of all H–1B workers. As the Department acknowledged in the IFR, using a single wage structure across multiple programs, hundreds of different occupations, and for hundreds of thousands of different workers necessarily means that prevailing wage rates will not be perfectly tailored to every single job opportunity. While still giving due weight to other occupations in its analysis, the Department has determined that paying special attention to those occupations where foreign workers are most heavily concentrated, and where the risk to U.S. workers' wages and job opportunities from the employment of foreign labor is therefore most acute, is the optimal way of advancing the purpose of the INA's wage protections while accounting for the breadth of the programs and occupations covered by the four-tier structure. As discussed further below, while several commenters disagreed with various aspects of this analytical framework and the Department's interpretation of the INA, the Department, after considering those comments, continues to believe that its approach is appropriate.

Having determined how it would analyze the question of how to set prevailing wage levels, the Department proceeded to review data from various, credible government sources, specifically the surveys from the National Science Foundation (NSF) and the Current Population Survey (CPS), about the wages paid to master's degree holders with limited work experience employed in occupations that account for the vast majority of workers covered by the prevailing wage levels. Based on its analysis of this data, the Department concluded in the IFR that the range within the OES distribution where workers similarly employed and with levels of education and experience comparable to entry-level H–1B and PERM workers fall is between the 32nd and 49th percentiles of the distribution. The Department continues to believe that this conclusion is largely accurate, and that it is highly relevant to how it will set the entry-level wage in this final rule.

In the IFR, the Department relied on a number of qualitative considerations, including the relative strengths and weaknesses of the data it relied on to identify the entry-level wage range as well as the purpose of the INA's wage protections, to conclude that the entry-level wage should be placed higher up within the identified range at approximately the 45th percentile. Based on private wage data and other considerations provided by commenters, which are addressed below, the Department has reassessed this conclusion, and has now determined that the entry-level wage for the H–1B and PERM programs is more appropriate at the 35th percentile. In particular, data provided by commenters indicate that the lower end of the range may in fact provide a more accurate representation of what U.S. workers similarly employed to entry-level H–1B and PERM workers are paid. Concerns from commenters about how a potentially inflated entry-level wage would affect employers' ability to access the program, and how the IFR's reasoning was weighted too heavily to certain occupations and geographic areas, are also compelling reasons, in the Department's judgment, to favor a lower point in the range. Importantly, the Department believes that by staying within the range identified in the IFR, the entry-level wage it has selected will provide robust protection for U.S. workers.

The Department acknowledges commenters' reliance interests on the current wage methodology and understands that immediate changes to wage rates could cause some economic uncertainty for both employers and foreign workers. Thus, the Department is also adopting a series of transition provisions in this final rule to make it easier for employers and workers to adapt to the changed wage levels, thus avoiding disruption and striking a proper balance between stakeholders' reliance interests and the Department's obligation to comply with the INA and pursue a policy that is protective of U.S. workers. For many job opportunities, the new wage rates will phase in through two steps over a year and a half period. For job opportunities that will be filled by workers on track to become lawful permanent residents, and who therefore have greater reliance interests in the old wage methodology, the new wage rates will phase in through four steps over a three and a half year period. The Department also reduced the Level IV wage from approximately the 95th percentile to the 90th percentile, and made a number of other technical modifications to how it uses BLS data to produce prevailing wage rates. These changes, too, address commenters' concerns that wages under the IFR were inappropriately high.

*B. Discussion*

1. The Need for Rulemaking

Summary of Comments

The Department received a number of comments in support of the IFR, including one commenter that believed the IFR ''makes important strides to bring wage requirements for the H–1B program closer to real prevailing wages in relevant industries.'' These commenters agreed with the Department that the prior wage levels resulted in adverse effects on U.S. workers' wages and job opportunities. Some of these commenters noted that the Level I and II wages under the prior wage level methodology (approximately the 17th and 34th percentiles) were well below the median for the occupation and that 60 percent of H–1B positions were certified at one of these wage levels. One of these commenters expressed concern that the prior wage level methodology permitted H–1B employers to ''engage in de facto wage arbitrage schemes.'' A public policy organization noted that many employers ''pay H–1B workers the lowest wages legally allowed, and outsource their H–1B employees to third-party firms.'' The commenter asserted that employers opposed to the revised wage level methodology and increased wages claim ''that employers will only hire H–1B workers if they are underpaid relative to similarly-situated U.S. workers,'' which creates a wage ''race to the bottom.'' The commenter further stated that ''other reliable sources of wage data'' demonstrate that the wage results generated by the Department in the IFR are in fact too low. The commenter cited data from both the Department and NSF to draw the comparison and substantiate this claim, and it requested that the Department conduct a ''systematic review'' of major H–1B occupations to ensure that updates to the wage structure are in line with credible sources of salary data, such as the NSF's survey of recent college graduates. Another commenter believed the IFR would ''prevent employers that seek specialized workers from being crowded out of the H–1B program by employers using the program to pay below market wages.'' Some of these commenters believed the Level I wage should be set closer to the median for the occupation and one of the commenters stated that the Level I wage was the only wage level that mattered because the Department ''has no adjudicative power over employer skill level claims.''

By contrast, the majority of comments received on the IFR expressed strong opposition to the rule and a number of commenters questioned whether adjustments to the prevailing wage level methodology are necessary. Many commenters believed there was no need to raise wages to protect U.S. workers, citing the Department's statement that many frequent H–1B program users pay wages above the required prevailing wage rates, as well as other external sources finding that foreign workers are paid as much or more than similarly employed U.S. workers and that foreign workers create jobs for U.S. workers or otherwise benefit U.S. workers and the economy broadly. Many commenters pointed to unemployment statistics and forecasted job growth in certain fields as evidence that the IFR changes are not necessary to protect U.S. workers. Three commenters stated that it is more expensive to hire foreign workers due to costs related to the visa process and that employers prefer to hire U.S. workers due to concern about the ''instability of H–1B lottery systems.'' Some commenters believed the regulatory requirement that H–1B employers must pay the highest of the actual or prevailing wage provides sufficient protection to U.S. workers because the employer must pay the actual wage in cases where the Department's PWD rate is lower. One commenter asserted the annual visa caps provide sufficient protection for U.S. workers and a second commenter asserted the recruitment requirements in the permanent labor certification regulations offer sufficient protection.

Several commenters claimed it was improper for the Department to cite higher actual wages paid by large H–1B employers as an indication that the prevailing wage levels were insufficient to protect U.S. workers. For example, an university commenter noted the Department's acknowledgment that many large ''program users pay well in excess of the prevailing wage'' and the commenter asserted this was an acknowledgment ''that the issue it is trying to resolve . . . is non-existent.'' This commenter stated that employers paying more than the prevailing wage might simply indicate these employers pay a higher actual wage ''due to legitimate business factors.'' Similarly, a public policy organization and a professional association stated that the fact that a group of H–1B employers pays more than the prevailing wage indicates only that some employers voluntarily increase wages for competitive reasons. Another commenter stated that pay differences are reflective of the ''free market at work'' and that ''high profile tech companies . . . are in heavy competition . . . and have large enough profit margins'' to pay higher wages. A group of associations stated that payment of higher wages by these employers may be due to geography and ''intensity of the work'' such that these employers must ''pay a premium to attract both domestic talent and foreign-born talent . . .'' By intensity of the work, the commenters referred to areas in which at least one percent of workers are employed in a particular occupation. The commenters stated that the OES ''identifies for each SOC . . . [areas where] the number of employed individuals per each 1,000 employed persons in that particular occupation . . .'' and that the Department should look to this as ''a useful proxy for the intensity of activity in that particular occupation in a particular geography,'' in addition to analyzing available LCA data to determine how often wages in excess of prevailing wages ''are primarily for such high intensity jobs and locations.''

Many commenters asserted the Department failed to consider or ''insufficiently weighted'' a wide range of relevant and readily available studies and reports that indicate a revision to the wage level methodology is unnecessary. These commenters stated that the Department ignored ample evidence that H–1B workers are paid at least as much as their U.S. counterparts and that employment of H–1B workers may increase the wages earned by U.S. workers. A few commenters cited a GAO report finding H–1B workers earn the same or more than similar U.S. workers and an analysis by the website Glassdoor finding that across ''10 cities and roughly 100 jobs'' it examined, salaries for H–1B workers were ''about 2.8 percent higher than comparable U.S. salaries . . . .'' Similarly, several commenters cited a report published by the Partnership for a New American Economy, a research and advocacy organization dedicated to ''mak[ing] the economic case for immigration,'' [76] finding that denials of H–1B petitions from 2007 to 2008 slowed job and wage growth for U.S. workers and that every one-percentage-point increase in the ''foreign STEM share of a city's total employment . . . made possible by the H–1B visa program'' increased wage growth by three to seven percentage points for U.S. workers. Other cited sources included:

- A Cato Institute report indicating roughly 80 percent of H–1B employers pay H–1B workers ''above average market wages'';
- A working paper from the National Bureau of Economic Research finding that ''complete elimination'' of the H–1B program would have virtually no effect on the wages of ''high-skilled Americans in year one and a slight reduction . . . by year three'';
- A National Foundation for American Policy (NFAP) report finding ''on average, H–1B workers reduce overall unemployment and increase earnings growth within the fields they are employed by increasing firm productivity'';
- An NFAP report finding that each 1 percent increase in H–1B workers in science, engineering, technology, and mathematics (STEM) occupations ''increased local wages of college educated Americans by 7–8 percent and non-college educated Americans by 3–4 percent'';
- A journal article concluding that ''after controlling for human capital attributes, foreign I.T. professionals'' earn more than their U.S. counterparts; and
- A National Survey of College Graduates comparative analysis finding that ''controlling for socioeconomic and demographic characteristics, workers who hold a temporary work visa earn about thirty percent more than comparable'' U.S. workers.

Commenters also cited a variety of studies and reports that conclude that the employment of foreign workers has little or no effect on employment rates for similarly employed U.S. workers. For example, a group comment cited a 2016 *Journal of Economic Perspectives* study on ''Global Talent Flows'' that the commenter said indicated ''very little displacement of U.S.-born innovators and high-skilled professionals by high-skilled immigrants.'' Another commenter stated ''key fields such as software development and data science . . . are facing undeniable workforce supply shortages'' and asserted this ''undermin[ed] the argument that an influx in cheaper labor supply will result in lower possible earnings'' for U.S. workers. In support, the commenter cited a *Wall Street Journal* article noting ''tech job postings in the U.S. rose 32%'' in the first half of 2019 and a 2018 BLS report projecting higher than average employment growth in high-tech services.

Some commenters also expressed concerns about the sources the Department did cite in the IFR in support of the need to revise wage levels. Citing an analysis of the IFR by labor economist and professor Dr. Madeline Zavodny, a trade association asserted the Department relied on ''outdated, incorrect, or limited empirical data'' and relied on sources that did not ''include an analysis of the wages of H–1B workers in direct comparison with other workers having the same level of education, experience,

[76] *See* New American Economy, ''About,'' *https://www.newamericaneconomy.org/about.*

or responsibility.'' The commenter stated that the Associated Press analysis cited at footnote 122 provides ''an incomplete picture'' because it is not based on ''actual workers in the U.S. who hold an H–1B visa'' but instead is based on LCA data, which includes ''applications that are denied (often because the wage is too low).'' The commenter also stated that the analysis ''does not control for any differences between applicants for an H–1B visa and U.S. workers, such as differences in age and education.'' An anonymous commenter stated that the Associated Press article indicated that 58 percent of H–1B workers are paid more than their U.S. counterparts and asserted the article can only be used to support statements regarding wages paid to workers in computer occupations.

The trade association stated that the citations at footnote 121 in the IFR that the Department relied on to support its statement that H–1B IT workers earn roughly 25–33 percent less than U.S. workers failed to provide ''a clear analysis of the wages of workers who hold an H–1B visa compared with other workers;'' failed to include H–1B workers in the analysis; and failed to provide sufficient details of the wage analysis to determine the reason for the wage differentials. The anonymous commenter stated that the CRISIL Research citation in this footnote failed to cite evidence or provide data to support the statement that H–1B workers earn 25 percent less than U.S. workers and failed to provide a source for the claim that ''local hires . . . cost 25–30% more.'' The anonymous commenter stated that the third citation in this footnote is outdated, analyzing ''only immigrant trends in the 1990s'' and does not ''specifically reference computer occupations.'' The commenter also noted that the report recognizes that ''the lower earnings of recent immigrants may reflect unobserved differences in the quality and type of education among immigrant cohorts'' and the report ''offers alternative factors that weigh into the wage trends of H–1B workers that [DOL] has not accounted for in this rule.''

An immigration law firm stated that the IFR misconstrued the CRISIL report, which the commenter asserted ''actually shows that as a result of recent H–1B policy changes, it is harder to obtain H–1Bs for employees that are contracted to work at third-party worksites forcing U.S. employers to instead hire full-time employees to fill these roles'' and ''the increase in costs is attributed to the costs of full time employees'' compared to the cost of ''contract employees.'' The commenter also asserted that the Department misconstrued Economic Policy Institute research when it claimed the research showed that only one of every two STEM graduates get a job in the field. The commenter stated that the researchers ''found that half of students that do not enter the STEM industry found jobs in other industries.''

The anonymous commenter also asserted that the congressional testimony cited in this footnote provides no evidence to ''establish the median wage as the appropriate compensation for any specific [H–1B] positions'' and fails to consider that ''that a Level 1 wage does not necessarily represent a position that requires less skill, but rather may have fewer experience requirements or supervisory duties.'' The commenter also asserted that the journal article cited in this footnote is ''outdated in its data'' and ''refers to computer occupations'' so it ''cannot be applied to any other occupational codes.''

Finally, a trade association noted that the Department cited findings by George Borjas regarding the impact of foreign workers on the wages of low-skill workers but failed to acknowledge Borjas's contribution to a 2016 National Academies of Sciences, Engineering, and Medicine (NASEM) literature review in which he stated ''wage impacts from immigrants on U.S.-born college-educated workforce is minor (an increase for U.S. professionals of one-half of one percent in wage rates as a result of high-skilled immigration).'' The commenter added that the NASEM review found that there is a ''broad consensus with respect to high-skilled immigration that any impacts on U.S. wages by high-skilled, college-educated foreign-born professionals are close to negligible.''

Response to Comments

First, as the Department explained in the IFR, a primary and independently sufficient reason for reforming the manner in which it sets prevailing wage levels in the H–1B and PERM programs is that the old wage levels were never justified through an economic analysis, nor codified in rulemaking through notice and comment, and, on closer inspection, are in substantial tension with the statutory framework. Notably, commenters have also not provided data or analysis demonstrating that the wage rates under the old wage methodology produces wage rates commensurate with the wages paid to U.S. workers similarly employed and with comparable education, experience, and responsibility to H–1B and PERM workers, as required by statute. While some commenters urged the Department to preserve the old wage methodology, they provided no evidence for why that would be appropriate or consistent with the INA. Moreover, the Department notes that criticism of the way in which the wage levels are currently set is longstanding and exists across the political spectrum.[77] Put simply, the old wage methodology is an outmoded method for calculating prevailing wage rates that is neither supported economic analysis, nor defended by commenters, and has never tied to the relevant statutory factors.

The Level I wage under the old methodology is set by calculating the mean of the bottom third of the OES wage distribution. That means the wages for many H–1B workers are set based on a calculation that takes into account wages paid to workers who, as explained in the IFR and below, almost certainly would not qualify to work in a ''specialty occupation,'' as defined by the INA. The Department has noted previously that ''workers in occupations that require sophisticated skills and training receive higher wages based on those skills.'' [78] As a worker's education and skills increase, his wages are expected to increase as well.[79] For that reason, it is likely that workers at the lowest end of an occupation's wage distribution generally have the lowest levels of education, experience, and responsibility in the occupation. In consequence, if the occupation by definition includes workers who do not have the level of specialized knowledge required of H–1B workers, as is the case with some of the most common occupations in which H–1B workers are employed, the very bottom of the wage distribution should be discounted in determining the appropriate point in the OES wage distribution at which to establish the entry-level wage under the four-tiered wage structure because workers at the bottom end are not similarly employed to H–1B workers. Yet the old wage structure made such workers a central component of that calculation.[80] Similarly, the current

[77] *See https://www.grassley.senate.gov/news/news-releases/bipartisan-group-lawmakers-propose-reforms-skilled-non-immigrant-visa-programs.*

[78] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[79] *See* Bureau of Labor Statistics, Learn more, earn more: Education leads to higher wages, lower unemployment, available at *https://www.bls.gov/careeroutlook/2020/data-on-display/education-pays.htm.*

[80] For example, the occupation of Software Developers, which accounts for a large number of H–1B workers, does not require the same degree of specialized knowledge as a baseline entry requirement as does the INA's definition of ''specialty occupation.'' Yet approximately 10

Continued

Level IV wage is set by calculating the mean of the upper two-thirds of the wage distribution. That means that the wage level provided for the most experienced and highly educated H–1B workers is determined, in part, by taking into account a sizeable number of workers who do not even make more than the median wage of the occupation. Given the correlation between wages and skills, this calculation also would appear inconsistent with the statutory and regulatory framework. Common sense dictates that workers making less than the median wage of the occupation cannot be regarded as being similarly qualified to the most competent and experienced members of that occupation. That puts the old methodology in substantial tension with the governing statute and is in and of itself a sufficient reason for reassessing and revising the prior methodology in order to bring it more closely in line with the INA's wage provisions.[81]

The Department also based its conclusion in the IFR that regulatory reform of H–1B and PERM prevailing wages was needed, in part, on a review of the academic literature on the subject, congressional testimony and media accounts of the practical consequences of the prior prevailing wage levels, and data on the actual wages that major users of the H–1B and PERM programs pay their foreign workers. As discussed at length in the preamble to the IFR, the Department considered numerous studies finding that H–1B workers are paid less than their U.S. counterparts.[82] Other studies found this disparity to be especially true of H–1B employees working in computer science and information technology, fields in which two thirds of H–1B workers are employed.[83] The Department's justification also took into account the fact that economic literature suggests that the introduction of low-cost foreign labor into a labor market suppresses wages in proportion to the number of foreign workers present in that labor market.[84] Studies involving computer science workers confirm this general finding.[85] Its review of this information led the Department to conclude that the old wage methodology resulted in adverse effects on both U.S. workers' wages as well as their job opportunities. After reviewing comments and the studies and information they provided, the Department continues to believe that, at least in some cases, the old prevailing wage methodology resulted in harm to U.S. workers and therefore should be revised.

The Department recognized, as did some commenters, the limitations of some of the wage studies it relied on in the IFR, noting that many of them compare H–1B and U.S. workers in the same occupation but do not directly compare workers in those occupations with the same levels of education, experience, and responsibility.[86] However, in the IFR, the Department explained why these studies nonetheless allow for an instructive wage comparison: ''[B]ecause H–1B workers are required to possess specialized knowledge and expertise that often exceeds the level of education and experience necessary to enter a given occupation generally, and greater skills are associated with higher earnings, the median H–1B workers should earn a wage that is at least the same, if not more, than the median wage paid to U.S. workers in the occupation. But a variety of studies show that the opposite is occurring.'' [87] Put another way, while the Department acknowledges that there is an inherent limitation in comparing median earnings of groups of workers, since doing so does not account for different levels of experience and education, the distortion in the data that results from such a limitation would be expected to show higher earnings for H–1B workers at the median given that a result of the INA's specialty occupation requirement for H–1B workers is that H–1B workers must possess more advanced education and experience than what is typically required to enter some of the most common occupations in which H–1B workers are employed. Yet the median earning of H–1B workers, according to these studies, are in fact skewed lower than the median U.S. worker in these occupations. Accordingly, the Department continues to believe this is a compelling data point demonstrating that H–1B workers in many cases make wages below those of similarly employed U.S. workers.

Further, the Department disagrees with commenters that other aspects of the methodology and reasoning relied on in the various studies that support the Department's position are flawed. These are, in many cases, studies from credible sources that are commonly cited in reporting and literature about the effects of the H–1B program on U.S. workers. Moreover, to the extent these

percent of all LCAs filed with the Department for software developer positions classify those positions as entry-level, meaning that under the current wage levels the wages paid to such specialty occupation workers are calculated based, at least in part, on the wages paid to some workers who do not have comparable specialized knowledge and expertise. This outcome contravenes the INA's requirement that H–1B workers be paid wages based on the wages paid to U.S. workers with similar levels of education, experience, and responsibility.

[81] *See Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 175 (2007) (''Neither can we find any significant legal problem with the Department's explanation for the change. The agency said that it had 'concluded that these exemptions can be available to such third party employers' because that interpretation is 'more consistent' with statutory language that refers to 'any employee' engaged 'in' the 'enumerated services' and with 'prior practices concerning other similarly worded exemptions.' There is no indication that anyone objected to this explanation at the time. And more than 30 years later it remains a reasonable, albeit brief, explanation.'').

[82] Atlantic Council, Reforming US' High-Skilled Guestworker Program, (2019), available at *https://www.atlanticcouncil.org/in-depth-research-reports/report/reforming-us-high-skilled-immigration-program/;* The Impact of High-Skilled Immigration on U.S. Workers: Hearing before the Senate Committee on the Judiciary (February 25, 2016) (testimony of John Miano, representing Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, the AFL–CIO); Norman Matloff, On the Need for Reform of the H–1B Non-Immigrant Work Visa in Computer-Related Occupations, 36 U. Mich. J.L. Reform 815 (2003).

[83] U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), available at *https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf,* (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations); Sean McLain & Dhanya Ann Thoppil, Bulging Staff Cost, Shrinking Margins, CRISIL Research, (2019), available at *https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html;* Sean McLain & Dhanya Ann Thoppil, U.S. Visa Bill 'Very Tough' for Indian IT, The Wall Street Journal, April 18, 2013, available at *https://blogs.wsj.com/indiarealtime/2013/04/18/u-s-visa-bill-very-tough-for-indian-it/?mod=wsj_streaming_latest-headlines;* The State of Asian Pacific America,'' Paul Ong (ed.), LEAP Asian Pacific American Public Policy Institute and UCLA Asian American Studies Center, 1994, pp. 179–180; Carnegie Endowment for International Peace, Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants, (1996); Youyou Zhou, Most H–1B workers are paid less, but it depends on the job, Associated Press, April 18, 2017, available at *https://apnews.com/afs:Content:873580003/Most-H-1B-workers-are-paid-less,-but-it-depends-on-the-type-of-job.*

[84] George Borjas, The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market, The Quarterly Journal of Economics Vol. 118, No. 4 (Nov., 2003), pp. 1335–1374, available at *https://www.jstor.org/stable/25053941?seq=1.*

[85] John Bound et al., Understanding the Economic Impact of the H–1B Program on the U.S., NBER Working Paper No. 23153 (2017), available at *https://www.nber.org/papers/w23153.pdf.* The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary (April 22, 2013) (testimony of Neeraj Gupta, CEO of Systems in Motion, to the Senate Judiciary Committee), available at *https://www.judiciary.senate.gov/imo/media/doc/04-22-13GuptaTestimony.pdf.* Daniel Costa and Ronil Hira, H–1B Visas and Prevailing Wage Levels, Economic Policy Institute, (2020), available at *https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/.*

[86] 85 FR at 63,882.

[87] *Id.*

studies focus on computer science and IT occupations, the Department believes that focus is appropriate. As explained at greater length below, the Department's analytic framework gives special attention to these occupations because they are where the largest concentration of H–1B and PERM workers are found, and therefore the places where the risks to U.S. workers that the Department is trying to guard against are most acute.

In addition, the Department considered testimony before the Senate Judiciary Committee [88] as well as news reports about the displacement of U.S. workers by H–1B workers.[89] As noted, some commenters criticized these sources as anecdotal and insufficient. But they were not the only sources on which the Department relied. The information from those sources supplemented the information the Department derived from studies and academic articles. Standing alone such information may (or may not) be insufficient to demonstrate systematic, adverse effects on U.S. workers, but, viewed in combination with other available evidence, it provides vital insight into the Department's understanding of the effects of the old wage methodology. The Department also views evidence about the real-world consequences of its wage methodology on U.S. workers, as shown in news reports, as important information that should not be ignored.

As detailed above, some commenters also claimed that the Department ignored or unfairly discounted studies showing that some H–1B workers earn more than U.S. workers. Far from ignoring or discounting such studies, the Department acknowledged their findings and addressed them in the IFR.[90] While the Department did not discuss in the IFR every study of that kind that the commenters cite, it has reviewed the studies provided by commenters and notes that it did consider many sources with similar information, analysis, and conclusions to these studies.[91] In addition, while some studies cited by commenters which were not directly addressed in the IFR offer additional analysis, they do not overwhelm the conclusions of other studies originally cited in the IFR. For example, reports that find that H–1B workers' wages exceed market wages often ignore that the prevailing wage level is fixed for the H–1B worker for three years, meaning that even if the H–1B worker is paid in excess of the market wage for an entry-level worker in year 1, this may not be the case in year 3 because the H–1B workers' wages should no longer be compared to entry-level workers. Other reports cited by critical commenters acknowledged that the research on employment of American workers in the presence of H–1B workers remains inconclusive or that the existing studies present mixed results on whether H–1B workers crowd out American workers. Some of these studies then focused on one segment of the American worker and H–1B market (*e.g.,* recent college graduates) to obtain specific results which in many cases cannot be extrapolated to other workers cohorts. Others of these studies relied on data gathered only during recent economic recessions, which make it difficult to draw proper conclusions about the effect of H–1B workers on compensation and employment for competing workers under other (and more typical) economic conditions. The Department examined these studies concluding that some H–1B workers in some circumstances are better paid than U.S. workers, weighed them against other studies reaching the opposite conclusion, and, in its expert judgment, determined that there was reason to conclude that, at least in some instances, prevailing wage levels are set too low. An agency's choice of studies on which to rely is entitled to substantial deference.[92] The Supreme Court has held that ''[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'' [93] The studies cited by commenters rest on the same kinds of analyses and reach similar conclusions to those studies reviewed by the Department in development of the IFR. The Department has reviewed these studies and has concluded that they do not discredit, or even necessarily contradict, other sources of information that demonstrate that H–1B workers do, in some instances, adversely affect U.S. workers' wages and job opportunities, even if that is not true in all cases, as explained throughout. Accordingly, based on its review of these studies the Department continues to believe that some modification to the wage levels is necessary.

Contrary to the commenters' assertions, the Department considered studies showing that H–1B workers benefit U.S. workers. In the IFR, the Department acknowledged that in some instances the employment of H–1B workers fuels economic growth and job creation,[94] as well as the fact that paying foreign workers at wages lower than U.S. workers may increase firms'

[88] The Impact of High-Skilled Immigration on U.S. Workers: Hearing before the Senate Committee on the Judiciary (Feb. 25, 2016) (testimony of John Miano, representing Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, the AFL–CIO); Immigration Reforms Needed to Protect Skilled American Workers: Hearing before the Senate Committee on the Judiciary (Mar. 17, 2015) (testimony of Ronil Hira, Associate Professor of Public Policy Rochester Institute of Technology, Rochester, NY), available at *https://www.judiciary.senate.gov/imo/media/doc/HiraTestimony.pdf;* The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary (Apr. 22, 2013) (testimony of Neeraj Gupta, CEO of Systems in Motion, to the Senate Judiciary Committee), available at *https://www.judiciary.senate.gov/imo/media/doc/04-22-13GuptaTestimony.pdf.*

[89] ''Visa Abuses Harm American Workers,'' The New York Times, June 16, 2016, available at *http://www.nytimes.com/interactive/opinion/editorialboard.html;* Julia Preston, Pink Slips at Disney. But First, Training Foreign Replacements, The New York Times, June 3, 2015, available at *https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html;* Julia Preston, Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas, The New York Times, Sept. 29, 2015, available at *https://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html;* Michael Hiltzik, A loophole in immigration law is costing thousands of American jobs, Los Angeles Times, February 20, 2015, available at *https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150222-column.html;* Daisuke Wakabayashi & Nelson Schwarts, Not Everyone in Tech Cheers Visa Program for Foreign Workers, The New York Times, Feb. 5, 2017, available at *https://www.nytimes.com/2017/02/05/business/h-1b-visa-tech-cheers-for-foreign-workers.html.*

[90] 85 FR at 63,882, 63,884.

[91] An agency is not required to respond to every study, or consider every conceivable piece of evidence in drawing a conclusion. *Tex. Office of Pub. Util. Counsel* v. *F.C.C.,* 265 F.3d 313, 328 n.7 (5th Cir. 2001).

[92] *See Or. Envtl. Council* v. *Kunzman,* 817 F.2d 484, 496 (9th Cir. 1987); *see also New York* v. *U.S. Nuclear Regulatory Comm'n,* 589 F.3d 551, 555 (2d Cir. 2009) (''These are technical and scientific studies. Courts should be particularly reluctant to second-guess agency choices involving scientific disputes that are in the agency's province of expertise. Deference is desirable.'' (quoted source omitted)); *see generally Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488 (1951) (''The substantiality of evidence [in APA review] must take into account whatever in the record fairly detracts from its weight,'' but this ''does not furnish a calculus of value by which a reviewing court can assess the evidence,'' nor does it negate agency expertise that the court ''must respect,'' nor permit a court to displace the agency's ''choice between two fairly conflicting views.''); *cf. Fed. Power Comm'n* v. *Fla. Power & Light Co.,* 404 U.S. 453, 463, (1972) (''Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.'').

[93] *Marsh* v. *Or. Nat. Res. Council,* 490 U.S. 360, 378 (1989).

[94] 85 FR at 63,882.

profitability.[95] Indeed, in the IFR the Department discussed studies that suggest the employment of H–1B workers has positive effects on the wages and job opportunities of U.S. workers and expressed a qualified agreement with them, specifically noting that ''[w]hile the Department agrees that this is true in some instances, it is also clear that the current prevailing wage levels often result in adverse effects, and that adjustments to the wage levels are needed to ensure that the positive effects of the program will be enjoyed more widely.'' [96] In other words, the Department anticipates that bringing the wages of foreign workers in line with what similarly employed U.S. workers actually make will enhance the benefits resulting from the employment of such workers, which studies considered in the IFR as well offered by commenters show exist in some cases. The Department did not dispute in the IFR ''that allowing firms to access skilled foreign workers can lead to overall increases in innovation and economic activity, which can, in turn, benefit U.S. workers,'' but did conclude ''H–1B workers' earnings data and other research indicate that, in many cases, the existing wage levels do not lead to these outcomes.'' [97] At no point in the IFR did the Department suggest that H–1B workers either always harm U.S. workers or always benefits U.S. workers and the firms that employ them. Rather, the Department concluded, and continues to conclude, that the positive benefits of the program, while real, are not as widespread as they might otherwise be, and that this is likely due to the fact that H–1B workers in some instances are paid wages below that paid to their U.S. counterparts.

One argument along these lines that the Department addressed in the IFR was made by the general counsel of a major user of the H–1B program in testimony before the Senate Judiciary Committee. In his testimony, he contended that H–1B workers raise the income of U.S. workers because they alleviate labor shortages, particularly in STEM and computer science. Importing workers to fill needs that would otherwise go unmet, he argued, allows companies to innovate and grow, creating more employment opportunities and higher-paying jobs for U.S. workers.[98] The Department rejects the premise of the general counsel's argument that STEM jobs are going unfilled because there are no qualified American workers willing to take them, and therefore U.S. gross domestic product (GDP) would be smaller without importing foreign STEM workers. The Department notes that for every two students who graduate from a U.S. university with a STEM degree, only one obtains a STEM job.[99] In the case of computer science occupations, another study cited by the Department challenges the notion that H–1B workers are filling needs unmet by U.S. workers. The study contains findings that foreign computer science workers have suppressed wages for U.S. computer science workers along with findings that ''imply that for every 100 foreign [computer science] workers that enter the US, between 33 to 61 native [computer science] workers are crowded out from computer science to other college graduate occupations.'' [100] Further, while some commenters argued that the Department misconstrued the study showing that only half of U.S. STEM graduates go on to work in STEM fields on the grounds that many of these students find employment in other industries, the Department disagrees that the study is not relevant here. In fields where a graduate's degree signals certain skills to potential employers, such as computer science or many STEM fields, it is reasonable to assume that students who major in a particular field typically intend to find employment in that field. The fact that many of these particular students are able to find employment in other industries does not undercut the conclusion—indeed, it bolsters it—that at least some of their job opportunities in the fields for which they trained are limited by the presence of lower-paid foreign workers in some instances.

The Department also acknowledges commenters' point that in some circumstances H–1B workers contribute to innovation. Those contributions notwithstanding, ''such outcomes are not the immediate objectives of the of the INA's wage protections.'' [101] Further, this rulemaking does not alter the number of H–1B workers permitted to work and it is unclear how the current wage levels promote greater innovation than the wages which will exist under this rule. The PERM program permits employers to hire aliens to work at permanent jobs where the Secretary of Labor has certified to the Secretary of State and the Secretary of Homeland Security that the employment of an alien seeking to enter the United States to perform skilled or unskilled labor ''will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' [102] In the case of H–1B workers, employers must file LCAs stating that the employer will offer wages that are, at a minimum, ''the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,'' or ''the prevailing wage level for the occupational classification in the area of employment, whichever is greater.'' [103] In rulemaking, an agency is not required ''to accord greater weight to aspects of a policy question than the agency's enabling statute itself assigns to those considerations.'' [104] In consequence, to the extent some comments and the studies cited therein criticized the Department's conclusion that the prevailing wage levels are set too low on the grounds that H–1B workers fuel innovation and economic growth, the Department affords them less weight. Such considerations are secondary to the Department's more immediate concern of fulfilling its statutory mandate to ensure that the presence of foreign workers does not adversely affect U.S. workers.

The Department also reemphasizes that while commenters preferred some studies and sources over others cited by the Department, they and their studies offered no affirmative argument in support of the old wage levels, nor did they explain how the prior wage levels reflect actual market wages. Rather, these commenters presented studies which the Department has already reviewed and which the Department does not believe align with the weight of the evidence which the Department continues to rely upon. The evidence amassed in the IFR provides a reasonable basis for increasing the wage rates, the Department stands by its determination that the old methodology did not adequately protect U.S. workers. The Department also notes that a number of commenters agreed with its conclusion that current wage levels often do not reflect prevailing wages and are set too low. For example, one commenter noted that, in some cases where H–1B workers are used to replace

[95] *Id.* at 63,883.

[96] *Id.* at FR at 63,882.

[97] *Id.* at 63,884.

[98] The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary (Apr. 22, 2013), available at *https://www.judiciary.senate.gov/imo/media/doc/04-22-13BradSmithTestimony.pdf.*

[99] 85 FR at 63,855.

[100] John Bound et al., Understanding the Economic Impact of the H–1B Program on the U.S., NBER Working Paper No. 23153 (2017), available at *https://www.nber.org/papers/w23153.pdf.*

[101] 85 FR at 63,884.

[102] 8 U.S.C. 1182(a)(5)(A)(i)(II).

[103] 8 U.S.C. 1182(n)(1)(A)(i).

[104] *Hussion* v. *Madigan,* 950 F.2d 1546, 1554 (11th Cir. 1992).

U.S. workers, ''the H–1B workers have been hired with annual wages of around $30,000 to $40,000 less than the workers they have replaced.'' These comments corroborate the Department's position that it weighted the conflicting evidence in a reasonable way and reached an appropriate conclusion that H–1B workers can and in many cases are used as low-cost alternatives to U.S. workers, and thereby undercut U.S. workers' wages and job opportunities.

The Department also acknowledges the comments it received (and studies cited therein) that argue that pointing to the higher actual wages that some employers pay H–1B and PERM workers to show that prevailing wage rates were too low is flawed reasoning because there may be other business factors beyond a worker's qualifications that explain why some employers pay a premium on the prevailing wage. The Department agrees that there may, in some instances, be legitimate business factors that explain why actual wages paid to H–1B workers would be higher than the prevailing wage rate. For example, a firm that faces a sudden increase in demand for its product relative to its competitors might be willing to pay premiums to both domestic and H–1B workers relative to its competitors. However, factors such as these are typically specific to a particular firm, employee, or geographic area, as some commenters acknowledged in their discussion of high-intensity occupation areas, and do not reflect the wages paid by the typical employer in a given labor market. In consequence, while the actual wages paid to H–1B workers might very well exceed the prevailing wage rate for legitimate reasons in some cases, such incidents should not be the norm across all employers, occupations, and locales. If the actual wage is consistently higher across the board than the prevailing wage rate, this suggests that the prevailing wage is not actually reflective of the market wage rate on offer in the labor market. As the data presented in the IFR shows, actual wages paid to H–1B workers not only exceed the prevailing wage rate, but do so consistently and substantially, on average, across many different employers. This suggests that legitimate business factors alone do not account for the extreme differences between the actual wages paid to H–1B workers and prevailing wage rates. Rather, it suggests that the prevailing wage rate is out of line with the market wage.

For similar reasons, the Department also rejects some commenters' contention (including as purportedly supported by the studies cited) that the fact that actual wages often exceeds the prevailing wage rate shows that there is no wage problem in the H–1B and PERM programs. One shortcoming such studies failed to acknowledge is that because the prevailing wage is in place for 3 years for H–1B workers, even if they are paid more than the prevailing wage in their first year, there is a distinct possibility that the prevailing wage will be low compared to the market for more experienced workers in the subsequent years. As the Department explained in the IFR, the INA takes a belt-and-suspenders approach to protecting U.S. workers' wages. Employers must pay the higher of the actual wage they pay to similarly employed workers or the prevailing wage rate set by the Department. Both rates generally should approximate the market wage for workers with similar qualifications and performing the same types of job duties in a given labor market as H–1B workers. It is therefore a reasonable assumption that, if both of the INA's wage safeguards were working properly, the wage rates they produce would, at least in many cases, be similar. Where the Department's otherwise applicable wage rate is significantly below the rates actually being paid by employers in a given labor market, it gives rise to an inference that the Department's current wage rates, based on statistical data and assumptions about the skill levels of U.S. workers, are not reflective of the types of wages that workers similarly employed to H–1B workers can and likely do command in the actual labor market. There is a mismatch between what the Department's prevailing wage structure says the relevant cohort of U.S. workers are or should be making and what employers are likely actually paying such workers, as demonstrated by the actual wage they are paying H–1B workers. Put another way, when many of the heaviest users of the H–1B program consistently pay wages well above the prevailing wage, it suggests that the prevailing wages are too low, and thus can be abused by other firms to replace U.S. workers with lower-wage foreign workers in cases where those firms do not have similarly employed workers on their jobsites whose actual wages would be used to set the wage for H–1B workers.[105]

The Department also believes that looking to the pay practices of some of the most frequent users of the H–1B program is appropriate in determining whether the prevailing wage rates are set too low. Because the risk of harm to U.S. workers is most acute by employers in labor markets with heavy concentrations of H–1B workers, data on the actual wage rates at those employers and in those areas are entitled to special weight in the Department's analysis. Further, to the extent some commenters argue that looking at such firms unduly minimizes the Department's consideration of wage effects in rural areas or at smaller employers, the Department notes that, like its use of anecdotal evidence, the wage data it looked to from the heaviest users of the program is just one piece of various types of evidence on which it bases its conclusions about the effects of the old wage levels—no single piece of which is given dispositive weight. Rather, when considered in combination, this evidence provides a sound basis, in the Department's judgment, for concluding that the old wage methodology resulted in inappropriately low wages in a variety of circumstances.

The Department also disagrees that other safeguards in the INA are sufficient to protect U.S. workers and that updates to the prevailing wage levels are therefore unnecessary. Congress chose to enact multiple forms of protection for U.S. workers in these foreign labor programs. The Department must operationalize those protections entrusted to its administration as it sees best for the discharge of its legal responsibilities under the INA and its policy of more fully ensuring the protection of U.S. workers, including by updating the prevailing wage levels.[106]

[105] *See* 63872 FR 63885–87.

[106] The Department also notes that the need for this rulemaking is undiminished by the possibility, recently proposed by DHS, that the limited visas available under the H–1B cap may be allocated based on how high the wage level is at which an employer plans to compensate its foreign workers. *See Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions,* 85 FR 69236 (November 2, 2020). The Department's wage structure applies to programs other than the H–1B program, meaning that even if there are other means of preventing adverse wage effects in the H–1B program, the benefits of updating the Department's prevailing wage methodology extend more broadly. Relatedly, even within the H–1B program, not all visas are subject to the annual cap, and would thus not be affected by a new method of allocating capped visas. Even more critically, the INA directs the Department to set wage levels that will ensure foreign workers will be compensated at rates comparable to U.S. workers similarly employed with similar levels of education, experience, and responsibility. As explained throughout, the Department has determined that adjustments are needed for all four wage levels to ensure they protect similarly employed U.S. workers from wage suppression and dangers to their job opportunities. Thus, even under a visas allocation system that prioritizes workers placed at higher wage levels, the Department's wage methodology must still protect workers similarly employed to workers at those wage levels from adverse employment effects. Put another way, the purpose of the INA's wage provisions is to protect individual U.S. workers from having to compete

Continued

As explained in the IFR, the Department has determined that the conclusions it reached about adverse wage effects with respect to the H–1B program can also be extrapolated to the PERM program, about which the economic literature is far scanter. Critically, the PERM programs and the H–1B program are closely linked in both how they are regulated and used by employers. Unlike most nonimmigrant visas, H–1B visas are unusual in that they are ''dual intent'' visas, meaning under the INA, H–1B workers can enter the U.S. on a temporary status while also seeking to adjust status to that of lawful permanent residents.[107] One of the most common pathways by which H–1B visa holders obtain lawful permanent resident status is through employment-based green cards, and in particular EB–2 and EB–3 visas.[108] USCIS has estimated that over 80 percent of all H–1B visa holders who adjust to lawful permanent resident status do so through an employment-based green card.[109] This is reflected in data on the PERM programs. In recent years, more than 80 percent of all individuals granted lawful permanent residence in the EB–2 and EB–3 classifications have been aliens adjusting status, meaning they were already present in the U.S. on some kind of nonimmigrant status.[110] Given that the H–1B program is the largest temporary visa program in the U.S. and is one of the few that allows for dual intent, it is a reasonable assumption that the vast majority of the EB–2 and EB–3 adjustment-of-status cases are for H–1B workers. This is corroborated by the Department's own data, which shows that, in recent years, approximately 70 percent of all PERM labor certification applications filed with the Department have been for H–1B nonimmigrants.[111]

Because of how many H–1B visa holders apply for EB–2 and EB–3 classifications, Congress has repeatedly amended the INA to account for the close connection between the programs. For example, while H–1B nonimmigrants are generally required to depart the U.S. after a maximum of six years of temporary employment, Congress has exempted from that requirement H–1B nonimmigrants who are beneficiaries of PERM labor certification applications with the Department, or who are beneficiaries of petitions for an employment-based immigrant visa with DHS that have been pending for longer than a year, if certain other requirements are met.[112] Similarly, as noted above, Congress established the INA's prevailing wage requirements in section 212(p) with specific reference to the fact that they would apply in both the H–1B and PERM programs.[113]

The various features of the statutory framework governing the programs, working in combination, have further tightened the relationship between them. In particular, because H–1B workers can have dual intent and, if they have a pending petition for an employment-based green card, can remain in the U.S. beyond the 6-year period of authorized stay limitation, many workers for whom an employer has filed a PERM labor certification application are already working for that same employer on an H–1B status.[114] And because the method by which employment-based green cards are allocated can result in significant delays between when an alien is approved for a green card and when the green card is actually issued, the period during which a worker can, in some sense, have one foot in each program, is often protracted.[115]

This system results in significant overlap in the principal uses of the H–1B and PERM programs. H–1B petitions approved in FY 2019,[116] and the vast majority of individuals waiting for adjudication of EB–2- and EB–3-based adjustment of status applications, are concentrated in the same countries of origin.[117] Relatedly, LCAs and applications for PERM labor certifications often are for job opportunities in the same occupations. Data from the Department's OFLC shows that of the ten most common occupations in which H–1B workers are employed, seven are also among the ten most common occupations in which PERM workers are employed. And PERM workers' wages are set based on the same methodology used for H–1B workers.

Given the evidence that these two programs are used similarly by employers, and employ in many instances the same or at least similarly situated foreign workers, the Department believes that it should treat the H–1B and PERM programs similarly. The upshot is that the H–1B and PERM programs are, in a variety of ways, inextricably conjoined. The rules governing the programs and how employers use them mean that, in many instances, workers in the PERM programs and workers in the H–1B program are often the exact same workers doing the same jobs in the same occupations for the same employers. And given the evidence of similarity, the Department can reasonably infer that the current wage levels under the four-tier structure—which result in inappropriately low wage rates in some instances for H–1B workers—also result in inappropriately low wage rates in some instances for the PERM programs. This is also borne out by the fact that, as noted in the IFR, the significant disparities between actual wages paid by heavy users of the programs and prevailing wage rates discussed above in connection with the H–1B program are also found in the PERM program.

## 2. Wage Level Methodology and Analytical Framework

### Summary of Comments

Many commenters disagreed with the methodology and analytical framework the Department used to determine the

with low-cost foreign labor, something that can only be accomplished by setting appropriate wage levels even if all H–1B workers granted work authorization are at the highest skill level since such workers will necessarily be competing with U.S. workers with comparable qualifications.

[107] *dePape* v. *Trinity Health Sys., Inc.,* 242 F. Supp. 2d 585, 593 (N.D. Iowa 2003).

[108] *See* Sadikshya Nepal, *The Convoluted Pathway from H–1B to Permanent Residency: A Primer*, Bipartisan Policy Center (2020); Congressional Research Service, The Employment-Based Immigration Backlog (2020) (''A primary pathway to acquire an employment-based green card is by working in the United States on an H–1B visa for specialty occupation workers, getting sponsored for a green card by a U.S. employer, and then adjusting status when a green card becomes available.'').

[109] U.S. Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate (2020).

[110] *See* Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, *available at https://www.dhs.gov/immigration-statistics/yearbook/2017/table7.*

[111] Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

[112] *See* Public Law 107–273, § 11030A(a), 116 Stat. 1836 (2002).

[113] *See* 144 Cong. Rec. S12741, S12756 (explaining that 8 U.S.C. 1182(p) ''spells out how [the prevailing] wage is to be calculated in the context of both the H–1B program and the permanent employment program in two circumstances.'').

[114] *See* Congressional Research Service, The Employment-Based Immigration Backlog (2020).

[115] *See* 8 U.S.C. 1152(a)(2); U.S. Department of State, Visa Bulletin For September 2020, *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html.*

[116] U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf* (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations).

[117] Congressional Research Service, The Employment-Based Immigration Backlog (2020).

appropriate prevailing wage rate, often asserting that the Department inappropriately relied on wage data from a limited pool of employers in the H–1B program and a pool of workers based on educational attainment limited to workers in information technology jobs, rather than basing the prevailing wage on market wages paid to workers in the applicable occupational classification based on the requirements of the occupation or employer's job opportunity. Several commenters also expressed concern about the chosen percentiles, asserting that an entry-level wage near the median for the occupation does not reflect real pay structures.

Some commenters asserted the Department inappropriately conflated the ''actual'' with the ''prevailing'' wage provisions in the INA and the Department's regulations at 20 CFR 655.731(a)(1) and (a)(2). A professional association stated it was improper to base prevailing wages on the ''accomplishments, education or training of the employee'' because that is the focus of the actual wage provision, whereas the prevailing wage is, ''by regulation, based on the requirements for the position.'' A university commenter noted that the prevailing wage is the wage paid to similarly employed workers, defined as ''positions that have substantially comparable duties'' in the occupation and area of employment and thus in prevailing wage determinations ''the requirements of the position matters, not the skills that the individual worker brings to the table.'' The commenter also asserted the IFR incorrectly states that the new methodology does not change the current wage determination process because the Department's 2009 PWD guidance indicates PWDs begin at entry level and ''progress . . . only after considering the experience, education, and skill requirements of an employer's job description (opportunity).''

Related to these comments, many commenters believed it was improper for the Department to rely solely on wages paid to workers that possess a master's degree. A university commenter stated that the fact many H–1B workers possess a master's degree or higher is ''attributed to the fact that USCIS favors beneficiaries with more advanced degrees.'' Some commenters asserted that determining prevailing wage levels based only on wages paid to master's degree holders violates the INA because Congress did not include a master's degree requirement as a prerequisite for the employment-based visa programs. An association noted the statute defines ''specialty occupation'' as ''an occupation requiring a bachelor's degree as the minimum qualification for entry.'' Similarly, an immigration law firm believed that exclusion of wage data from workers possessing less than a master's degree is ''baseless'' because ''attainment of a U.S. Bachelor's degree, or its equivalent, is sufficient for H–1B eligibility provided the petitioner can show a sufficient nexus between the degree earned and the offered position'' and ''the nexus of the degree specialty is a separate inquiry from prevailing wage requirements.'' Noting that DHS regulations at 8 CFR 204.5(k)(2) ''equate[ ] a master's degree to a bachelor's degree plus 5 years of progressively responsible work experience,'' the commenter asked how the same Level I wage can represent both a position requiring a master's degree for entry and ''entry level H–1B occupations that require a bachelor's degree in a specific specialty.''

Some commenters noted that a large number of occupations require at least a master's degree for entry and that it is improper for the Department to exclude the bottom third of wage data when determining the Level I prevailing wage in these occupations. For example, a university commenter stated that even if one accepts the prevailing wage was set too low for IT occupations ''it is arbitrary to extrapolate from that very limited data set that the prevailing wage data set for other occupations is also lacking, especially for occupations where the normal educational requirement is an advanced degree.'' Similarly, a professional association noted that at least 99 occupations require an advanced degree for entry according to DOL sources, including many that require a Ph.D., and that the bottom third of wages in these occupations ''capture qualified and eligible H–1B individuals.'' The commenter asserted the Department improperly excluded from consideration ''one-third of the wages of individuals who are 'similarly employed' '' and ''essentially sets a minimum education level for entry as those with at least a master's degree in most professions.'' One commenter from academia stated that many H–1B occupations that require a bachelor's degree are nonetheless specialized and thus the Department should consider all wage data for the occupation.

Several commenters also asserted that reliance on only wages paid to workers possessing a master's degree is particularly inappropriate for determining prevailing wages in the permanent labor certification context because many job opportunities in that program are in occupations that require no more than a bachelor's degree for entry. A group of associations asserted the Department ignored the fact that ''about an equal number of individuals in H–1B status with advanced degrees and Bachelor's degrees are sponsored for green card status.'' An immigration law firm stated the Department's reasoning focused centrally on wages paid to H–1B workers and asked the Department to explain how the ''prior wage levels as applied in the PERM program negatively impact the wages of U.S. workers.'' The commenter noted the PERM program differs from H–1B in relevant respects, including the labor market test requirement and the fact that employers file PERM petitions to fill ''a future permanent position'' that is ''not necessarily the current position of the H–1B employee.'' Noting the Department's acknowledgment that ''not all SOC [occupations] qualify as a 'specialty occupation,' '' this commenter asserted the IFR methodology ''would arbitrarily raise salary requirements for occupations that are not used in the H–1B program but are used in the PERM program.'' This commenter also noted that the Department acknowledged the new wage level methodology would create a ''premium'' on the wages of EB–3 workers and the commenter asserted the Department failed to cite authority to ''require EB–3 petitioners to pay an additional fee, above what would be required to ensure the wages of U.S. workers are not negatively affected.''

Some commenters asserted that reliance on education alone when considering relevant wage data was inappropriate because many other factors can determine a worker's wage level. One commenter stated the Department provided no evidence that workers with a bachelor's degree ''necessarily . . . make up a lower paid cohort of employees'' and noted the Department's acknowledgment that ''H–1B workers with master's degrees tend to be younger and less highly compensated than H–1B workers with bachelor's degrees.'' The commenter noted that employers will accept equivalent credentials like experience and training and may base worker compensation on factors like ''experience, special skills, history with the company or industry . . . [and] highly specialized knowledge.'' Another commenter noted that someone with a bachelor's degree and 10 years of experience might be paid more for the same job opportunity than someone with a master's degree and 2 years of experience, whereas a bachelor's degree holder with 2 years of experience may be paid less. The prevailing wage in this case would be based on the requirements for the position, whereas the actual wage would be the wage paid to the worker employed in the position and may depend on the worker's education and experience.

A number of commenters asserted it was improper for the Department to rely only on wage data from workers in a limited set of information technology occupations as the relevant benchmark for determining the appropriate wage level. An anonymous commenter asserted that the Department's reasoning focused solely on ''computer occupations'' and the prevailing wage methodology based on that reasoning ''can therefore only be applied to computer occupations.'' A university commenter noted that many common occupations in the H–1B and PERM programs fall outside of this occupation set, including many occupations in the education sector, such as post-secondary teachers, several of which may require a Ph.D. for entry. The commenter added that even if one assumes wages are too low in the IT sector, ''it is arbitrary to extrapolate from that very limited data set that the prevailing wage'' is too low in other sectors.

Based on these concerns, some commenters urged the Department to reconsider its decision in the IFR to use a uniform wage structure across all occupations and programs. For example, a university commenter suggested the Department should apply the pre-IFR wage level methodology to occupations that normally require an advanced degree for entry, according to O*Net, rather than discounting the first one-third of occupational wage data for these occupations. One commenter suggested the Department should apply the revised wage level methodology to large IT employers and H–1B dependent employers, while applying the ''PWD data from 07/01/2020–10/06/2020'' to occupations in ''medicine and health [070–079] and education [090–099].'' Similarly, some commenters urged the Department to exempt specific positions in the medical field from revised wage methodology or exempt all ACWIA-eligible employers.

Many commenters also took issue with the reasoning behind setting the Level I wage for entry-level workers at approximately the 45th percentile. A public policy organization stated that placing entry level workers close to the median wage in the occupation ''departs from the English language definition of median'' and stated that, by definition, ''[e]ntry level workers cannot be both at the bottom quarter of the wage scale and at almost the median of the wage scale.'' A trade association stated that no employer sets compensation above the occupational median wage for all entry-level workers ''completing graduate or professional degrees with little professional experience.'' The commenter asserted the Department provided no evidence indicating a near-median wage is ''the most reasonable and closest proxy'' for the market wage paid to entry-level workers. A human resources professional association stated that it is ''particularly important to reflect the lower and higher range'' of an occupational wage distribution when using the SOC system because the SOC occupations are ''hopelessly broad'' and the commenter stated that SOC 11–9033 encompasses 126 distinct jobs in higher education.

Response to Comments

As noted, some commenters asserted that the Department misinterpreted the INA in the IFR, specifically disagreeing with the notion that the prevailing wage rate and the actual wage provided for by the INA should approximate one another, and similarly contending that the Department should not consider the accomplishments, education, or training of the employee as those are considerations associated with the actual wage requirement; rather, the Department should focus on the requirements for the position. This argument, however, misreads the statute, and also fails to understand a fundamental premise of the IFR. The Department is not ignoring its regulations or guidance on how prevailing wages rates are assigned; rather, the Department in this rulemaking is doing something different. It is making an assessment of how the four wage levels required by 8 U.S.C. 1182(p)(4) are to be established.

To begin with, as the IFR discussed in detail, the INA requires employers to pay H–1B workers the greater ''of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,'' or the ''prevailing wage level for the occupational classification in the area of employment.'' [118] The statute further provides that, when a government survey is used to establish the wage levels, ''such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.'' [119] If an existing government survey produces only two levels, the statute provides a formula to calculate two intermediate levels.[120] Thus, like the statute's actual wage clause, the prevailing wage requirement, when calculated based on a government survey, makes the qualifications possessed by workers, namely education, experience, and responsibility, an important part of the wage calculation.

Put slightly different, both clauses yield wage calculations that in similar fashions are designed to approximate the rate at which workers in the U.S. are being compensated, taking into account the area in which they work, the types of work they perform, and the qualifications they possess. The statute requires employers to pay the rate of whichever calculation yields the higher wage. In this way, the statutory scheme is meant to ''protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.'' [121] If employers are required to pay H–1B workers approximately the same wage paid to U.S. workers doing the same type of work in the same geographic area and with similar levels of education, experience, and responsibility as the H–1B workers, employers will have significantly diminished incentives to prefer H–1B workers over U.S. workers, and U.S. workers' wages will not be suppressed by the presence of foreign workers in the relevant labor market.

The Department therefore disagrees with commenters' contention that the INA's actual wage clause and prevailing wage clause are not to be understood and operationalized in similar fashions. Moreover, the Department notes that, while commenters are correct that Department guidance and regulations discuss the ''prevailing wage'' as something that is assigned based on the requirements of a job opportunity, rather than the qualifications of the specific worker who will fill the position, the manner in which the ''prevailing wage'' for a specific job is assigned is different from the manner in which the Department establishes the four ''prevailing wage levels'' required by § 1182(p)(4). For one thing, a prevailing wage for a specific job opportunity is often assigned before the identity and actual qualifications of the worker who will fill the position are known. As a practical matter, it is therefore unavoidable that this would be done by reference to job requirements as

[118] 8 U.S.C. 1182(n)(1)(A).

[119] 8 U.S.C. 1182(p)(4).

[120] *Id.*

[121] *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80110, 80110 (Dec. 20, 2000).

opposed to the qualifications of an unknown worker. By contrast, the Department sets the four wage levels that are used to calculate specific prevailing wage rates by reviewing statistical data. The review of statistical data necessarily occurs at a more general level given that the four wage levels apply to broad swaths of workers and occupations and therefore relies on information from surveys, which often collect information about the skills possessed by particular workers rather than the job requirements of specific jobs.[122] It is thus reasonable for the Department to consider the qualifications possessed by actual workers in operationalizing section 1182(p)(4).

In addition, the Department notes that it is a reasonable inference that, in many cases, the skills possessed by an actual worker will likely align with the qualification requirements of the job opportunity such worker fills. Looking to the skills possessed by actual workers thus should serve as a reasonable proxy in many cases for the requirements of the job opportunities in which they work. Moreover, to the extent the qualifications possessed by workers are different from the requirements of the jobs they fill, the Department believes that taking workers' actual skills and qualifications into account furthers the purpose of the statute. As explained throughout, the INA's wage provisions are designed to protect U.S. workers. In the labor market, workers compete with other workers based on the skills and qualifications those workers bring to the job—not based on what qualifications an employer lists in a job opening. Giving some weight to the actual characteristics of entry-level workers in the foreign labor programs thus takes into account important factors that determine how workers compete against one another over wages and job opportunities. Ignoring workers' actual qualifications in setting the wage levels would thus potentially weaken protections for U.S. workers insofar as it would mean the Department was leaving out of its analysis an important factor that influences employment outcomes.

Further, because, as noted, the actual wage clause and the prevailing wage clause of the INA are designed to achieve similar outcomes, serving as a form of belt-and-suspenders protection for U.S. workers, and given that the actual wage clause does take into account the specific qualifications possessed by actual workers, the Department believes it is reasonable to similarly take into account the actual qualifications of the workers when assessing survey data to set prevailing wage levels.

Finally, the Department also notes that, to the extent commenters suggest that the method by which the Department is setting the four wage levels pursuant to section 1182(p)(4) contradicts the previous method by which the Department set the wage levels, they are also mistaken. As noted, the Department has never previously set the wage levels through regulation. or has it ever explained its analysis or provided an economic justification for why the wage levels are set as they are. Rather, the old wage levels were set through a memorandum of understanding between DOL components, which offered no explanation for why the specific levels used were selected or how they comported with the statute. This rulemaking is therefore the first time the Department has undertaken to justify, and tether to the relevant statutory factors the manner in which the wage levels are established. There is no prior analytical framework to contradict because none was ever used. Again, the distinction between assigning a prevailing wage rate and setting prevailing wage levels pursuant to section 1182(p)(4) is key. While the Department has longstanding regulations on the former, this rulemaking is its first attempt to do the latter in a meaningful way.

Based, in part, on similar reasoning related to the actual demographics of workers in the H–1B program, the Department also concluded in the IFR, and continues to believe, that using master's degree holders with limited work experience as a proxy for entry-level workers in analyzing survey data to determine the entry-level wage for its H–1B and PERM programs is appropriate.[123] In particular, in the IFR the Department examined the demographic characteristics of H–1B workers and concluded that many entry-level workers in the program are master's degree holders with limited work experience. In particular, a review of data from USCIS about the characteristics of individuals granted H–1B visas in fiscal years 2017, 2018, and 2019 indicates that H–1B workers with master's degrees tend to be younger and less highly compensated than H–1B workers with bachelor's degrees. On average, individuals with master's degrees in the program are approximately 30 years old, whereas bachelor's degree holders are, on average, 32 years old. This suggests that, while possessing a more advanced degree, master's degree holders in the program are likely to have less relevant work experience than their bachelor's degree counterparts.[124] Relatedly, H–1B master's degree holders make, based on a simple average, $86,927, whereas bachelor's degree holders make on average $88,565.[125] Given that differences in skills and experience often explain differences in wages, this gap in average earnings and age suggests that, while possessing a more advanced degree, master's degree holders in the H–1B program tend to be less skilled and experienced—and are therefore more likely to enter the program as entry-level workers—than are bachelor's degree holders.[126]

This conclusion is further bolstered by the fact that master's degree holders have, in recent years, been the largest educational cohort within the program. In FY2019, for instance, 54 percent of the beneficiaries of approved H–1B petitions had a master's degree—whereas only 36 percent of beneficiaries had only a bachelor's degree.[127] These facts, in combination with the age and earnings profiles of master's degree holders in the program, strongly suggest that a significant number of entry-level H–1B workers are individuals with a master's degree and very limited work experience. Because, as explained above, the Department has determined

[122] For example, both the NSF and CPS surveys the Department used in the IFR survey individual workers about the wages they make and the skills they possess, not the qualification requirements of the jobs they fill.

[123] Contrary to some commenters' contentions, the Department did not look exclusively at educational attainment in assessing where the entry-level wage should be placed. It also took into account work experience. While commenters are correct that in some cases factors other than education and work experience may influence wages, these are the factors the INA requires the Department to consider. Further, as explained in the IFR, education and experience are often key determinants of levels of compensation, and therefore allow for a reasonable differentiation among workers.

[124] Age is a common proxy for potential work experience. *See, e.g.,* Rebecca Chenevert & Danial Litwok, *Acquiring Work Experience with age,* United States Census Bureau, (2013) *available at https://www.census.gov/newsroom/blogs/random-samplings/2013/02/acquiring-work-experience-with-age.html.*

[125] This analysis is based on data from U.S. Citizenship and Immigration Services about the demographic characteristics of H–1B workers.

[126] Elka Torpey, Same occupation, different pay: How wages vary, Bureau of Labor Statistics (2015), *available at https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm.*

[127] U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.*

that the qualifications of actual workers are highly relevant to establishing prevailing wage levels pursuant to section 1182(p)(4), this analysis of the demographic characteristics of H–1B workers adds critical weight to the Department's conclusion to use master's degree holders as an analytical proxy for entry-level workers.

To further address commenters' concerns that master's degree holders with limited work experience are an inappropriate proxy for entry-level H–1B workers, the Department notes that, contrary to some commenters' contentions, this approach is consistent with the baseline qualification requirements in the INA for the H–1B program, as well as for EB–2 visas. For one thing, the statutory criteria for who can qualify as an EB–2 worker provide a clear, analytically useable definition of the minimum qualifications workers within that classification must possess. Even the least experienced individuals within the EB–2 classification are likely to have at least a master's degree or its equivalent.[128] Possession of an advanced degree is thus a meaningful baseline with which to describe entry-level workers in the EB–2 classification.

As noted in the IFR, the baseline qualifications needed to obtain entry as an H–1B worker are different. An individual with a bachelor's degree in a specific specialty, or its equivalent, may qualify for an H–1B visa; a master's degree is not a prerequisite.[129] However, the bachelor's degree or equivalent must be in a specific specialty. A generalized bachelor's degree is insufficient to satisfy the requirement that H–1B workers possess highly specialized knowledge.[130] Further, the statute requires that the individual be working in a job that requires the application of ''highly specialized knowledge.''[131] Again, this means, contrary to some commenters' assertions, that for the H–1B program the possession of any kind of bachelor's degree is not the baseline qualification criterion for admission. Something more is needed. The ultimate inquiry rests also on whether the individual can and will be performing work requiring highly specialized knowledge.

As with aliens in the EB–2 classification, looking to the earnings of individuals with a master's degree provides an appropriate and analytically useable proxy for purposes of analyzing the wages of typical, entry-level workers within the H–1B program. For one thing, master's degree programs are, generally speaking, more specialized courses of study than bachelor's degree programs. Thus, while the fact that an individual possesses a bachelor's degree does not necessarily suggest one way or another whether the individual possesses the kind of specialized knowledge required of H–1B workers, the possession of a master's degree is significantly more likely to indicate some form of specialization. Although a master's degree alone does not automatically mean an individual will qualify for an H–1B visa, possession of a master's degree—something that is surveyed for in a variety of wage surveys—is thus a better proxy for specialized knowledge than is possession of a bachelor's degree for purposes of the Department's analysis. While possession of a bachelor's degree is also commonly surveyed for, mere possession of a bachelor's degree is not nearly as reliable an indicator that the degree holder possesses specialized knowledge.

Importantly, the Department is not claiming that all entry-level workers in the H–1B program possess a master's degree, or that possession of a bachelor's degree in a specific specialty such as would demonstrate specialized knowledge is in all cases the equivalent of having a master's degree. To reiterate, the Department is using master's degree holders with limited work experience as a proxy for entry-level workers purely for analytical purposes. As more fully explained below, because the OES survey does not capture data on workers' education and experience—the factors that the INA requires the Department to take into account in establishing wage levels—the Department sought in the IFR to identify where within the OES wage distribution the entry-level wage should fall by consulting other survey sources that do gather information on education and experience. Doing so necessarily requires the Department to identify an appropriate wage comparator or group of comparators for entry-level H–1B and PERM workers within those survey sources to ensure that the wage level for entry-level workers set based on that data reflects what workers with similar qualifications to entry-level H–1B and PERM workers are paid. For the reasons given above the Department, in its discretion, has determined that using master's degree holders as an analytical proxy for entry-level workers in these high-skilled programs is a reasonable method of assessing wage data for purposes of establishing the entry-level wage.

As noted, commenters also criticized the conclusion the Department reached about where to place the entry-level wage in the IFR based on its analysis of wage data about master's degree holders, arguing that placing the entry-level wage at approximately the 45th percentile is axiomatically in error given that entry-level workers do not, by definition, start out making more than almost half of all workers in an occupation. Although for the reasons given below the Department has decided to adjust the entry-level wage downward to the 35th percentile, the Department disagrees with commenters that setting the entry-level wage closer to the median of the OES distribution is inappropriate. As explained in the IFR, the interplay between the statutory framework governing the prevailing wage and the OES survey data demonstrate that, for the top H–1B and PERM occupations, workers at the lower end of the OES distribution in the most common H–1B occupations likely would not qualify as working in a ''specialty occupation,'' as that term is defined in the INA, and thus do not have education and experience comparable to even the least qualified H–1B worker—a contention generally not disputed by commenters—meaning their wage data must be discounted in setting wages for entry-level H–1B workers. In consequence, while a wage close to the median does not represent what all entry-level workers in a given occupation generally make, it is entirely reasonable that the wage for the vast run of entry-level workers covered by the four-tier wage structure, many of whom are required to possess more specialized skills, would fall closer to the median.

As explained above, the Department interprets the INA's wage provisions to require it to take into account the education, experience, and responsibility of workers in setting wage levels for the H–1B program. It is therefore necessary to identify what types of U.S. workers in a given occupation have comparable levels of education, experience, and responsibility to H–1B workers. The Department did so by looking to wage data about master's degree holders with limited work experience in occupations in which H–1B workers are commonly employed. While the INA makes clear that the prevailing wage levels must be set commensurate with education, experience, and level of supervision, it leaves assessment of those factors to the Department's discretion. How the

[128] *See* 8 U.S.C. 1153(b)(2)(A) (''Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . .'').

[129] 8 U.S.C. 1184(i).

[130] *See Chung Song Ja Corp.* v. *U.S. Citizenship & Immigration Servs.,* 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015).

[131] 8 U.S.C. 1184(i).

Department exercises that discretion is informed by the legislative context in which the four-tier wage structure was enacted, which indicates that the wage levels are primarily designed for use in the Department's high-skilled and PERM foreign labor programs.[132] Other provisions in the INA relating to the education and experience requirements of those programs—and in particular the statutory definition of ''specialty occupation''—therefore serve as critical guides for how wage levels based on experience, education, and level of supervision should be formulated.

Under the INA, H–1B visas can, in most cases, only be granted to aliens entering the U.S. to perform services ''in a specialty occupation.'' [133] The statute defines ''specialty occupation'' as an occupation that requires theoretical and practical application of a body of ''highly specialized knowledge'' and the ''attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.'' [134] An alien may be classified as an H–1B specialty occupation worker if the alien possesses ''full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,'' ''completion of [a bachelor's or higher degree in the specific specialty (or its equivalent)],'' or ''(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.'' [135] DHS regulations further clarify the requirements for establishing that the position is a specialty occupation and that the beneficiary of an H–1B petition must be qualified for a specialty occupation.[136] The Department's regulations restate the statute's definition of specialty occupation essentially verbatim.[137]

A few features of the definition bear emphasizing. First, the statute sets the attainment of a bachelor's degree in a specific specialty, or experience that would give an individual expertise equivalent to that associated with a bachelor's degree in the specific specialty, as the baseline, minimum requirement for an alien to qualify for the classification. Of even greater importance, having any bachelor's degree as a job requirement is not sufficient to qualify a job as a specialty occupation position—the bachelor's degree or equivalent experience required to perform the job must be ''in the specific specialty.'' In other words, the bachelor's degree required, or equivalent experience, must be specialized to the particular needs of the job, and impart a level of expertise greater than that associated with a general bachelor's degree, meaning a bachelor's degree not in some way tailored to a given field.[138] These aspects of the definition play an important role in how the Department uses data from the BLS OES survey to set appropriate prevailing wage levels.

The OES survey categorizes workers into occupational groups defined by the SOC system, a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.[139] An informative source on the duties and educational requirements of a wide variety of occupations, including those in the SOC system, is the Department's Occupational Outlook Handbook (OOH), which, among other things, details for various occupations the baseline qualifications needed to work in each occupation. A review of the OOH shows that only a portion of the workers covered by many of the occupational classifications used in the OES survey likely have levels of education and experience similar to those of H–1B workers in the same occupation. Some share of workers in these classifications likely do not have the education or experience qualifications necessary to be considered similarly employed to specialty occupation workers. Because the INA requires the prevailing wage levels for H–1B workers to be set based on the wages of U.S. workers with levels of experience and education similar to those of H–1B workers, the Department must take this into account when using OES data to determine prevailing wages.

For example, a common occupational classification in which H–1B nonimmigrants work is Computer Programmers.[140] In some cases, the work of a computer programmer may involve writing basic computer code and testing it.[141] The OOH's entry for Computer Programmers describes the educational requirements for the occupation as follows: ''Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree.'' [142] In other words, while common, a bachelor's degree-level education, or its equivalent, is not a prerequisite for working in the occupation. USCIS and at least one court have reasoned from this that the mere fact that an individual is working as a Computer Programmer does not establish that the individual is working in a ''specialty occupation.'' [143] Because a person without a specialized bachelor's degree can still be classified as a Computer Programmer, some portion of Computer Programmers captured by the OES survey are not similarly employed to H–1B workers because the baseline qualifications to enter the occupation do not match the statutory requirements.[144]

[132] *See Consolidated Appropriations Act,* 2005, Public Law 108–447, div. J, tit. IV, § 423; 118 Stat. 2809 (Dec. 8, 2004).

[133] 8 U.S.C. 1101(a)(15)(H)(i)(b).

[134] 8 U.S.C. 1184(i)(1).

[135] 8 U.S.C. 1184(i)(2).

[136] 8 CFR 214.2(h)(4)(iii) (A) and C).

[137] *See* 20 CFR. § 655.715.

[138] *See Chung Song Ja Corp.* v. *U.S. Citizenship & Immigration Servs.,* 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015) (''Permitting an occupation to qualify simply by requiring a generalized bachelor degree would run contrary to congressional intent to provide a visa program for specialized, as opposed to merely educated, workers.''); *Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (''A position that requires applicants to have any bachelor's degree, or a bachelor's degree in a large subset of fields, can hardly be considered specialized.'').

[139] U.S. Bureau of Labor Statistics, Standard Occupational Classification, *https://www.bls.gov/soc/.*

[140] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.*

[141] Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Programmers, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm..*

[142] *Id.*

[143] *See Innova Sols., Inc.* v. *Baran,* 399 F. Supp. 3d 1004, 1015 (N.D. Cal. 2019).

[144] As noted throughout, under the INA a bachelor's degree is not an absolute prerequisite for obtaining an H–1B visa. Work experience imparting comparable levels of expertise will also suffice. Indeed, as the President has noted in other contexts, focusing on possession of a degree to the exclusion of work experience ignores important considerations about how merit and qualifications should be assessed. *See* Exec. Order No. 13932, 85 FR 39457 (2020). The Department's focus on the OOH's description of degree requirements here is not meant to suggest otherwise, but rather simply accounts for the fact that, within the H–1B program, nearly all nonimmigrants hold a degree. *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.* Further, under the INA, EB–2 and EB–3 immigrants are, in many cases, required to possess a degree. And, in any event, the Department's assessment of the OOH's descriptions of education requirements and how they demonstrate that, for the most common H–1B occupations, there is some portion of workers who would not qualify as working in a specialty occupation holds true for the OOH's description of various occupations' experience requirements. The mere fact that OOH describes many workers in an occupation as having several years of experience in or skills relevant to their respective fields does not necessarily mean

Continued

The same is true for other occupational classifications in which H–1B workers are often employed. For example, the Medical and Health Services Manager occupation, as described by the OOH, does not in all cases require a bachelor's degree as a minimum requirement for entry.[145] USCIS has therefore concluded that the fact that an individual works in that occupational classification does not necessarily mean that the individual is working in a ''specialty occupation.''[146] USCIS and its predecessor agency, the Immigration and Naturalization Service, have long emphasized that the term ''specialty occupation'' does not ''include those occupations which [do] not *require* a bachelor's degree in the specific specialty.''[147] In other words, if not all jobs in an occupational classification require a specialized bachelor's degree or equivalent experience, under the INA other evidence is needed to show that a worker will be performing duties in a specialty occupation beyond whether the job opportunity falls within a particular SOC classification.[148]

A review of the OOH entries for the occupations in which H–1B nonimmigrants most commonly work demonstrates that most H–1B workers fall within SOC classifications that include some number of workers who would not qualify for employment in a specialty occupation. For instance, the OOH entries for Software Developers—an occupation accounting for over 40 percent of all certified LCAs[149]—provides that such workers ''*usually* have a bachelor's degree in computer science and strong computer programming skills.''[150] For Computer Systems Analysts, which make up approximately 8.8 percent of all certified LCAs,[151] ''a bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.''[152] Similarly, the O*Net database, which surveys employers on the types of qualifications they seek in workers for various occupations, shows that, on average, over 13 percent of all jobs in the occupations that H–1B workers are most likely to work in do not require workers to have even a bachelor's degree.[153] Moreover, the O*Net does not differentiate between jobs that require bachelor's degrees in specific specialties and job for which a general bachelor's degree will suffice. It is therefore a reasonable inference that the percentage of jobs in these occupations that would not qualify as specialty occupation positions for purposes of the INA is almost certainly even higher.

Simply put, the universe of workers surveyed by the OES for some of the most common occupational classifications in which H–1B workers are employed is larger than the pool of workers who can be said to have levels of education and experience comparable to those of even the least skilled H–1B workers performing work in a specialty occupation. Because the statutory scheme requires the Department to set the prevailing wage levels based on what workers similarly employed to foreign workers make, taking into account workers' qualifications and, as noted, the large majority of foreign workers are H–1B workers, it would be inappropriate to consider the wages of the least educated and experienced workers in these occupational classifications in setting the prevailing wage levels. To conclude otherwise would place the Department at odds with one of the purposes of the INA's wage protections: to ensure that foreign workers earn wages comparable to the wages of their U.S. counterparts.

As a result, it is entirely reasonable that the entry-level wage for H–1B workers would fall closer to the median of the OES distribution. The OES survey is not specifically designed to serve the Department's foreign labor programs. It does not survey for education and experience—the factors the INA requires the Department to consider in setting prevailing wage levels—which is why the Department looks to other survey sources, like the NSF and CPS, to make assessments about where within the OES distribution workers with particular education and experience levels are likely to fall. So too, as demonstrated by the above analysis of the OOH, its occupational classifications are not delineated so as to exclude workers who could not be regarded as working in a specialty occupation, meaning only a portion of the OES distribution for many occupations is actually relevant to how the Department sets wages for the H–1B program. As a result, the median of the OES distribution is not necessarily the

that they possess ''highly specialized knowledge,'' or that all workers in the occupation have such experience. *See Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007). *See also* Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Systems Analysts, available at *https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm;* Bureau of Labor Statistics, Occupational Outlook Handbook, Food Service Managers, *available at https://www.bls.gov/ooh/management/food-service-managers.htm.* Whether discussing education or experience requirements, the fact remains that OOH's description of the occupational classifications used in the BLS OES are, in most cases, not limited to workers who would qualify as working in a specialty occupation.

[145] *See Ajit Healthcare Inc.* v. *U.S. Dep't of Homeland Sec.,* 2014 WL 11412671, at 4 (C.D. Cal. Feb. 7, 2014); *see also* Bureau of Labor Statistics, Occupational Outlook Handbook, Medical and Health Services Managers, available at *https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm.* The Department notes that some courts and USCIS have concluded that the fact that an occupation does not in all cases require a bachelor's degree as a minimum qualification does not necessarily preclude the occupational classification from serving as evidence that a particular job qualifies as a ''specialty occupation.'' *See, e.g., Taylor Made Software, Inc.* v. *Cuccinelli,* 2020 WL 1536306, at 6 (D.D.C. Mar. 31, 2020); *see also* 8 CFR 214.2(h)(4)(iii). That said the INA ultimately does not admit of any exceptions to the rule that a job must require a bachelor's degree in a specific specialty, or its equivalent, to qualify as a specialty occupation, meaning, whatever its relevance to determining whether a particular job is in a ''specialty occupation,'' the fact that many SOC classifications contain workers that would not meet the statutory definition is highly relevant to how OES data for an entire occupational classification is used in setting prevailing wage levels. Put another way, as the court in *Taylor Made* acknowledged, the fact that a bachelor's degree is not required in all cases for a given occupation means that some number of workers within the occupation are not performing work in a specialty occupation. *Id.* Because such workers are almost certainly captured within OES data, and the Department calculates prevailing wages by taking into account the actual wages reported for broad swaths of workers in the OES data, the presence of these workers in the survey data directly relates to how prevailing wage levels are set, even if it does not have a great deal of significance for how a single, specific job in an occupation is determined to be or not to be in a ''specialty occupation.''

[146] *See Ajit Healthcare,* 2014 WL 11412671, at 4.

[147] *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 56 FR 61,111, 61,113 (Dec. 2, 1991) (emphasis added).

[148] 8 U.S.C. 1184(i); *see Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007).

[149] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf*

[150] Bureau of Labor Statistics, Occupational Outlook Handbook, Software Developers, *available at https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm.*

[151] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf*

[152] Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Systems Analysts, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm*

[153] *See* Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, available at *https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf;* O*NET Online, *https://www.onetonline.org/.*

median of the distribution of workers who have qualifications comparable to H–1B workers. The median of that distribution will likely in many cases fall above the median of the overall OES distribution since lower skilled, and therefore less highly compensated workers will be excluded.

On this last point, commenters also argued that the IFR's analysis improperly focused on only certain occupations, and that, for other occupations, most particularly those requiring an advanced degree, the above reasoning about how SOC classifications should be assessed in light of the statutory framework is inapposite. Relatedly, a number of commenters faulted the Department for focusing much of its analysis on the H–1B program, claiming the Department did not take adequate account of the array of occupations for which labor certification is sought in the PERM program. Despite these comments, for the reasons discussed above, the Department continues to believe that focusing its analysis on those programs and occupations that account for the largest share of workers covered by the four-tier wage structure is appropriate and consistent with the approach the Department has taken in setting wages in other foreign labor programs. Doing so is, in the Department's judgment, the most appropriate way to ensure U.S. workers are protected to the greatest extent possible in light of the fact that the Department's wage structure applies to a large and varied class of workers and occupations. Further, the Department acknowledges that PERM workers and advanced degree occupations are entitled to some weight in the Department's decision over how to set wage levels. As discussed at greater length below, taking into account these aspects of the issue addressed by this rule played an important part in the Department's decision to reduce the entry-level wage from the 45th percentile to the 35th percentile.

To explain its focus on H–1B workers, the Department notes that the H–1B program accounts, by order of magnitude, for the largest share of foreign workers covered by the Department's four-tier wage structure. Upwards of 80 percent of all workers admitted or otherwise authorized to work under the programs covered by the wage structure are H–1B workers.[154] This, in combination with the fact that, as explained in an earlier section, the risk of adverse effects to U.S. workers posed by the presence of foreign workers is most acute where there are high concentrations of such workers, supports the Department's determination to pay special attention to the H–1B program in how it sets wages. Because the wage structure governs wages for hundreds of thousands of workers across five different foreign labor programs and hundreds of different occupations, no wage methodology will be perfectly tailored to the unique circumstances of every job opportunity.[155] Advancing the INA's purpose of guarding against displacement and adverse wage effects against this statutory backdrop therefore means, in the Department's judgment, that particular weight should be given in the Department's analysis to those aspects of the problem this rule addresses where there is the greatest danger to U.S. workers' wages—hence the added focus on the H–1B program.

Relatedly, the Department notes that the H–1B program is linked closely to the PERM programs that are also covered by the Department's wage structure. For one thing, there is significant overlap in the types of occupations in which H–1B and PERM workers are employed.[156] For example, the top ten most common H–1B occupations include seven of the ten most common PERM occupations. Through the third quarter of FY 2020, 80 percent of PERM cases were for jobs in Job Zones 4 and 5 [157]—the most highly skilled job categories, which also account for 94 percent of all H–1B cases.[158] Moreover, it is also clear that H–1B status often serves as a pathway to employment-based green card status for many foreign workers and that a very substantial majority of workers covered by PERM labor certification applications are already working in the U.S. as H–1B nonimmigrants.[159] In FY 2019, 68.2 percent of all PERM applications were for aliens that at the time the applications were filed were already working in the U.S. on H–1B visas.[160] For these reasons, giving particular attention to the H–1B program in determining how to adjust the wage levels is entirely consistent with also ensuring that how the wage levels are applied in the PERM programs is properly accounted for in the Department's analysis.

Similarly, the Department has concluded, in its discretion, that the Level I wage should be established based on the wages paid to workers in those occupations that make up a substantial majority of the applications filed in the H–1B, H–1B1, E–3, and PERM programs. This also ensures that the Department appropriately takes into account the size and breadth of the programs covered by the four-tier wage structure by giving special attention to those areas where the risk to U.S. workers' wages and job opportunities is most severe by virtue of having high concentrations of H–1B and PERM workers. Commenters are incorrect that the Department's decision to take this focus means it only looked at computer occupations. Rather, the Department looked at all occupations that account for one percent or more of the total H–1B population. While many of these occupations are computer-related, some are not. Further, while commenters are correct that there are as many as 99 occupations that require advanced degrees, the Department notes that this is out of a total of over 550 occupations covered by the OOH. Further, those 99 occupations account for an even smaller share of the actual workers who are employed under the Department's four-tier wage structure. While this does not

[154] *See* Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, *available at https://www.dhs.gov/immigration-statistics/yearbook/2017/table7;* United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2017 Annual Report to Congress October 1, 2016—September 30, 2017, (2020), *available at https://www.uscis.gov/sites/default/files/document/foia/Characteristics_of_H-1B_Specialty_Occupation_Workers_FY17.pdf.*

[155] *Cf. Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (Jan. 19, 2011) (justifying wage methodology designed for lower-skilled workers that was adopted in the H–2B program on grounds that the program ''is overwhelmingly used for work requiring lesser skilled workers,'' while also acknowledging that ''not all positions requested through the H–2B program are for low-skilled labor.'').

[156] In FY2019, 68.2 percent of all PERM labor certification applications filed were for H–1B workers already working in the United States. Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

[157] Under the O*Net system a job zone is a group of occupations that are similar in the amount of education, experience, and on the job training that is required for a worker to fill a position in the occupation. Job Zone 4 includes occupations that require considerable preparation; Job Zone 5 includes occupations that require extensive preparation. *See https://www.onetonline.org/help/online/zones.*

[158] This information is based on data collected by the Department's Office of Foreign Labor Certification on LCAs filed between March 1, 2020, and August 14, 2020.

[159] *See* Sadikshya Nepal, *The Convoluted Pathway from H–1B to Permanent Residency: A Primer,* Bipartisan Policy Center (2020).

[160] Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

mean that due attention should not be given to how the wage levels affect workers in advanced degree occupations, it does guide the relative weight these occupations are given in the Department's analysis.

Despite their disagreement with the methodology employed by the Department, commenters generally did not offer alternative ways to balance using a single wage structure across all five programs and hundreds of different occupations with varying skill requirements against the need to protect U.S. workers as fully as possible. Some commenters suggested as an alternative that different occupations or groups of occupations should be subject to a separate analysis and different wage structure. The Department has considered this option and believes that the utility of preserving a uniform wage structure across all programs and occupations outweighs any benefits that might be achieved by promulgating multiple, occupation or program-specific wage structures. The Department continues to believe that its method of doing so is the best available option as it is consistent with the approach the Department has taken in other foreign labor programs and focuses the Department's analysis on those areas where the risk to U.S. workers is greatest.

As for treating the PERM programs differently than the H–1B program, the Department notes that its analysis of highly skilled workers with advanced degrees and/or specialized knowledge—namely the EB–2 immigrant classification and the H–1B, E–3, and H–1B1 nonimmigrant programs—already takes into full account a large portion of the PERM program. With respect to the EB–3 classification, it is also noteworthy that many H–1B workers adjust status to that of lawful permanent residents through EB–3 classification, and the manner in which the programs operate means that, in many cases, foreign workers can, in some sense, have one foot in each program simultaneously for extended periods of time. Using different wage methodologies in the programs would therefore result in the incongruous possibility of a worker doing the same job for the same employer suddenly receiving a different wage upon adjusting status. Similarly, while having somewhat different eligibility criteria, the EB–2 and EB–3 classifications are not mutually exclusive: many workers that satisfy the eligibility criteria for one would also do so for the other.[161] Applying the same wage methodology in both classifications is therefore important to ensure consistent treatment of similarly situated workers and prevent the creation of incentives for employers to prefer one classification over the other because different wage methodologies yield different wages.[162] Thus, it is key in the Department's judgment that the EB–3 classification be treated the same as the EB–2 classification and H–1B program. More generally, continuing to employ the same wage structure across both the H–1B and PERM programs advances the Department's interest in administrative consistency and efficiency. Because there is significant overlap between the H–1B and PERM programs, they have long been regulated in connection with one another. Moreover, to the extent commenters assert that the IFR's wage levels resulted in inappropriately high wages for certain workers in advanced degree occupations, the Department notes that its decision to reduce the entry-level wage should, to some degree, ameliorate this concern.

For several reasons, the Department has also determined that occupation-specific wage structures are undesirable. For starters, calculating multiple different wage structures based on occupation would be a substantial and costly administrative undertaking for multiple components within the Department. There are over 800 different occupations in the SOC classification system used in the OES survey. The analysis needed to tailor different wage structures to each occupation would be an enormous undertaking, even assuming it were possible to conduct a meaningful, occupation-by-occupation analysis. Further, the burden on BLS to produce hundreds of different wage levels every year across various occupations would simply be unsustainable.

In addition, treating different occupations differently would create an opportunity and incentive, in some cases, for employers to misclassify workers in order to take advantage of lower wage rates. This is something that the Department already encounters by virtue of having different wage methodologies for different nonimmigrant programs that cover different types of jobs. Introducing the possibility of securing a different wage methodology within the H–1B and PERM programs would similarly allow employers ability to seek lower wages even if such wages are not the right wage for the job opportunity in question and result in adverse effects on U.S. workers. Again, this also means that, barring a compelling reason to introduce this kind of disuniformity into the H–1B and PERM programs, a single wage structure should be preserved. And the Department does not believe that there is such a compelling reason to disaggregate the wage methodology by occupation. While certain advanced degree occupations present somewhat different considerations in terms of how wage rates should be provided as compared to the top H–1B and PERM occupations the Department focused on in its analysis in the IFR, the Department reiterates that, as explained more fully below, the effects of the new wage methodology on advanced degree occupations have been given significant weight in the Department's analysis of where to set the entry-level wage. The Department therefore believes that adjusting the IFR's entry-level wage down to the 35th percentile—together with other features of the system, discussed below—adequately accounts for the interests of workers and employers in advanced degree occupations and will more consistently supply wage rates that are appropriate across a broader range of occupations. Moreover, other changes made in this final rule, including eliminating the use of the default wage of $208,000 per year for all four wage levels in cases where BLS cannot supply a Level IV wage (an issue that was of particular concern for commenters that discussed how the IFR affected employers of workers in advanced degree occupations), will also reduce the incidence of job opportunities requiring an advanced degree being assigned inflated wage rates.

Moreover, the Department notes that the use of a single wage structure has been its practice ever since it began using leveled wages in the H–1B and PERM programs. Twenty years of experience shows that using a single wage structure across all occupations is not unmanageable for employers. Indeed, given that the previous wage levels were selected with no analysis or explanation, the Department anticipates that its revised levels will in fact produce more appropriate outcomes in a larger number of cases across different occupations. For the first time the Department has undertaken a meaningful analysis of what wage levels

[161] *See Musunuru* v. *Lynch,* 831 F.3d 880, 885 (7th Cir. 2016) (describing a person applying for both EB–2 and EB–3 status).

[162] *See Comite' De Apoyo A Los Trabajadores Agricolas* v. *Perez,* 774 F.3d 173, 185 (3d Cir. 2014) (noting loopholes that can be created if employers are able to use different methodologies to calculate wages for the same types of workers).

will yield prevailing wage rates in the largest number of cases possible that are consistent with the wages paid to U.S. workers similarly employed and with comparable levels of education, experience, and responsibility to H–1B and PERM workers. In consequence, preserving a single wage structure should, if anything, be even more feasible and reasonable now than it was when the old wage levels were operative.

Further, the INA allows an employer to use the best available information at the time of filing an LCA in setting the wages in the H–1B program.[163] If an employer does not believe the OES wage provided by the Department is the best available information at the time of filing, the employer may utilize an alternative prevailing wage survey provided by an independent authoritative source or another legitimate source of wage information.[164] Such alternative sources of wage information are, in the Department's experience, widely available, and provide a backstop for employers, thereby reducing any need to create multiple, precisely tailored wage structures for different occupations.

The Department defines a prevailing wage survey published by independent authoritative source as ''a prevailing wage survey for the occupation in the area of intended employment published . . . in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24–month period immediately preceding the filing of the employer's application.'' [165] The independent authoritative source should: (1) Reflect the average wage paid to workers similarly employed in the area of intended employment; (2) Reflect the median wage of workers similarly employed in the area of intended employment if the survey provides such a median and does not provide a weighted average wage of workers similarly employed in the area of intended employment; (3) be based upon recently collected data; and (4) represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.[166]

In utilizing an independent authoritative source, the Department requires employers to follow the Department guidance, which explains the standards contained in the Department's regulations.[167] Employers following the 2009 Guidance should ensure wage data collected is for similarly employed workers, meaning having substantially similar levels of skills. The survey should contain a representative sample of wages within the occupation that comports with recognized statistical standards and principals in producing prevailing wages. It is important to note that the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and should not limit the universe of employers surveyed. The relevant factors are the job, the geographic locality of the job, and the level of skill required to perform independently on the job. The Department provides a set of minimum survey standards in Appendix E of the 2009 Guidance, and encourages employers to reference these standards when seeking to use an independent authoritative source as the prevailing wage. Written documentation on the methodology used to conduct the survey and the validity of the methodology used in computing the occupational wage data covering the area of intended employment must be kept in the employer's data file and made available in the event of an investigation.

In addition, the Department allows employers to rely upon other legitimate sources of wage information if they do not have access to a published independent authoritative source.[168] The only difference between a published independent authoritative source and another legitimate source of wage information is that the other legitimate source of wage information simply has to be ''reasonable and consistent with recognized standards and principals in producing a prevailing wage'' and does not need to be published.[169] As with independent authoritative sources, the Department encourages employers to ensure the other legitimate source of wage information follows the Department's 2009 Guidance to ensure it is reasonable and consistent with recognized standards and principals in producing a prevailing wage.

The Department notes that since the IFR, employers have availed themselves of the ability to use independent authoritative sources and other legitimate sources of wage information at rates 274 percent greater than the same timeframe in 2019. In fact, since publication of the IFR, the Department has received 14,153 LCAs supported by an independent authoritative source or other legitimate source of wage information for 153 unique occupations, compared to 19,509 representing 216 unique occupations for the entirety of FY 2020. This increased use of private surveys is consistent with the Department's experience that alternative wage surveys are readily available across many different regions and industries.

This widespread use and availability of alternative age sources extends to advanced degree occupations. Since the IFR publication, employers filing 523 LCAs representing 950 positions for occupations requiring advanced degrees used an independent authoritative source or other legitimate source of wage information. Since the IFR, there have been 4,973 PWDs requested for occupations requiring an advanced degree using a survey as the wage source; this is 1,780 more PWDs relying on a survey as the wage source than for similar PWDs in FY 2020.

For the PERM program, too, employers are required to obtain a PWD from the Department; they have the option of providing an alternate wage source to the OES survey in this process as well. There are well-established standards of acceptance of alternative wage sources. In the weeks since the publication of the IFR, the Department has received more than 6,900 prevailing wage requests supported by private wage surveys in the PERM program, which is a 335% increase over the same timeframe in 2019. Again, this increase confirms that such sources of wage data are readily available for use in seeking a PWD not based on the OES survey if employers believe in anomalous cases that the OES survey does not produce an accurate wage. This obviates any need, in the Department's view, to create a complicated, administratively burdensome scheme of occupation-specific wage structures.

3. The IFR Wages and Market Wage Rates

Summary of Comments

The most common concern raised by commenters on this subject was that prevailing wages under the IFR's

[163] 8 U.S.C. 1182(n)(1)(A)(i)(II).

[164] 20 CFR 655.731(a)(2)(ii)(B) and (C).

[165] 20 CFR 655.715.

[166] 20 CFR 655.731(b)(3)(iii)(B)(1)–(4).

[167] Employment and Training Administration; Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Revised Nov. 2009), *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[168] 20 CFR 655.731(b)(3)(iii)(C).

[169] 20 CFR 655.731 (b)(3)(iii)(C)(4).

methodology do not reflect actual market rates and in many cases are unrealistically high such that they will require employers to lay off currently employed foreign workers, will make it ''difficult if not impossible, to hire for highly specialized and hard-to-recruit for positions,'' and will ''frustrate equal pay principles for U.S. workers, and create an endless upward spiral of wage obligations that bear no relation to market dynamics.'' A professional association asserted that the wage level methodology in the IFR produced ''artificially high'' prevailing wages and circumvented congressional intent by making it ''virtually impossible for employers to use the H–1B visa program.'' The commenter asserted the Department violated section 212(n) of the INA by ''incorrectly setting the way data is leveled'' and ''prevent[ing] employers from obtaining'' from the Department's Online Wage Library ''a wage that is in fact the prevailing wage for the'' occupation and Area of Intended Employment or a wage that represents ''the best information available as of the time of filing the application.'' An employer asserted the IFR would create spiraling wages because ''the next collection of BLS data will be distorted by these new wage requirements, yielding new and even higher prevailing wage requirements, in a pattern that will repeat and multiply'' over time. A public policy organization said the IFR would lead to inflated wages because employers must post at the worksite the H–1B worker's salary, which will compel employers to pay the increased IFR wage to similarly employed U.S. workers.

Commenters cited numerous general and specific examples of substantial wage increases for combinations of occupations and areas of employment that do not reflect, according to commenters, market wages. Several commenters cited an NFAP analysis that compared wages under the IFR to private survey wages and pre-IFR OES wages and found that for all occupations and geographic locations the new wages are ''on average, 39% higher for Level 1 positions, 41% higher for Level 2, 43% higher for Level 3 and 45% higher for Level 4.'' Examples included a 99.5 percent increase for Level I petroleum engineers and for electrical engineers, computer network architects, computer systems analysts, mechanical engineers, and database administrators at all wage levels. The most dramatic examples included a Level I wage increase of more than 206 percent for a computer and information systems manager in East Stroudsburg, Pennsylvania, and more than 177 percent for a pediatrician in Wichita, Kansas. Referencing an American Action Forum report, a trade association cited average IFR wage increases for several occupations, including ''an 83 percent increase for Level 1 Computer and Information Systems Managers'' and ''a 44 percent increase for Level 2 Software Developers.'' Several commenters asserted the required prevailing wages for some information technology occupations would exceed the salary cap implemented by some big tech employers, such as Level II and Level IV wages in Silicon Valley and Seattle that exceed a $160,000 salary maximum at Amazon.

Many commenters stated the wages produced under the IFR did not reflect data on prevailing wages found on websites like Payscale, Glassdoor, Indeed, or Levels.fyi. Examples cited include Level I software developer wages in Santa Clara and Level I engineer wages in Seattle that are lower than the 45th percentile, according to Levels.fyi, and a median salary for software developers in Cincinnati that is $20,000 per year lower than the entry level wage under the IFR, based on Payscale data. One commenter also stated that the Level IV IFR wage for electrical engineers in Seattle exceeded $168,820, the highest wage listed for the occupation in O*Net.

A few commenters expressed concern that the IFR wages are not consistent with prevailing wage determinations produced by private wage surveys. A public policy organization compared wages under the IFR to surveys conducted by Willis Towers Watson and found a divergence in wage determinations between the two, including IFR wages 63 percent higher for Level IV programmers in Chicago, three times higher for all levels of financial analysts in New York City, and 62 percent higher for Level I software developers in Los Angeles. This commenter noted that many private surveys use ''precise methodologies and a wide range of data gathering to ensure that the surveys'' are accurate and they are ''used by employers for company-wide salary benchmarking.'' Similarly, a trade association stated that private wage surveys ''commonly collect compensation information reflecting education, experience, and responsibility,'' and a professional association stated these surveys often ''gather real market data for what companies are paying employees at different levels,'' in contrast to the OES, which gathers ''general data without regard to experience levels.''

In addition to arguing that the IFR's wage rates were too high, a number of commenters highlighted what can be described as second and third order consequences of prevailing wage rates being out-of-step with market wages. For instance, comments primarily from academic and research institutions and related organizations and individuals expressed concern that if wages are untethered from market rates, particularly for post-doctoral research positions, clinical faculty, administrative positions, and teaching assistants, and the prevailing wage requirement would be untenable for institutions reliant on grant funding, especially those reliant on government funding. As a result, commenters believed the IFR would produce a shortage of qualified faculty and diminish the quality of education students receive; reduce already declining foreign student enrollment and tuition revenue; and derail critical research projects in science, healthcare, and technology.

Most of these commenters asserted wages under the IFR often are significantly higher than prevailing wages in the higher education or research sectors, and several commenters cited specific examples, like a Level I wage increase for post-doctoral researchers that would raise the wage higher than the salary of many experienced tenure track faculty. Several commenters asserted the increased wages would be especially burdensome for employers reliant on grant funding that may be subject to statutory or other limits on the funding amounts and the ways the employer can expend the funds. For example, a university stated that federal research organizations lack adequate funding to pay the IFR wages for work on research projects funded by federal awards and will need to reduce the size of those project groups or attempt to avoid employing H–1B workers on any of those projects. Other commenters noted more specifically that grants like those awarded by the National Institute of Health (NIH) are subject to rules limiting the amount that can be used for ''administrative costs, including salaries,'' and one commenter stated that the IFR prevailing wage for biological scientists would exceed the NIH salary cap by as much as 79 percent in some areas.

Commenters expressed concern the wage increases would diminish the quality of education universities provide by making it difficult or impossible to retain or hire qualified faculty, researchers, and workers in other jobs like administrative positions.

A leading teaching and medical research hospital stated that the inability to retain researchers at the IFR wage levels would jeopardize critical research projects and the jobs in which U.S. workers are employed in ''assistant, tech and coordinator roles.'' Commenters also believed the wage increases would reduce post-graduation career opportunities significantly for international students and would reduce already declining foreign student enrollment, which in turn would contribute to a shortage of skilled labor in higher education and research and in the United States broadly. For example, some commenters asserted the IFR would reduce the number of available and qualified graduate teaching assistants, tutors, post-doctoral researchers, and similar workers because international students constitute a substantial portion of this labor force. An employer expressed concern about the impact of the IFR on the STEM and engineering labor force, noting that foreign graduates account for more than 70 percent of workers possessing a master's degree or Ph.D. in electronics engineering or related fields, according to a referenced 2018 National Center for Education Statistics Integrated Postsecondary Education Data System survey. Several of the commenters also stated the enrollment decline would reduce not only tuition revenue but also tax revenue and consumer spending.

Citing budget constraints and the importance of its work, a research organization reliant on NIH grant funding urged the Department to provide an exemption from the wage rule for ACWIA-eligible employers, which would encompass institutions of higher education and related or affiliated nonprofit entities, as well as nonprofit and governmental research organizations. The commenter added that the Department should continue to work to ''update the ACWIA wage library.''

Comments primarily from healthcare providers and academic institutions expressed concerns similar to concerns of higher education commenters. The commenters asserted the new wage rates would exceed market rates, particularly for physicians subject to a $208,000 wage in many areas and for resident physicians. Two commenters asserted university clinical programs and medical research programs did not have adequate funds to pay the increased wages and asserted this would set back important ''biomedical research during a pandemic'' and curtail their ability ''to care for and treat those afflicted.'' A professional association stated that resident physicians are physicians in training and asserted that use of the OES to determine the prevailing wage for these job opportunities would produce wages higher than the actual prevailing wage for residents.

Most of these commenters asserted the increased wages would lead to a shortage of healthcare workers, including bilingual workers and mental health professionals and would reduce the quality of and access to healthcare and the quality of care available. Several commenters expressed concern this would have a particularly significant impact on providers in rural areas that have difficulty recruiting, cannot afford to pay the same wages as employers in larger areas, and often rely on foreign workers allocated to underserved areas through the Conrad-30 waiver program. One commenter also asserted the increased wages under the IFR ''may cause elimination of the Conrad-30 waiver program'' altogether.

Several commenters expressed concern the IFR would adversely impact small employers, start-ups, and nonprofits in particular because many these employers cannot afford competitive base wages due to limited resources and instead compete based on intangibles or use incentives like stock options. One commenter asserted that ''incremental compliance costs'' for small employers would be as much as three percent of revenue in 2020–21 and that these employers would effectively ''be shut out of the H–1B visa program for new workers.'' Some commenters asserted these employers are more likely to rely on DOL issued wages than private wage surveys, either due to inability to afford the survey or because they operate in small or nonmetropolitan areas and ''private wage surveys are based on metropolitan area wages and do not cover many small market areas or less commonly utilized occupations because of data limitations.''

Many commenters expressed concern that the IFR would require employers to pay foreign workers more than the wage paid to U.S. workers or foreign workers hired prior to the IFR effective date and this would require employers to increase wages across the board due to the potential for worker resentment or decreased morale or because federal and state laws prohibiting discrimination require equal pay. For example, a professional association expressed concern that the IFR would require employers to pay the IFR wage to similarly employed workers to avoid potential pay equity claims under federal and state laws prohibiting discrimination, including Title VII of the Civil Rights Act of 1964 and a New York state law requiring equal pay for ''equal or substantially similar work.'' Similarly, some higher education commenters were concerned that they would need to pay the IFR wage to a broad range of U.S. workers due to ''pay equity demands'' or an ''actual wage analysis'' requiring payment of the higher wage to ''all comparable workers.'' Several commenters expressed general concern that the IFR would produce entry-level wages higher than wages paid to mid-career professionals or even the managers or supervisors of those workers.

By contrast, a number of commenters suggested that IFR's entry-level wage was set too low, that the entry-level wage should be placed no lower than the median of the OES distribution, and that some place even higher up within the distribution may be appropriate. A public policy organization asserted that wages ''close to and above the median . . . will ensure H–1B workers are not being sought out simply because employers can save on labor costs.'' A second public policy organization expressed concern that the pre-IFR wage level methodology that set rates below the median in the occupation ''failed to require that firms pay market wages to H–1B workers.'' A third public policy organization supported the increased wages under the IFR but expressed concern that setting the Level I wage ''just below the local median wage'' would ''permit employers to pay H–1B workers at below market wage rates.'' Similarly, a labor union and a commenter from academia supported the Department's decision to increase the Level I wage closer to the median, which the labor union asserted ''is reflective of the minimum market rate that should be paid to an H–1B worker in order to safeguard U.S. wage standards and ensure that migrant workers in H–1B status are compensated fairly.'' Another public policy organization and an academic commenter suggested the Department should increase the Level I wage to the 75th percentile and require that all H–1B job opportunities be certified ''at a wage that is no lower than the national median wage for the occupation.''

Other suggestions about how to set the wage levels included one from an anonymous commenter, who urged the Department to set the prevailing wage at the highest prevailing wage in the country for the occupation, such as requiring all employers to pay the prevailing wage for physicians in New York City if that is the highest wage among all areas in the country. The commenter believed this would ''equalize the cost to [all] employers'' and would incentivize employers to recruit in other regions of the United States before hiring foreign workers. Another anonymous commenter suggested the Department should set the wage levels at the average of the IFR and pre-IFR levels, stating this would result in wage levels at the 31st, 48th or 50th, 64th or 66th, and 81st or 83rd percentiles for Levels I through IV, respectively.

Response to Comments

At the outset, the Department notes that commenters generally did not offer data or economic justifications purporting to show that the old wage level methodology produced wages across many different occupations and geographic areas that reflect the wages paid to U.S. workers similarly employed to H–1B and PERM workers. Further, as explained above, the Department has reasonably concluded that the old wage methodology, in many instances, is a source of harm to U.S. workers' wages and job opportunities. This fact, on its own, in the Department's view, gives rise to a clear inference that the old wage levels were not set in a manner that yielded prevailing wage rates on par with market wages. Whatever merits some commenters might see in the old methodology, it is clear it did not advance the purpose of the INA's wage provisions to protect U.S. workers. Of equal importance, and a reason independently sufficient for concluding that adjustments to the old wage methodology are needed, is the fact that the old methodology, as noted previously, is in tension with the governing statute.

The need for this rulemaking clear, the question then turns to how the wage levels should be adjusted. Notably, a number of commenters agreed with the foundational premise of the IFR that the Department should set prevailing wage levels based on an assessment of what workers with similar levels of education and experience to the foreign workers covered by the four-tier wage structure are paid. As one commenter said, ''DOL reasonably claims that a well-functioning system for prevailing wages determinations would find that the wages that need to be paid for foreign national workers subject to these requirements 'generally should approximate the going wage for workers with similar qualifications and performing the same types of job duties in a given labor market.' '' This commenter, and others, therefore did not disagree with the aim of the IFR, but rather simply claimed that the Department had overshot the mark and adjusted the wage levels so high that they do not reflect actual market wages.

The Department agrees with these commenters, and the reasoning in the IFR, that prevailing wage rates produced by the four-tier wage structure should approximate actual market wages to the greatest extent possible. The Department also takes seriously commenters' concerns that the IFR's wage levels may yield prevailing wage rates that do not meet that goal. It has therefore taken into account data and analysis provided by commenters to supplement and inform the analysis used in the IFR. Based on this reassessment of the conclusions it reached in the IFR, the Department has determined that it is appropriate to reduce the entry-level wage from the mean of the fifth decile, or the 45th percentile, to the 35th percentile. Doing so will, in the Department's expert judgment, and based on a review of the relevant data sources, including those provided by commenters, result in entry-level prevailing wage rates that approximate the wages paid to U.S. workers similarly employed to H–1B and PERM workers.

While the Department believes that data and analysis provided by commenters warrants a reassessment of the IFR's wage levels, the Department, as discussed in detail above, has determined that the analytical framework relied on in the IFR remains the appropriate lens through which to understand how the levels should be set.

While the INA provides the relevant factors and general framework by which the wage levels are to be set, it leaves the precise manner in which this is accomplished, including the types of data and evidence to be used and how such data and evidence are weighed, to the Department's discretion and expert judgment. In exercising that discretion, the Department's decision on how to adjust the wage levels is informed by the statute's purpose of protecting the wages and job opportunities of U.S. workers. This means the Department has focused its analysis on those areas where the risk to U.S. workers is most acute, taken into account how the foreign labor programs are actually used by employers, and, where appropriate, resolved doubts in favor of refining the wage calculations so as to eliminate to the greatest extent reasonably possible adverse effects on U.S. workers caused by the employment of foreign workers, while also ensuring that the program is still accessible to employers.

As explained in the IFR, to determine the wages typically made by individuals having comparable levels of education, experience, and responsibility to the prototypical entry-level H–1B and EB–2 workers and working in the most common H–1B and PERM occupations, the Department consulted a variety of data sources, most importantly wage data on individuals with master's degrees or higher and limited years of work experience—the type of worker the Department determined to be an appropriate wage comparator for entry-level H–1B and EB–2 workers—from the 2016, 2017, and 2018 CPS [170] conducted by the U.S. Census Bureau, and data on the salaries of recent graduates of master's degree programs in STEM occupations garnered from surveys conducted by the NSF in 2015 and 2017. Both of these surveys represent the highest standards of data collection and analysis performed by the federal government. Both surveys have large sample sizes that have been methodically collected and are consistently used not just across the federal government for purposes of analysis and policymaking but by academia and the broader public as well.

In the case of the CPS survey, the Department used a wage prediction model to identify the wages an individual with a master's degree or higher and little-to-no work experience (based on age) would be expected to make and matched the predicted wage with the corresponding point on the OES wage distribution. Using the NSF surveys, the Department calculated the average wage of individuals who recently graduated from STEM master's degree programs and matched the average wage against the corresponding point on the OES distribution.

These analyses located three points within the OES wage distribution at which the wages of U.S. workers with similar levels of education and experience to the prototypical entry-level workers in specialty occupations and the EB–2 program are likely to fall. In particular, the 2015 NSF survey data indicate that workers in some of the most common H–1B and PERM occupations with a master's degree and little-to-no relevant work experience are likely to make wages at or near the 49th percentile of the OES distribution.[171]

[170] The CPS, sponsored jointly by the U.S. Census Bureau and BLS, is the primary source of labor force statistics for the population of the U.S. *See* United States Census Bureau, Current Population Survey, available at *https://www.census.gov/programs-surveys/cps.html.*

[171] For the CPS data, the Department looked at the wages of workers in all occupations that account for 1 percent or more of the total H–1B population. These occupations also account for the majority of PERM workers. For the NSF data the Department examined the wages of workers in 11 of the most common (in the top 17) occupational codes for H–

The 2017 NSF survey suggests that these workers are likely to make wages at or near the 46th percentile of the OES distribution. On the low end, the CPS data suggest that such individuals make wages at or near the 32nd percentile.

The Department thus identified a range within the OES data wherein fall the wages of workers who, while being relatively junior within their occupations, clearly possess the kinds of specialized education and/or experience that the vast majority of foreign workers covered by the Department's wage structure are, at a minimum, required to have.[172] Put another way, through an assessment of the experience and education generally possessed by some of the least skilled and least experienced H–1B and EB–2 workers—workers who are likely entry-level workers within their respective programs—the Department determined what U.S. workers with similar levels of education and experience are likely paid. Accordingly, it is appropriate for the wages paid to such U.S. workers to govern the entry-level prevailing wage paid under the Department's wage structure.[173]

In the IFR, the Department explained that translating the identified range into an entry-level wage for the Department's use in the H–1B and PERM programs could be accomplished in a number of ways. One option would be to simply calculate the average wage of all workers that fall within the range, meaning those workers whose reported wage falls between the 32nd and 49th percentiles, which would place the entry-level wage at approximately just above the 40th percentile. An alternative would be to identify a subset of wages within the range—either on the lower end or the higher end of the range—and calculate the average wage paid to workers within such subset. Because of the greater suitability of the NSF data for the Department's purposes, likely distortions in the wage data of both surveys caused by the presence of lower-paid foreign workers in the relevant labor markets, and the purposes of the INA's wage protections, the Department determined in the IFR that the most appropriate course was to set the entry-level wage by calculating the average of a subset of the data located at the higher end of the identified wage range. This resulted in the entry-level wage being placed at approximately the 45th percentile. Notably, commenters did not dispute these three qualitative considerations the Department offered for why it favored the higher end of the range.

The Department therefore continues to believe that the reasoning that led it to set the entry-level wage at the higher end of the identified range remains relevant to its decision in this rule. For one thing, as between the two data sources and the manner in which they were analyzed, the NSF data are better tailored to the Department's purposes in identifying an entry-level wage for the H–1B program. The NSF surveys provide data on the wages of individuals with degrees directly relevant to the specialized occupations in which they are working, namely degrees in STEM fields. By contrast, the CPS data only show whether a person does or does not have a master's degree and does not identify what field the master's degree or the individual's undergraduate course of study was in. It is therefore likely that some of the wage data relied on in generating the CPS estimate were based on the earnings of individuals who possess degrees not directly related to the occupation in which they work. Given that the CPS data used only accounted for persons with little-to-no experience, such individuals would therefore be unlikely to have the qualifications needed to work in a ''specialty occupation,'' as that term is defined in the INA. Having neither a specialized degree nor experience, and therefore lacking in specialized skills or expertise, at least with respect to the occupations in which they work, such individuals would not qualify as similarly employed to even the least skilled H–1B workers and are thus not appropriate comparators for identifying an entry-level wage in the H–1B program. Because of these workers' relative lack of skill and expertise, they are likely to command lower wages, and thus decrease the predicted wage below what would be an appropriate entry-level wage for the Department's foreign labor programs.

Relatedly, the Department's method for approximating experience in the CPS data is also not as closely tailored to the goal of determining what U.S. workers similarly employed to the prototypical entry-level H–1B and EB–2 workers are paid as is the NSF data. The CPS analysis relied on potential experience as a proxy for actual experience, which was calculated using a standard formula of subtracting from individuals' ages their years of education and six, based on the common assumption that most individuals start their education at the age of six.[174] While a standard measure for potential experience, this method of approximation is imprecise because it shows each individual of the same age and education level as having the same level of work experience. In reality, such individuals may vary significantly in their levels of experience.

For starters, the approximation does not take into account the possibility of a worker temporarily exiting the workforce, and would count the time spent outside the workforce as work experience. It also does not account for gaps between when a person received his or her bachelor's degree and when he or she enrolled in a master's degree program. In such cases, the work experience captured by the proxy of potential experience may thus not be directly relevant to the work a person performs after he or she graduates from a master's degree program since in some cases the work experience in question was likely acquired before the individual enrolled in a master's degree program. In consequence, the sample used in the CPS analysis almost certainly includes some individuals who have no relevant experience in the specialized occupations in which they are working, which likely decreases the wage estimate calculated using the CPS data and makes it a less precise and reliable estimation of the wages of U.S. workers with similar levels of education and experience to the prototypical, entry-level H–1B and EB–2 workers. In other words, the CPS data allows for

1B workers that were convertible to the occupational code convention of the NSF, which account for approximately 63 percent of all H–1B workers, according to data from USCIS.

[172] The Department notes again by way of clarification that it is not suggesting that possession of a master's degree is required to work in a specialty occupation. Rather, as explained above, possession of a master's degree by someone with little-to-no relevant work experience is being employed as a useable proxy, for analytical purposes, of the level of education and experience that approximates the baseline level of specialized knowledge needed to work in the H–1B and EB–2 programs and that many entry-level workers in those programs actually possess. Again, the Department notes that master's degree holders have, in recent years, been the largest educational cohort within the H–1B program, accounting in FY2019 for over fifty percent of new H–1B workers. *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018—September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.*

[173] *See* 8 U.S.C. 1182(a)(5)(A) (requiring the Secretary to certify that the employment of immigrants seeking EB–2 classification ''will not adversely affect the *wages* and working conditions *of workers in the United States similarly employed*) (emphasis added); 8 U.S.C. 1182(n)(1)(A)(i) (requiring prospective H–1B employers to offer and pay at least the actual wage level or ''the prevailing wage level for the occupational classification in the area of employment'').

[174] For example, under this metric, a 30 year old individual with 18 years' worth of education would be counted as having six years of work experience.

only a rough approximation of experience—a key factor the Department must take into account in adjusting the prevailing wage levels. This, in combination with the fact that some workers contained within the CPS dataset likely also lack specialized education relevant to the occupations in which they work, means that CPS data is, in some degree, distorted by wage earners who should be discounted in identifying the appropriate entry-level wage because they likely possess neither the type of specialized experience nor the education in their field that is comparable to that possessed by entry-level H–1B and EB–2 workers.

The NSF survey data, by contrast, are uniquely suited to the Department's purposes. The NSF surveys in 2015 and 2017 capture wage data about exactly the sort of workers the Department has determined serve as the appropriate comparators for entry-level H–1B and EB–2 workers. They surveyed individuals with master's degrees in STEM fields who are working in STEM occupations, including some of the most common H–1B and PERM occupations, and who are approximately three years or less out of their master's degree programs. In other words, the NSF surveys report wage data for individuals with specialized knowledge and expertise working in the occupations in which H–1B and PERM workers are most often employed and who are relatively junior within their respective occupations. The NSF data therefore provide a more accurate wage profile of workers similarly employed to entry-level H–1B and EB–2 workers. While both data sources are useful in helping determine a wage range for entry-level H–1B and PERM workers, of the two, the NSF surveys provide information more relevant to the Department's assessment of what is the appropriate entry-level wage. Therefore, the Department's analysis relies more on the NSF surveys. This weighs in favor of placing the entry-level wage higher up in the identified wage range given that is where the NSF survey results fall.

Beyond the relative weight of each data source, the Department also takes into account in identifying the appropriate entry-level wage the fact that both sources are likely distorted to some degree by the presence, in both the surveyed population and the labor market as a whole, of the very foreign workers the Department has determined are, in some instances, paid wages below the market rate. As noted above, various studies and data demonstrate that some H–1B workers are paid wages substantially below the wages paid to their U.S. counterparts, and that this has a suppressive effect on the wages of U.S. workers. Further, these adverse effects are most likely to occur and be severe in occupations with higher concentrations of foreign workers. It is therefore relevant to how the Department weighs the data that many of the occupations examined in the analyses of the NSF and CPS datasets have very high concentrations of H–1B workers. H–1B nonimmigrants make up about 10 percent of the total IT labor force in the U.S.[175] In certain fields, including software developers, applications (22 percent); statisticians (22 percent); computer occupations, all other (18 percent); and computer systems analysts (12 percent), H–1B workers likely make up an even higher percentage of the overall workforce.[176]

From this, the Department draws two conclusions. First, the respondents reporting wages in the CPS and NSF surveys are likely in some cases H–1B or PERM workers, given that both surveys contain responses from both U.S. citizens and noncitizens and the surveyed occupations have high concentrations of such foreign workers. The reported wages are thus in some instances likely not the market wage paid to U.S. workers similarly employed to H–1B and PERM workers, but rather the wages of the foreign workers themselves, which, as discussed previously, will be likely lower than the wages of U.S. workers in some cases. Second, even the reported wages of respondents who are not H–1B and PERM workers are likely not perfectly accurate reflections of what the market rate would be absent wage suppression given that high concentrations of lower-paid foreign workers likely decrease the overall average wage paid in the relevant labor market, as detailed above.

The need to account for these distortions also weighs in favor of setting the entry-level wage at the higher end of the identified wage range. To discount this consideration would mean that, far from ensuring that the adjusted wage levels guard against adverse effects on U.S. workers caused by the presence and availability of lower-cost foreign labor, the Department would, to some degree, be basing its regulations on a preexisting distortion caused by the old, flawed wage methodology.[177]

Finally, the purpose of the relevant INA authorities, particularly the prevailing wage requirement, also weighs in favor of adjusting the entry-level wage higher up within the identified wage range. As emphasized throughout, the guiding purpose of the INA's prevailing wage requirements is to ''protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.'' [178] Giving due weight to the purpose of the statutory scheme suggests, in the Department's judgment, that uncertainties should, to some extent, be resolved so as to eliminate the risk of adverse effects on U.S. workers' wages and job opportunities. That also countenances in favor of placing the entry-level wage at the higher end of the wage range.

However, in response to the IFR commenters provided the Department with additional data and considerations, which have led the Department to modify the wage levels established in the IFR. As noted, the principal concern commenters expressed about the IFR was that the wages it produces are significantly higher than the actual market wages employers pay their workers. To substantiate this criticism, various commenters offered wage figures from private and public wage surveys, and, in some instances, reported what specific employers pay their workers. The wage data from commenters analyzed by the

[175] The Department estimated the share of H–1B workers in the IT sector by tallying the total number of computer occupation workers in the U.S., subtracting those workers that fill positions for which H–1B workers are generally ineligible, and dividing the total by the total number of H–1B workers likely working in computer occupations, based on data and reports issued by USCIS. *See* Bureau of Labor Statistics, Employment by Detailed Occupation, *https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm;* United States Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf;* United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.*

[176] These findings come from data provided by USCIS and the 2017 Occupational Employment Statistics survey from the Bureau of Labor Statistics. They are based the total number of H–1B workers according the FY19 USCIS tracker data within a SOC code divided by the 2017 OES estimate of total workers in a SOC code.

[177] *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3453 (Jan. 19, 2011) (acknowledging the Department did not conduct ''meaningful economic analysis to test [the] validity'' of its ''assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage''); *see also Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24,047, 24,051 (Apr. 24, 2013).

[178] *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80,110 (Dec. 20, 2000).

Department generally dealt with wages paid to what commenters represented to be starting or entry-level positions.

To allow for a meaningful comparison with the wage figures used in the IFR, the Department selected a cross section of the wage data provided by commenters and used the same mode of analysis it used in the IFR to match those figures with percentiles in the OES. In particular, it compared annual wage data offered for specific jobs in specific metropolitan areas with OES data for the occupation in which the job falls in the same metropolitan area. OES data provides annual wage data for the 10th, 25th, 50th, 75th, and 90th percentiles for occupations at national, state, and metropolitan area levels. Using these data, the Department interpolated annual wages data provided by commenters at each of the missing percentiles between the 10th and the 25th, the 25th and the 50th, the 50th and the 75th, and the 75th and the 90th percentiles. This allowed the Department to approximate the specific percentile at which the wages offered by employers fall.

In general, the Department found that the annual wage data for specific jobs in specific metropolitan areas offered by commenters were clustered around percentiles in the 30s. Some annual wage data offered by commenters fell in lower percentiles, and a few fell higher in the distribution.

A number of commenters cited annual wage data based on salary offers for L3 software developers with no relevant work experience from major employers that are significant users of H–1B workers in the Seattle-Tacoma-Bellevue, WA Metropolitan Statistical Area (MSA) and San Jose-Sunnyvale-Santa Clara, CA. These offers ranged between the 25th percentile and 42nd percentile of the OES distribution. Excluding the lowest offer and the highest offer, most offers were clustered between the 32nd percentile and 41st percentile.

One commenter cited annual wage data from Glassdoor for entry-level tax managers at public accounting firms in the New York-Newark-Jersey City, NY-NJ-PA MSA. The Department found that the annual wage was between 33rd percentile and the 34th percentile. Another commenter offered Indeed and Payscale annual wage data for accountants in the Dallas-Fort Worth-Arlington, TX MSA. Using the higher annual wages from the two surveys, annual wages were between the 19th percentile and the 20th percentile.

One comment cited Glassdoor, Payscale, and ZipRecruiter data for minimum and maximum annual wages for statisticians in the New York-Newark-Jersey City, NY-NJ-PA MSA. Review of this data showed the minimum annual wages were less than the 10th percentile. Another comment cited Glassdoor average annual wage data for financial analysts with no experience in in the Dallas-Fort Worth-Arlington, TX MSA, which showed that the average annual wages were between the 31st percentile and 32nd percentile.

A commenter cited annual wages offered by a major university in the Bloomington, IN MSA. Because of data limitations in the OES, the Department could only compare the annual wages for the computer system analyst position provided by the commenter. The Department found that the annual wages for this position were between the 68th percentile and 69th percentile.

A commenter cited the annual wages of an assistant professor of clinical pediatrics/physician surgeon at a major university in the Chicago-Naperville-Elgin, IL-IN-WI MSA. The Department found the annual wages were between the 44th percentile and the 45th percentile.

One commenter cited the annual wages of four employees of a major university in the Salt Lake City, UT MSA: (1) A computer and information research scientist, (2) a database architect, (3) a foreign language instructor, and (4) a pediatric endocrinologist. The Department found that these annual wages were (1) between the 36th percentile and the 37th percentile, (2) between the 32 percentile and the 33rd percentile, (3) between the 12th percentile and 13th percentile, and (4) between the 34th percentile and the 35th percentile, respectively.

Another commenter cited Glassdoor annual wage data for a structural engineer with four to six years of experience in the Boston-Cambridge-Nashua, MA-NH MSA. The Department found that the annual wages were between the 24th percentile and the 25th percentile.

One commenter cited Willis Tower Watson private wage survey data for eight jobs in different metropolitan area that compare with Level 1 and Level 4 OES. The Department focused on the Level 1 data and found the following:

| Job | OES code | Metro | Percentile below | Percentile above |
|---|---|---|---|---|
| Electrical Engineer | 17–2017 | San Jose-Sunnyvale-Santa Clara, CA | Less than 10 | |
| Computer Programmer | 15–1251 | Chicago-Naperville-Elgin, IL-IN-WI MSA | 32 | 33 |
| Financial Analyst | 13–2098 | New York-Newark-Jersey City, NY-NJ-PA MSA. | 10 | 11 |
| Software Developer | 15–1256 | New York-Newark-Jersey City, NY-NJ-PA MSA. | 14 | 15 |
| Information Security Analyst | 15–1212 | Chicago-Naperville-Elgin, IL-IN-WI MSA | 16 | 17 |
| Software Developer | 15–1256 | Los Angeles-Long Beach-Anaheim, CA | 11 | 12 |
| Electrical Engineer | 17–2071 | Los Angeles-Long Beach-Anaheim, CA | 21 | 22 |

In sum, most of the wage data offered by commenters was for salaries paid by employers to entry-level workers in positions typically filled by H–1B workers. While there are outliers, most of these wage observations fell between the 30th and 40th percentiles of the OES distribution. Importantly, wage data about entry-level software developers employed by some of the largest users of the H–1B program fell between the 32nd and 41st percentiles. This is noteworthy given that such data may allow for the closest comparison to the IFR's data of all the private wage data submitted by commenters. This is because, as noted above, the IFR's analysis also focused on software developers and other occupations in the IT sector to account for the fact that such occupations comprise the largest share of the relevant programs.

It is also notable, in the Department's judgment, that, while the wage data submitted by commenters tends to be lower on the OES distribution than the IFR's 45th percentile entry-level wage, it still generally falls within the wage range between the 32nd and 49th percentiles identified by the IFR as the portion of the OES distribution where U.S. workers similarly employed to entry-level H–1B workers are likely to be found. From this, the Department draws two conclusions. First, the IFR's determination that wages paid to workers similarly employed to entry-level H–1B and PERM workers likely fall in this range seems to be largely accurate. While there are outliers in the wage data provided by commenters that fall both well above and well below the range, the data from commenters does not give the Department reason to abandon its conclusion in the IFR that some point within that range will serve as the appropriate entry-level wage.

Second, while consistent with the IFR's wage range, the commenters' data suggests, contrary to the IFR's reasoning, that the lower half, as opposed to the upper half of the range, would be a more appropriate place to set the entry-level wage. While the IFR offered a variety of reasons for why the NSF data, which falls at the higher end of the range, were likely better suited as compared to the CPS data for informing the Department's decision about where to set the entry-level wage, and the Department still views those considerations as relevant, the commenters' data suggests otherwise. As noted, the CPS data suggest that a point closer to the 32nd percentile would be the appropriate place to set the entry-level wage, which many data from commenters would seem to confirm.

As was the case in the IFR, the Department does not evaluate the data from either the government sources it analyzed or the private wage data submitted by commenters in a vacuum. Various qualitative considerations, including key points raised by commenters, shape the Department's assessment of what conclusions to derive from this data.

First, DOL regulations and guidance establish quality standards for the use of private wage sources in setting prevailing wage rates.[179] Some of the private wage sources provided by commenters—particularly the comments that offer a single example of a wage paid by one employer in one geographic area—would almost certainly not satisfy these standards if an employer sought to use them to establish a wage rate for its H–1B workers. These data are therefore arguably entitled to less weight than the data relied on in the IFR. Similarly, even as to the private wage survey sources offered by commenters that may satisfy DOL's standards, the NSF and CPS data are, in the Department's judgment, of higher quality. These are highly credible government surveys administered by agencies with extensive experience in gathering wage data. This too suggests that the data provided by commenters is entitled to less weight in the Department's analysis than the data used in the IFR.

Similarly, as explained above, the analysis used in the IFR controlled for characteristics relevant to setting a wage rate under the INA's framework. Because the Department is seeking to set an appropriate wage primarily for workers in specialty occupations—not for workers generally—the IFR took, among other things, the INA's minimum qualification requirements for working in a specialty occupation into account in deciding what data to use. It is at best unclear whether some of the surveys offered by commenters are also limited to workers who could be described as working in a specialty occupation, and therefore similarly employed to H–1B workers. For example, while data from one commenter suggest that an entry-level computer programmer working in the Chicago area makes wages that fall between the 32nd and 33rd percentiles of the OES distribution, computer programmers will likely not in all cases be properly regarded as working in a specialty occupation. For example, in some cases, the job of a computer programmer may involve writing basic computer code and testing it.[180] As explained previously, because a person without a specialized bachelor's degree can still be classified as a Computer Programmer, some portion of Computer Programmers captured by the OES survey are not similarly employed to H–1B workers because the baseline qualifications to enter the occupation do not match the statutory requirements. It is therefore possible that the computer programmer described as an entry-level worker by the commenter may not in fact have the same level of qualifications as an entry-level H–1B computer programmer. In such cases, the wage data provided by commenters, being based on the wages paid to workers who lack the specialized knowledge required of H–1B workers, is likely below the level that would be an appropriate entry-level wage for the Department's foreign labor programs. This, in turn, suggests that the data provided by commenters are entitled to less weight than the IFR's analysis, which controlled for the INA's specialty occupation requirement, and may also explain some of the extreme outliers at the lower end of the OES distribution found among commenters' data.

Relatedly, some of the commenters' private wage surveys report the bare minimum wage paid to workers in the occupation as the entry-level wage. Given that entry-level workers typically fall within a range of the wage data, as opposed to falling only at the very low end of the distribution, some of the private wage data arguably does not represent what would count as a reasonable entry-level wage, even if some portion of entry-level workers do in fact make wages at the bottom end of the distribution. Indeed, as the Department explained above, the purpose of the INA's wage provisions to protect U.S. workers suggests that uncertainty over how to read available wage data should be resolved in favor of placing the entry-level wage higher up within the distribution to eliminate as much as possible risks to U.S. workers from the employment of foreign labor. Yet these private wage sources do just the opposite, offering what is the absolute bare minimum wage that an entry-level worker might be expected to make. This too likely accounts for some of the outliers in the commenters' data that fall below the IFR's identified wage range, and suggests a wage higher up within the range should be selected.

On the other side of the equation, and in addition to the data they provided, commenters have provided the Department with various considerations that pull in the direction of favoring the lower end of the IFR's wage range. As explained previously, commenters detailed various second and third order consequences that would result if prevailing wage rates do not approximate actual market wages. These consequences include limiting healthcare providers', universities', and small businesses' ability to use the H–1B program, which would, in turn, disrupt research and impede access to healthcare, particularly in rural areas. Commenters also expressed concerns about the effect overly inflated prevailing wages would have on their ability to comply with pay equity laws. The Department takes these concerns seriously, and has determined that they weigh in favor of placing the entry-level wage at the lower end of the range identified by the IFR.

To begin with, the Department notes that many if not all of these problems are eliminated if prevailing wages rates are set in line with actual market wages. Each of these issues arises principally because, according to commenters, the IFR's wages do not approximate market wages. Setting an appropriate entry-level wage based on available data and

[179] *See* 20 CFR 655.731(b)(3)(iii)(B) and (C); § 656.40(g).

[180] Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Programmers, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm.*

other relevant considerations is thus the appropriate way to address these concerns.

As explained previously, the Department continues to believe that the range identified by the IFR accurately reflects the portion of the OES distribution where workers with levels of education, experience, and responsibility similar to the vast run of entry-level H–1B and PERM workers likely fall—something that commenters' wage data largely confirms. However, as the Department has also acknowledged, there is some level of indeterminacy about the exact point in that range at which placing the entry-level wage will yield optimal outcomes in the largest number of cases given that different data sources point toward somewhat different conclusions. In the IFR, the Department reasoned that the purpose of the INA's wage provisions to protect U.S. workers warranted resolving such indeterminacy in favor of placing the wage higher up within the range. However, the Department also recognizes that a purpose of the H–1B program more generally is to ensure that employers can access needed high-skilled labor to supplement their workforces.[181] Given that prevailing wage rates that are substantially above actual market wages can impede employers' access to the program, and cause various problematic, secondary consequences, the importance of avoiding such outcomes weighs in favor of resolving indeterminacy in favor of the lower end of the identified range. While the INA's wage provisions must be implemented in a way that fully protects U.S. workers' wages, raising wages to such a degree that the program becomes unusable for many employers defeats the entire reason Congress created the program. Placing the entry-level wage at a lower point within the range is one way to ensure that does not occur.

Relatedly, because the four-tier wage structure covers hundreds of thousands of workers employed across hundreds of different occupations by a wide variety of different employers, there is some level of variability as between different workers and what would constitute an appropriate entry-level wage for each of them. As explained above, in establishing the identified range, the Department focused its analysis on those occupations that account for the largest number of workers covered by the four-tier wage structure. The Department continues to believe this is appropriate given that occupations with large numbers of foreign workers are where U.S. workers are most at risk of experiencing adverse wage effects due to competition from foreign labor. However, the Department also acknowledges that some occupations, such as physicians, that account for a smaller share of H–1B and PERM workers and are therefore given less weight in how the Department identified the entry-level wage range, may have entry-level market wages that are somewhat lower within the OES distribution than the top H–1B occupations. This is because, as commenters explained, occupations like physicians typically require all workers in them to possess an advanced degree, meaning that, while in the top H–1B occupations the INA's specialty occupation requirement will generally mean that wages paid to H–1B workers should be placed higher up within the OES distribution, that is less true of advanced degree occupations. Workers in such occupations with qualifications similar to the least skilled H–1B worker might be found closer to the lower end of the OES distribution.

In consequence, while the analysis used to identify the entry-level wage range largely focused on top H–1B occupations, the decision of where within that range the entry-level wage should be set should give additional weight to occupations that account for a smaller number of workers within the program, particularly the advanced degree occupations about which commenters raised concerns. This suggests that the lower end of the entry-level range would be a more appropriate point to place the first wage level. Indeed, the Department notes that data from at least one commenter about the starting salary of a pediatric endocrinologist—which falls between the 34th and the 35th percentiles of the OES distribution—suggest that the lower end of the range may yield an appropriate entry-level wage for some positions in advanced degree occupations. Further, as discussed previously, some commenters suggested that the bottom third of the distribution for advanced degree occupations consists of entry-level workers similarly employed to H–1B workers. If commenters are correct, that means that the lowest points within the entry-level range identified by the Department does in fact cover the highest paid entry-level workers in such occupations.

Accounting for small businesses and rural employers that use the H–1B and PERM programs in selecting a point within the entry-level range identified by the Department also weighs in favor of the lower part of the range. As commenters note, large employers are able in some cases pay higher wages than small businesses. Further, wages in metropolitan areas may be higher to the extent that these are high-intensity occupational areas. The Department notes that some of these differences are already accounted for by other aspects of the regulatory framework governing prevailing wage rates. In particular, the Department issues wages based not only on the occupation a worker is in, but also on the geographic area in which the worker is employed. Thus, for example, while the wage data described above from large tech companies fall between the 32nd and 41st percentiles of the wage data gathered for the metropolitan areas in which those firms operate, such data fall well above the 60th percentile of the national OES wage distribution. By taking geographic area into account in analyzing what the appropriate entry-level wage is, the Department has thus, to some degree, already accounted for the differences between employers about which some commenters expressed concern. However, the Department also recognizes that higher wages may still be less manageable for small businesses and rural employers, which suggests that the lower part of the entry-level range would be appropriate.

Moreover, the Department acknowledges that placing the entry-level wage at any place within the identified range—even the lowest point—will result in significant wage increases for employers that may, in some cases, be difficult to adapt to given how long the old wage methodology has been in place. As detailed at greater length below, the Department is addressing this concern by phasing in the new wage rates over a period of time. However, the Department also believes that, even with a phased-in approach, the ability of employers to adapt to a significant change is relevant to the decision of where to set the entry-level wage. Insofar as a smaller increase—albeit one that is still substantial—will be more manageable for employers, the Department considers that also to be a reason to favor the lower end of the range.

On balance, the Department has determined that the factors pointing to the lower end of the identified range carry greater weight than the reasoning relied on in the IFR to select the higher end of the range. Accounting for advanced degree occupations, employers' ability to access the program and adapt to the change effected by this rule, and private wage data are all compelling considerations put forward by commenters that, in the Department's judgment, warrant a reassessment of its

[181] *See* 144 Cong. Rec. S12741–04, 144 Cong. Rec. S12741–04, S12749, 1998 WL 734046.

decision in the IFR. Thus, while in the IFR the Department chose to set the entry-level wage at approximately the 45th percentile, which fell at approximately the midpoint of the upper half of the entry-level range, the Department is now adjusting the level downward to approximately the midpoint of the lower half of the range, which is the 35th percentile.

Importantly, setting the wage at the 35th percentile will, in the Department's view, still provide the full protection to U.S. workers contemplated by the INA. The 35th percentile falls within the range identified in the IFR as the portion of the OES distribution where workers with qualifications comparable to entry-level H–1B and PERM workers are likely to fall. The manner in which the Department identified that range, as recounted above, relied on a variety of considerations, including the INA's specialty occupation requirement and how that interplays with the OES data, to ensure that the interests of U.S. workers are fully and properly accounted for in how the wage levels are set. As a result, while lower than the level set in the IFR, the 35th percentile will still achieve the purpose of the INA's wage provisions. While a point higher up within the range may also be reasonable, and the Department may reassess how to set the entry-level wage as it gains experience administering the entry-level at the 35th percentile, the Department believes that the 35th percentile strikes the right balance between fully protecting workers' wages and job opportunities while also preserving employers' ability to access the program.

By favoring the lower end of the range, the Department is confident the second and third order consequences identified by commenters as a product of prevailing wage rates that are inflated above actual market wages will be reduced if not eliminated by the downward adjustment in the entry-level wage. The Department notes that the downward adjustment is substantial. To compare the effects of the final rule on prevailing wages with the effects on prevailing wages produced by the IFR, the Department calculated the prevailing wages for two common occupations for H–1B workers (web develops and electrical engineers) in five metropolitan area (Atlanta-Sandy Springs-Roswell, GA; Austin-Round Rock, TX; Chicago-Naperville-Elgin, IL-IN-WI; San Jose-Sunnyvale-Santa Clara, CA; and Seattle-Tacoma-Bellevue, WA) under the IFR and the final rule. The Department then analyzed the differences. Comparing the prevailing wages under the final rule and interim final rule, the Department found that the prevailing wages are significantly lower under the final rule for both occupations in all five metropolitan areas at all four levels expect for the prevailing wage for level 4 web developers in Seattle, which is $7,322 or 3.8% higher (see table below).

| MSA | Occupation | Level 1 | | Level 2 | | Level 3 | | Level 4 | |
|---|---|---|---|---|---|---|---|---|---|
| Atlanta-Sandy Springs-Roswell, GA | Web Developer | −$11,648 | −13.1% | −$12,370 | −11.6% | −$13,114 | −10.6% | −$13,836 | −9.8% |
| Atlanta-Sandy Springs-Roswell, GA | Electrical Engineer | −11,635 | −12.6% | −13,743 | −11.6% | −15,851 | −11.0% | −17,960 | −10.6% |
| Austin-Round Rock, TX | Web Developer | −4,235 | −5.9% | −7,805 | −8.2% | −11,355 | −9.5% | −14,926 | −10.5% |
| Austin-Round Rock, TX | Electrical Engineer | −2,732 | −3.0% | −9,165 | −7.6% | −15,576 | −10.5% | −22,009 | −12.4% |
| Chicago-Naperville-Elgin, IL-IN-WI | Web Developer | −27,280 | −29.6% | −29,138 | −25.6% | −30,974 | −22.9% | −32,831 | −20.9% |
| Chicago-Naperville-Elgin, IL-IN-WI | Electrical Engineer | −9,720 | −10.5% | −15,301 | −13.2% | −20,881 | −15.1% | −26,462 | −16.4% |
| San Jose-Sunnyvale-Santa Clara, CA | Web Developer | −9,157 | −10.2% | −11,963 | −10.0% | −14,769 | −9.9% | −17,576 | −9.9% |
| San Jose-Sunnyvale-Santa Clara, CA | Electrical Engineer | −5,420 | −4.5% | −18,039 | −11.1% | −30,680 | −15.0% | −43,299 | −17.6% |
| Seattle-Tacoma-Bellevue, WA | Web Developer | −20,876 | −14.6% | −11,477 | −7.2% | −2,078 | −1.2% | 7,322 | 3.8% |
| Seattle-Tacoma-Bellevue, WA | Electrical Engineer | −16,485 | −14.1% | −21,561 | −14.8% | −26,617 | −15.2% | −31,693 | −15.4% |

Further, the Department notes that many of commenters' concerns are also addressed by other measures the Department is taking in this final rule. For example, commenters' complaints about overly inflated wages for physicians, particularly in rural areas, focused in many cases on the fact that the IFR resulted in a default wage of $208,000 a year for all four levels in a number of different locations. As detailed more fully below, the Department is eliminating the influence of outliers on the upper level wage, reducing the upper level wage, and providing a default rule for cases where BLS is unable to calculate the upper level wage to ensure that the Department provides leveled wages wherever possible. These measures will further alleviate complications healthcare providers and other employers in rural areas encountered under the IFR.

The Department disagrees with comments that suggested that the median of the OES distribution should be the absolute minimum for the entry-level wage, and that some point even higher up in the distribution might be appropriate. The purpose of having a four-tier wage structure is to provide gradually increasing wages as workers skill levels increase. The entry-level wage should therefore be set not based on what the median wage is of all workers, but rather based on an assessment of what other entry-level workers with qualifications comparable to H–1B and PERM workers possess. As detailed at length above, the Department's review of the relevant data and other considerations indicates that a point below the median is the right place to set the entry-level wage.

The Department also rejects other alternatives suggested by commenters. For example, the recommendation that the Department set wages by averaging the IFR's wage levels with the old wage levels is flawed because, as noted, the old wage levels were selected arbitrarily, and therefore should not be a significant factor in how the Department determines the new wage levels, except insofar as the Department takes into account employers' and workers' reliance interests in the prior methodology. The Department also disagrees with the commenter that suggested that the prevailing wage should be the highest prevailing wage in the nation for any given occupation. Doing so would ignore the importance variations in labor markets by geographic area have long played in how prevailing wage rates are provided, as well as the statutory requirement that prevailing wage rates be based in part on geographic area.

4. Reliance Interests

Summary of Comments

Many commenters expressed concern about the IFR's negative impact on current H–1B visa holders in the United States, especially those with families and strong ties in the United States and those with pending or approved I–140 Immigrant Petitions for Alien Workers or pending I–485 Applications to Register Permanent Residence or Adjust Status (''green cards''). Several commenters discussed the impact on foreign workers who had expected to continue working in the United States and for some, obtain lawful permanent status through their employer. Commenters expressed concern that employers would terminate H–1B visa holders and ''potential green-card recipients'' would have to leave the country. An individual commenter asserted that the IFR would inhibit job opportunities for international graduates of U.S. universities, regardless of their capabilities, and contended that the new wage levels would disincentivize legal immigration. Similarly, another individual commenter described the rule as ''eliminating legal immigration paths'' and warned that it will cause foreign workers who have contributed greatly to the U.S. tax base to go out of status.

Commenters stated that since some employers will not be able to afford the wage increases and will terminate foreign workers, the IFR would have devastating effects on the lives of foreign workers with families, property, and ties to a community. One lobbying organization stated the IFR would mean that ''many talented foreign nationals [would be] forced to leave the U.S. because these new wage requirements make it impractical to continue employing them in our country.'' Based on polls of their membership conducted by some of the signatories, a group of professional associations and advocacy organizations asserted that as many as 70 percent of H–1B workers who are making progress toward obtaining a green card, and in many cases have ''developed permanent ties to the United States'' through home ownership or U.S.-born children, may have to abandon the process. The commenter also stated that the IFR ''understates or ignores altogether the reliance interests'' of the nearly 600,000 H–1B workers currently employed in the United States. This professional association warned that H–1B workers whose status is threatened by the IFR will need to leave the country abruptly, impacting not only the workers, but also their spouses and children, and it expressed concern about COVID–19 complicating further their ability to relocate. The commenter maintained that suddenly changing the longstanding rules that have before now allowed workers to buy homes, raise children, and otherwise create ties to the United States over time is unfair and unreasonable. Meanwhile, an attorney claimed that the IFR's economic and social impacts will be acute for Indian nationals in particular because they often face long delays while waiting for green cards, which the commenter said results in many purchasing houses and having children here. One public policy organization that supported the IFR opposed immediate implementation, asserting the abrupt wage increase would put currently employed workers in a ''precarious position'' and ''may cause churn if employers [are] unwilling to pay real market wages [and] decline to renew their workers' H–1B visas or initiate petitions for permanence.''

One commenter also expressed concern that an employer may violate DOL regulations at § 655.731(a) if it pays the IFR wage to workers hired after the IFR effective date, but continues to pay a current H–1B worker the lower wage issued prior to the IFR, because the employer will be paying less than the actual wage to the first employee. The commenter suggested that this would result in additional disruption to employers' operations as the new wage levels would result in increases in the wages owed to new H–1B workers, but would result in immediate changes to the wages owed to workers already employed.

Many commenters expressed concern that immediate implementation of the IFR dramatically increased prevailing wages too abruptly, jeopardizing operations by disrupting long-term budget and other planning, interfering with contractual obligations, and preventing employers from adapting to the wage increases by adjusting operations and hiring and training new workers.

A professional association expressed concern that the immediate implementation of the IFR would increase costs for ''human resources and compensation staff to bring their companies into compliance with the rule'' and asserted the Department failed to consider staffing changes that may be necessary for employers that cannot ''support'' wages at levels produced by the IFR methodology. A trade association expressed concern that the IFR may cause ''material disruption'' to employers' ''operations or delivery models . . . because of long-term contractual commitments . . .'' and that these employers may be ''forced to operate at a loss'' because they are unable to re-negotiate contracts entered into prior to the IFR effective date. Another trade association stated that the IFR forced employers to put ''talent acquisition and workforce development decisions on hold'' and required them to ''reconsider work schedules, cost increases, and performance metrics that impact their entire workforce.'' The commenter expressed concern that immediate implementation of the IFR created operational disruptions because employers relied on the published July 2020 OES wages ''to create plans, develop strategies and hiring, and consider talent retention and immigration programs.'' A third trade association asserted the IFR may cause long-term damage to employers and disrupt U.S. worker hiring processes because employers ''plan and budget their hiring months and often years in advance.''

A higher education policy organization noted that colleges and universities have planned budgets and salaries and signed employment contracts in reliance on wages produced by the Department's wage surveys and expressed concern the IFR would require these employers to ''re-visit all of those plans, in the midst of a pandemic and in the middle of an academic year.'' The commenter also stated the Department's wage rules are complex and that universities have ''spent years developing the methodology according to DOL requirements'' and ''invested significant resources over the years to train international offices on DOL prevailing wage methodology.'' A higher education professional association noted hiring cycles at academic institutions ''often run over a year'' and that employers have already made offers to foreign workers ''based on the ability to sponsor H–1B status and/or green cards.'' A university submitted a similar comment and expressed concern that immediate implementation of the IFR would require the employer to renegotiate employment offers ''in some cases . . . just days before the expiration of the beneficiary's current status.''

Several commenters, including some that expressed support for the IFR, urged the Department to provide for a transition period or to phase in the wages over time to permit employers to adjust to the wage increases. A commenter from academia suggested the Department should phase in the new wage levels over no more than a two-year period, which the commenter believed would be sufficient time for employers to adjust to the new wage levels while also preventing employer ''exploitation of artificially low wage rules.'' A public policy organization that supported a phase-in period also suggested the Department should work with DHS to ''create positive incentives for employers who match the new wage requirements for their existing workforce.'' A public policy organization also suggested the Department should apply the revised wage level methodology only to ''new workers in . . . temporary work visa programs with [LCAs] submitted after the IFR took effect'' to avoid ''discourag[ing] renewals and petitions for lawful permanent residence by employers unwilling to pay market wage rates.'' The commenter stated this would protect workers who were ''contracted under one set of rules and expectations'' by avoiding an unreasonable change to those terms and conditions of employment.

Response to Comments

While the Department believes that adjusting the wage levels in the IFR to a level that more closely approximates the actual wage typically paid to U.S. workers similarly employed to H–1B workers will address many if not most of the concerns raised by commenters about the impact of the new wage methodology, it also recognizes that implementing such an immediate and significant change may cause disruption to employers' and foreign workers' reliance interests in the old methodology. While such reliance interests are difficult to quantify, the Department has sought to account for these interests and ensure that the new wage levels are implemented in a way that appropriately balances the need to protect U.S. workers with the Department's obligation to consider reliance interests engendered by its prior methodology, the Department has decided to adopt a series of measures to ease the transition to the new wage structure.

In particular, the Department is including in the final rule a delayed implementation period under which adjustments to the new wage levels will not begin until July 1, 2021. Further, once adjustments begin, they will be made in a phased approach, with most job opportunities not becoming subject to the full increase to the new levels until July 1, 2022. For workers who are on track to receive lawful permanent resident (LPR) status, as indicated by their being the beneficiaries of approved employment-based green card petitions, or otherwise eligible to extend their H–1B status beyond the six-year limit, the Department has determined that a more gradual phase-in occurring in four steps that results in job opportunities filled by such workers being placed at the new wage levels beginning on July 1, 2024, is appropriate. Finally, to the extent that employers' actual wage obligations under the INA may result in more immediate changes to the wages they must pay workers who have already received work authorization on a previously approved LCA, the Department will take this into account in exercising the discretion afforded it by the INA when enforcing such obligations.

In effecting an adjustment to the wage levels previously used to set the prevailing wage in the H–1B and PERM programs, the Department is obligated to consider whether ''its prior policy has engendered serious reliance interests.'' [182] In the IFR, the Department recognized that the old wage levels ''have been in place for over 20 years, and that many employers likely have longstanding practices of paying their foreign workers at the rates produced by the current levels.'' [183] The Department further acknowledged that making significant adjustments to the wage levels ''may result in some employers modifying their use of the H–1B and PERM programs,'' and ''will also likely result in higher personnel costs for some employers.'' [184] Despite these considerations, the Department concluded that ''to the extent employers have reliance interests in the existing levels . . . setting the wage levels in a manner that is consistent with the text of the INA and that advances the statute's purpose of protecting U.S. workers outweighs such interests and justifies such increased costs.'' [185]

As explained above, the Department continues to believe that the old wage levels are the source, in many cases, of serious, adverse effects on U.S. workers' wages and job opportunities. Adjusting the levels to bring them in line with the wages paid to U.S. workers with levels of education, experience, and responsibility comparable to H–1B workers—and thereby reducing the danger posed to U.S. workers by the employment of foreign workers—remains the principal aim of this rulemaking. Ensuring that the Department's wage structure is set in accordance with the relevant statutory factors is also necessarily a controlling objective in the Department's assessment of how best to reform the prevailing wage levels. The old levels have never been justified by economic analysis, and, as detailed above, are in tension with the statutory scheme insofar as they are based, in many instances, on data about the earnings of workers who cannot be regarded as similarly employed to workers in specialty occupations. Effecting a significant adjustment to the wage levels, and doing so as expeditiously as is reasonably possible, is therefore of paramount importance in the Department's judgment.

That said, concerns raised by commenters about disruptions to business operations, fairness to foreign workers, and the feasibility of adapting to significant changes to the wage levels in a short period of time are also entitled to weight in how the Department implements adjustments to the levels. The old levels were set far too low, which means that the adjustment necessary to bring them in line with what similarly employed U.S. workers make, and therefore be consistent with the statutory scheme, is substantial. The Department notes that shifting the entry-level wage from approximately the 45th percentile provided for by the IFR to the 35th percentile means the adjustment employers will have to make to accommodate themselves to the new levels is less dramatic. But it is still significant. Indeed, approximately 60 percent of all LCAs in recent years have been for job opportunities at the first and second wage levels, which are at roughly the 17th and 34th percentiles of the OES distribution. Setting the lowest wage level at the 35th percentile thus means that the prevailing wage for all H–1B workers going forward will likely be higher—and in many cases substantially so—than the prevailing wage for as much as 60 percent of the current H–1B population. The Level III and Level IV wages will also now be, in many cases, higher than the highest wage required under the old Level IV wage. Considerations brought to the Department's attention by commenters about the effects of an adjustment of this magnitude have provided the Department with greater insight into how to implement such a substantial change.

For that reason, the Department has reassessed how it balanced in the IFR reliance interests in the old wage levels with the need to adjust the wage levels. To begin with, the Department reiterates that setting wages so as to protect U.S. workers is the central purpose of the INA's wage requirements.[186] To the extent commenters suggest that business practices have evolved around and been shaped by the old wage levels, and that the old levels, or something close to them, should therefore be maintained indefinitely or for extended periods of time to prevent disruption to employers' operations, the Department disagrees. The fact that some employers have long benefited from inappropriately low

[182] *F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

[183] 85 FR 63,893.

[184] 85 FR 63,894.

[185] *Id.*

[186] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models,* 59 FR 65,646, 65,655 (Dec. 20, 1994) (describing the ''Congressional purposes of protecting the wages of U.S. workers'' in the H–1B program); H.R. Rep. 106–692, 12 (*quoting* Office of Inspector General, U.S. Department of Labor, Final Report: The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs to Be Fixed 21 (May 22, 1996) (''The employer's attestation to . . . pay the prevailing wage is the only safeguard against the erosion of U.S. worker's [sic.] wages.'').

wage rates cannot justify the continued perpetuation of the harms to U.S. workers that result from foreign workers earning wages that do not reflect what similarly employed U.S. workers are paid.

However, in light of the comments it received, the Department has determined that a wage increase that is both dramatic and immediate is also undesirable, and indeed may be counterproductive to the aims of this rule. For one thing, as some commenters noted, immediate disruptions to business operations, such as might lead to the termination of contracts or the shuttering of offices, may in fact threaten U.S. workers with job losses or reductions in work. Adopting a rule that eliminates workers' jobs in order to protect their wages advances neither the interests of workers nor the purposes of the INA.

Similarly, the Department acknowledges that, while the aim of the INA's wage requirements is to protect U.S. workers, one purpose of the H–1B program more generally is to ensure that employers can access needed high-skilled labor to supplement their workforces.[187] Although permitting employers to access temporary foreign labor must be accomplished in a way that works no harm on the wages and job opportunities of U.S. workers, it is also important to ensure that reforms to the prevailing wage do not unnecessarily limit employers' use of the program. Helping employers bring the wages they pay their H–1B workers in line with the requirements of the INA while avoiding the kind of abrupt change that might make it unreasonably difficult for employers to adapt is therefore consistent with the broader goals of the H–1B program.

For those reasons, the Department has determined that a gradual transition to the new wage levels is needed to account for employers' reliance interests on the prior system while still ensuring that U.S. workers' wages and job opportunities are fully protected. Such an approach is a reasonable method of effecting a regulatory change that results in increased costs on regulated entities.[188] Modifying the existing system over a period of time, even where the prior system is inconsistent with the governing statute, can assist affected parties in ''reorder[ing] their affairs.'' [189] The Department's decision to implement the new wage rates through a transition rather than through an immediate adjustment is also consistent with the notice the IFR gave to the public of the intended policy change.[190]

Modifying the prevailing wage levels through a delayed or graduated transition matches how Congress and other agencies have instituted similar changes to employers' wage obligations in other contexts. For example, all increases in the Federal minimum wage that Congress enacted over the last 60 years were phased in over two or more years.[191] Only two of the ten minimum wage adjustments since the enactment of the Fair Labor Standards Act have been made fully effective immediately. The three most recent amendments to the Federal minimum wage were implemented over two or three year periods.[192] In so doing, Congress has sought to minimize any loss of jobs or other economic disruptions that an immediate, one-step increase in the Federal minimum wage might cause to labor markets. Changes to minimum wage laws at the state level are also often made through incremental adjustments.[193] Similarly, the Department has employed comparable transition provisions when implementing wage changes in other foreign labor programs.[194]

Similarly, the Wage and Hour Division has typically implemented changes to employers' obligations to provide overtime pay through delayed effective periods. The most recent change to overtime rules was made effective more than 90 days after the final rule was published—more time than is required by either the Administrative Procedure Act or the Congressional Review Act.[195] The 2016 overtime rule (later enjoined) was made effective more than five months after publication.[196] The 2004 overtime rule was made effective 120 days after publication.[197] In both cases, the Department determined that a delayed effective date would ''provide employers ample time to make any changes necessary to ensure compliance with the final regulations.'' [198]

The Department notes that changes to the minimum wage or overtime obligations are different in important respects from the adjustments the Department is making to the prevailing wage levels. For one thing, changes to the minimum wage and overtime requirements are often made in light of gradual changes in economic conditions that make it necessary to reassess a prior policy determination. By contrast, in undertaking a change to the prevailing wage levels, the Department is giving meaningful consideration to what employers' wage obligations should be based on available economic data for the first time since the Department began using a multi-level wage structure in its foreign labor programs. Similarly, while Congress's decision to adjust the minimum wage is driven entirely by competing policy considerations, the Department's discretion to adjust the wage levels is to some degree confined by the INA. As explained above, the Department is adjusting the manner in which it sets prevailing wage rates not only because the existing wage levels are the source, in some cases, of harm to U.S. workers' wages and job opportunities, but also because they are inconsistent with the governing statute. In consequence, the reform the Department is undertaking in this rulemaking is long overdue and of greater significance than similar kinds of changes to employers' wage obligations in other contexts. Finally, as explained further below, the adjustments to the prevailing wage levels will not have the same kind of immediate impact on employers' wage obligations with respect to all workers currently on their payroll as changes to the minimum wage do. Employers will be able to pay H–1B workers currently employed in many cases at the current wage levels for the duration of the validity period of their current LCAs. Increases in the wage levels will generally have an immediate impact only on new workers or where the employer seeks to renew a current worker for a new period of employment. In consequence, immediate changes to the wage levels are likely to be less disruptive than immediate increases in the minimum wage. In combination, these considerations weigh in favor of keeping the transition period to the new wage levels of short duration, even if that means employers will still be required to adapt quickly to a significant increase in the wage levels.

The Department has therefore decided to implement the adjustments to the prevailing wage levels through a combination of a delayed effective period and multi-step adjustments occurring over approximately a year and

[187] *See* 144 Cong. Rec. S12741–04, 144 Cong. Rec. S12741–04, S12749, 1998 WL 734046.

[188] *See Mexichem Fluor, Inc.* v. *Envtl. Prot. Agency,* 866 F.3d 451, 464 (D.C. Cir. 2017).

[189] *Dep't of Homeland Sec.* v. *Regents of the Univ. of California,* 140 S. Ct. 1891, 1914 (2020).

[190] *Select Specialty Hosp.-Akron, LLC* v. *Sebelius,* 820 F. Supp. 2d 13, 24 (D.D.C. 2011).

[191] *https://www.dol.gov/agencies/whd/minimum-wage/history.*

[192] *Id.*

[193] *https://www.dol.gov/agencies/whd/minimum-wage/state.*

[194] *See* 20 CFR 655.211(d).

[195] 84 FR 51,230, 51,234.

[196] 81 FR 32,391 (May 23, 2016).

[197] 69 FR 22,121.

[198] *Id.* at 22,126.

half period. The first adjustment to employers' prevailing wage obligation will not occur until July 1, 2021. This delay from publication of this rule until the first wage increase will give employers time to plan for the adjustment. Adjusting the wage levels on July 1st is also consistent with historical practice at the Department, which has typically published the new annual wage rates for the H–1B and PERM programs each year at the beginning of July. Employers are thus accustomed to modifications being made at that time of the year.

On July 1st, the entry-level wage will increase from roughly the 17th percentile to 90 percent of the 35th percentile wage, as provided by BLS—a point approximately halfway between the current Level I wage and the 35th percentile, which, as explained above, is the point in the OES distribution that the Department has determined is appropriate for setting entry-level wage rates. Similarly, at the same time the Level IV wage will increase from roughly the 67th percentile to 90 percent of the 90th percentile wage. The following year, on July 1, 2022, the wage levels will again increase, and be placed at the 35th percentile for the entry-level wage and the 90th percentile for the uppermost level, at which point the transition to the new wage structure will be complete.

The Department determined the appropriate step up in wages by analyzing national wage data for the top ten occupations in which H–1B workers are employed. In particular, the Department averaged the wages estimated to fall at various percentile in the OES distribution using linear interpolation, and weighted that average by the share of H–1B workers in each occupation relative to the total number of H–1B workers in the top ten occupations. In so doing, the Department relied on the same basic methodology it used to determine the appropriate entry-level wage. As explained elsewhere, the Department's interest in maintaining a single, uniform wage methodology for the H–1B and PERM programs means that the wage provided will not be perfectly tailored to every job opportunity or geographic location. Providing wages that are closely tailored to the unique circumstances of as many job opportunities as possible while still using a single wage structure necessarily means that the Department must focus on nationwide data and those occupations that account for the largest share of the affected programs.

An analysis of national data for the top ten H–1B occupations indicates that 90 percent of the average wage at the 35th percentile falls approximately at the midpoint between wages at the 17th percentile—a rough proxy for the wages yielded by the old wage methodology—and wages at the 35th percentile. Similarly, 90 percent of the average wage at the 90th percentile is approximately the midpoint between wages at the 67th percentile—a rough proxy for the Level IV wages yielded by the old methodology—and the 90th percentile. Requiring employers to pay wages that are 90 percent of the 35th percentile for entry-level workers and 90 percent for Level IV workers in the first stage of the two-step implantation of this rule will thus ensure an even and gradual adjustment over the period of time the Department has determined is appropriate to allow employers to adapt to the new wage rates.

The Department recognizes that, even under this incremental approach, wage rates will still increase significantly in a relatively short period. An analysis of wage rates based on current OES data suggests that an increase in the entry-level wage from roughly the 17th percentile to 90 percent of the 35th percentile may equate in many cases to a real dollar increase of approximately 14 percent in the annual wages employers will be required to pay their foreign workers. However, for the reasons given above, the Department believes that a transition consisting of both a delayed effective period and a gradual increase to the new wage levels occurring over a year and a half period is the appropriate way to balance the need to ensure U.S. workers are not harmed by the presence of foreign workers in the labor market while giving employers time to adapt to the new wage system. Further delay in adjusting to the new levels would, absent some other compelling consideration, entail too great a risk to U.S. workers' wages and job opportunities, in the Department's judgment.

Beyond employers' general reliance on the old wage levels, the Department notes that some employers also have reliance interests in a specific worker or group of workers currently working who were hired on the understanding that they would be employed at wages based on the prior prevailing wage methodology. Immediate changes to the wages employers are required to pay could change the expectations employers had about the cost of employing such workers when they invested in sponsoring them for a visa. Such concern would only pertain to visa workers who have already been approved and who are already working. It is unlikely that this kind of immediate change to employers' wage obligations to current workers will occur, however, to the extent it does the Department possesses some enforcement discretion to mitigate against any such potential impact on visa workers hired under the prior prevailing wage methodology.[199]

As some commenters noted, there is a possibility that employers' wage obligations as to current workers will be immediately affected by significant adjustments to the prevailing wage levels, even though the Department has already approved LCAs for these workers, which contain prevailing wage rates that will remain valid for the duration of the LCA's validity period.[200] This may occur through operation of employers' actual wage obligation under the INA and the Department's regulations, which is to say their obligation to pay the higher of the actual wage or the prevailing wage to their H–1B workers.[201] As the Department's regulations note, ''employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H–1B employees based on different prevailing wage rates stated in applicable LCAs.'' [202] While new prevailing wage rates based on this rule's revised methodology will not immediately change the prevailing wage for H–1B workers with already-approved LCAs, the arrival of new H–1B workers at the same worksite that is subject to a higher prevailing wage under the new methodology could potentially modify employers' actual wage obligations with respect to current H–1B workers and result in the employer having to pay a higher wage.

While acknowledging this issue, the Department believes, as a practical matter, it is unlikely that the introduction of new H–1B workers at a worksite will result in immediate and

[199] It should be noted that this is a finite issue that exists only until current workers' visas expire.

[200] *See* 20 CFR 655.731(a)(2)(viii) (''Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment.

[201] *See* 8 U.S.C. 1182(n)(1).

[202] 20 CFR 655.731(a)(2)(viii); *see also* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 FR 80,110–01 (''The Department's interpretation of an employer's actual wage obligation as an ongoing, dynamic obligation has been the Department's position since the inception of the H–1B program.'').

significant increases in the wages an employer is required to pay current H–1B workers who have already been approved to work at prevailing wage rates based on the prior wage methodology. First, the Department's Wage and Hour Division has never brought a case in which an employer was deemed to have violated its actual wage obligations as a result of a different H–1B worker being paid a higher prevailing wage rate. This is so for a few reasons. For instance, for the wage paid to a new H–1B worker to be relevant to the employer's actual wage obligation to a current worker, the new worker would not only have to be stationed at the same specific worksite, but also possessed of similar qualifications and experience as the current worker and be performing the same set of duties and responsibilities.[203] Thus, the wages paid to many new H–1B workers will likely simply not be relevant to employers' actual wage obligations to current workers.

Second, the actual wage ''reflects the application of an employer's actual pay system.'' [204] Employers are therefore permitted to establish the actual wage they pay H–1B workers by taking into account ''Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors.'' [205] In consequence, even as between H–1B workers with similar qualifications and experience performing the same duties and responsibilities, an employer may have other legitimate reasons for paying these workers different wages. The fact that one worker has a significantly higher prevailing wage rate will, in many cases, be only one of many relevant factors governing the employers' actual wage obligation.

In those instances where the employer has not documented and cannot reconstruct its actual wage system, the Department may base the actual wage on averaging the wages paid to all similarly employed workers.[206] In those instances, the introduction of a new H–1B worker at the worksite will not necessarily cause the actual wage owed to current H–1B workers to immediately increase to whatever the new workers' prevailing wage rate is. Rather, a more modest increase may be required based on an average of what the new worker is being paid as compared to what similarly employed current workers are making.

Finally, although the Department does not believe that employers' actual wage obligations to current H–1B workers are likely to change immediately as a result of adjustments to the prevailing wage levels, the Wage and Hour Division will, where appropriate, take the above factors into consideration in enforcement actions. In some cases, the Department has discretion over whether to launch an investigation into potential violations of the INA's wage requirements.[207] Similarly, even in those cases where the Department is obligated by statute to initiate an investigation and make a determination as to whether a violation has occurred, the assessment of civil money penalties, where such penalties are applicable at all, is sufficiently flexible to take all of the facts and circumstances into account.[208]

In the unlikely event that violations of this kind arise the Department will evaluate them on a case-by-case basis, and, in choosing whether to bring an enforcement action or impose civil monetary penalties, the cause of the violation will be taken into account.

Once a currently employed worker's LCA expires, the employer will, except as explained below, be required to pay the worker a prevailing wage rate based on the new methodology if the employer seeks a new labor certification. As noted above, some commenters suggested that this will result in certain employers being unable to renew their workers for a new period of employment as it will be too costly to do so, and that this will be disruptive to business operations. While this may be the case in some instances, the Department emphasizes that H–1B visas provide only temporary work authorization. Neither employers nor guest workers on H–1B visas can claim a permanent interest in a temporary employment relationship.[209] Further, requiring employers to file new LCAs periodically to continue employing H–1B workers gives teeth to the INA's wage protections by ensuring that the prevailing wage an employer must pay is not based on out-of-date information.[210] Allowing all current H–1B workers to continue working at the prevailing wage rates below the level the Department has determined is appropriate after the LCAs associated with their positions have expired and their employers have filed new LCAs would undermine the Department's determination that significant adjustments are needed to the wage levels to adequately protect U.S. workers.

In consequence, when an employer files a new LCA as part of the process of renewing an H–1B worker for a new period of employment, the Department has concluded that it is appropriate that the new prevailing wage rates should, except as noted below, apply. To the extent employers may have had expectations that current workers could be renewed at rates based on the old wage levels, such expectations are naturally circumscribed by the fact that H–1B visas are inherently temporary in nature and there is no legal guarantee that work authorizations will be renewed on the terms that they were previously granted. Further, any such expectations are, in the Department's view, outweighed by the need to guard against adverse effects on U.S. workers' wages and job opportunities.

Beyond concerns about being able to renew current H–1B workers generally, some commenters also noted that employers' and guest workers' reliance interests in the old wage methodology are particularly weighty in cases where the employer has sponsored the H–1B worker for LPR status. As one commenter noted, H–1B workers who are on the path to obtaining LPR status ''often have purchased a home, developed permanent ties to the United States, or made a decision to have children here, counting on obtaining Lawful Permanent Resident status.'' That commenter also suggested that an immediate and abrupt change in the wage rates could mean that ''65%–70% of all individuals being sponsored for green card status through a Permanent Employment Certification may be unable to continue in the process'' as their employers will be unable to pay the increased wage rates. Relatedly, employers of such workers have undertaken additional investments in the workers beyond what would ordinarily be expended on sponsoring an H–1B worker as part of the permanent labor certification process.

The Department agrees with commenters that H–1B workers who are on the path to becoming employment-based lawful permanent residents present unique considerations for how the Department transitions current H–1B workers to wage rates produced by the new wage methodology. These

[203] *See* 20 CFR 655.731(a)(1); 20 CFR 655.715.

[204] 65 FR 80193 (Dec. 20, 2000).

[205] 20 CFR 655.731(a)(1).

[206] 65 FR 80193.

[207] *See* 8 U.S.C. 1182(n)(2)(G)(ii); *Heckler* v. *Chaney,* 470 U.S. 821, 835 (1985).

[208] *See* 8 U.S.C. 1182(n)(2)(C); *Butz* v. *Glover Livestock Comm'n Co.,* 411 U.S. 182, 185–86 (1973); 20 CFR 655.810(c).

[209] *Cf. LeClerc* v. *Webb,* 419 F.3d 405, 417–18 (5th Cir. 2005).

[210] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models,* 59 FR 65646, 65654–55.

individuals, in many cases, have spent extended periods of time in the United States, during which they have developed greater connections to this country than the typical temporary visa holder. What's more, they have done so under a legal regime established by Congress that permits and, indeed, encourages them to develop strong ties to the United States. In other words, not only have these individuals built lives in the United States in reliance on the prior wage methodology, which set the terms of their employment, but their expectation of being able to remain in the country indefinitely has been fostered by congressional enactments specifically designed to treat this group of individuals differently than other H–1B visa holders. For that reason, the Department has concluded that accelerated, significant increases in the wages employers owe these workers, insofar as it may result in large numbers of these workers losing their current employment, and therefore potentially being required to depart the country, would work a unique hardship and unfairness on both the workers themselves as well as the employers that have made greater investments in retaining these workers. In consequence, the Department has determined that a more gradual transition to the new wage rates for these workers is appropriate.

As the Department noted in the IFR, unlike most nonimmigrant visas, H–1B visas are unusual in that they are ''dual intent'' visas, meaning under the INA H–1B workers can enter the U.S. on a temporary status while also seeking to adjust status to that of lawful permanent residents.[211] One of the most common pathways by which H–1B visa holders obtain lawful permanent resident status is through employment-based green cards, and in particular EB–2 and EB–3 visas.[212] USCIS has estimated that over 80 percent of all H–1B visa holders who adjust to lawful permanent resident status do so through an employment-based green card.[213] This is reflected in data on the PERM programs. In recent years, more than 80 percent of all individuals granted lawful permanent residence in the EB–2 and EB–3 classifications have been aliens adjusting status, meaning they were already present in the U.S. on some kind of nonimmigrant status.[214] Given that the H–1B program is the largest temporary visa program in the U.S. and is one of the few that allows for dual intent, it is a reasonable assumption that the vast majority of the EB–2 and EB–3 adjustment of status cases are for H–1B workers. This is corroborated by the Department's own data, which shows that, in recent years, approximately 70 percent of all PERM labor certification applications filed with the Department have been for H–1B nonimmigrants.[215]

Because of how many H–1B visa holders apply for EB–2 and EB–3 classifications, Congress has repeatedly adapted the INA to account for the close connection between the programs. For example, while H–1B nonimmigrants are generally required to depart the U.S. after a maximum of six years of temporary employment, Congress has created an exception that allows H–1B nonimmigrants for whom PERM labor certification applications have been filed with the Department or petitions for employment-based immigrant visas have been filed with DHS that have been pending for longer than a year to be exempt from the six year period of authorized admission limitation if certain requirements are met.[216] In such cases, the workers are able to renew their H–1B status in one-year increments indefinitely until the process by which they can obtain lawful permanent resident status is resolved.[217] Similarly, aliens who are the beneficiaries of an approved petition for an EB–1, EB–2, or EB–3 green card and who are eligible to be granted LPR status but for application of the per country limitations are permitted to extend their stay beyond the usual six year limit in three year increments.

Congress created these exceptions to the temporary limits of H–1B status in recognition of the fact that the method by which employment-based green cards are allocated—namely through the operation of caps on the number of visas that can be allocated to nationals of a given country in any given year—can result in significant delays between when an alien is approved for a green card and when the green card is actually issued.[218] Put another way, the system for allocating employment-based green cards often results in protracted periods during which a worker can, in some sense, have one foot in the temporary H–1B program and another in the PERM program as they progress to LPR status. These workers, while not yet possessed of LPR status, have made substantial, formal steps toward acquiring such status, and, in so doing, acquired more permanent ties to the United States than does the typical temporary worker. Congress recognized as much and singled out this group for a special accommodation that allows their temporary status to continue indefinitely.[219] In so doing, Congress further increased the degree to which such workers can reasonably expect to be permitted eventually to remain in the country on a permanent basis.

Congress's creation of exceptions to the six-year limit on H–1B status was also undertaken in recognition of the fact that requiring workers on track to receive LPR status to leave the United States after six years before they receive a green card would be disruptive to the employers of such workers. As noted above, employers that have sponsored H–1B workers for an employment-based green card have undertaken investments in retaining such workers beyond what would ordinarily be required to continue renewing such workers' H–1B status. Similarly, in many cases these workers will likely have been with their employer for longer than the typical H–1B worker, meaning the employer may have developed a greater reliance on the services of these particular workers. Absent these workers being able to extend their stays indefinitely, they ''would otherwise be forced to return home at the conclusion of their allotted time in H–1B status, disrupting projects and American workers.'' [220] As a result, Congress chose to allow ''these individuals to remain in H–1B status until they are able to receive an immigrant visa and adjust their status

[211] *dePape* v. *Trinity Health Sys., Inc.,* 242 F. Supp. 2d 585, 593 (N.D. Iowa 2003).

[212] *See* Sadikshya Nepal, *The Convoluted Pathway from H–1B to Permanent Residency: A Primer,* Bipartisan Policy Center (2020); Congressional Research Service, The Employment-Based Immigration Backlog (2020) (''A primary pathway to acquire an employment-based green card is by working in the United States on an H–1B visa for specialty occupation workers, getting sponsored for a green card by a U.S. employer, and then adjusting status when a green card becomes available.'').

[213] U.S. Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate (2020).

[214] *See* Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, *available at https://www.dhs.gov/immigration-statistics/yearbook/2017/table7.*

[215] Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

[216] *See* Public Law 107–273, 11030A(a), 116 Stat. 1836 (2002).

[217] *Id.*

[218] *See* 8 U.S.C. 1152(a)(2); U.S. Department of State, Visa Bulletin For September 2020, *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html.*

[219] *See Save Jobs USA* v. *Dep't of Homeland Sec.,* 942 F.3d 504, 506–08 (DC Cir. 2019) (''Recognizing the potential for delay in adjustment, Congress amended the Act to permit H–1B visa holders who have begun the employer-based immigration process to remain and work in the United States while awaiting decisions on their applications for lawful permanent residence.'').

[220] S. Rep. 106–260, 22.

within the United States, thus limiting the disruption to American businesses.'' [221]

In sum, H–1B workers whose employers have taken substantial, formal steps toward obtaining an employment-based green card are uniquely situated as compared to other H–1B visa holders subject to the Department's prevailing wage methodology such that applying a sudden and significant change in wages would work a special hardship to such workers and their employers to the extent it might result in some workers losing their H–1B status. Not only have many of these workers spent extended periods of time in the United States, and begun building lives here, but they have done so with a guarantee from Congress that they legally may remain here beyond the six year limit that usually applies to H–1B visa holders until their application for LPR status is resolved. And because such workers are seeking employment-based green cards, their employers in many cases also have substantial reliance interests on such workers' continued presence in the country beyond what would normally be the case for other H–1B workers. The special status of workers who are the beneficiaries of an approved employment-based green card petition, or who are otherwise eligible to extend their status beyond the six-year limit, has also been recognized by the Department of Homeland Security in a separate rulemaking that singled this group out for unique treatment for many of the same reasons outlined above.[222]

Consequently, as suggested by some commenters, the Department is adopting a phase-in approach to how it applies the new wage methodology to job opportunities that will be filled by workers who are on track to obtaining employment-based green cards. While, for the reasons given above, the Department believes that a two-step transition is appropriate with respect to new H–1B workers and many other workers for whom their employer seeks renewed status, the Department has concluded that the unique circumstances of workers who are on track to receive LPR status warrant a longer transition period. These workers and their employers have more substantial expectations of their being able to remain employed in the United States that have been engendered by congressionally created exceptions to the six year limit on H–1B status.

The Department is also cognizant of its obligation to ensure that U.S. workers' wage and job opportunities are protected. That consideration, as elaborated previously, means that any transition to the new wage structure should be kept as short as reasonably possible while still accommodating the reliance interests identified by commenters. The Department believes that a delayed implementation period followed by a four-step adjustment occurring over a three and a half year period for job opportunities filled by workers on track to receive LPR status appropriately balances these competing considerations.

By making the phase-in nearly twice as long for these workers, and stretching it out over a period of more than three years, the Department has taken into account the fact that most LCAs are approved for a three year period, meaning that all employers seeking to renew the status of H–1B workers on track to receive LPR status will be able to do so at least once at wage levels below the new levels set by this rule and that in many cases will be closer to the prevailing wage rates that would have obtained if the prior methodology had been left in place. This allows for a more gradual transition than would be achieved if these job opportunities were subject to the two-step phase-in occurring over a year and a half. Gradually increasing the wage rates that will be available for these job opportunities over a period of time also takes into account the need to protect U.S. workers by not allowing the current, inappropriately low wage levels to remain in place beyond the initial, delayed effective period, as well as the fact that wage increases that occur further out in time from the date this rule is published will be more manageable for both employers and workers to plan for. Moreover, the Department notes that, because employers have undertaken significant investments in the long-term employment of these workers, a longer transition period is also unnecessary insofar as such employers can be expected to have an incentive to undertake the additional expenditures needed to retain the workers at the new prevailing wage levels by the time the transition is complete.

The Department recognizes that many H–1B workers on track to receive LPR status will still be on H–1B status and have their green card petitions pending at the time the transition to the new wage rates is complete. Workers in the green card backlog as of October 2020 may not be able to obtain an employment-based green card for a decade or more.[223] However, in the Department's judgment, delaying full implementation of the new wage rates for what amounts to a significant share of the current H–1B population [224] until all workers on track to receive LPR status have had their green card petitions resolved would result in far too lengthy of a delay that would result in ongoing harm to U.S. workers' wages and job opportunities. A three and a half year, graduated transition gives these workers adequate time to adjust to the new wage rates, whether by allowing their employers sufficient time to adapt or, in some cases, allowing such workers additional time to find a new employer that is able to pay the higher wage rates.[225]

Using the same methodology and data it used to set the wage rate at the intermediate step of the two-step transition, the Department has concluded that the wage rates for the three and a half year transition will be 85 percent of the wage rates produced by the 35th and 90th percentiles beginning in July, 2021; 90 percent of such wage rates beginning in July, 2022; and 95 percent of such rates beginning in July, 2023. For the reasons given with respect to the year and a half transition, these rates allow for a gradual, even adjustment to the wage levels the Department has determined are appropriate. Beginning in July 2024, the wage rates provided for any job opportunity filled by an alien on track to receive LPR status will be the same as the wage rates provided for all H–1B job opportunities.

Finally, the Department has decided that the job opportunities that should be eligible for these special transition wage rates are those that will be filled by any H–1B workers who, as of October 8, 2020, were the beneficiaries of approved employment-based green card petitions, or who were otherwise eligible to extend their temporary status beyond the six year limit under the American Competiveness in the 21st Century Act. October 8th is the date the Department published the IFR and thereby gave notice to employers and workers that it would be increasing wage rates. It thus provides a clear, administrable delineation of the class of workers who can benefit from the three and a half year transition period, and takes into account the fact that workers whose expectation of being able to remain in the country indefinitely became settled

[221] *Id.*

[222] Employment Authorization for Certain H–4 Dependent Spouses, 80 FR 10284, 10289–90.

[223] *See https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-october-2020.html.*

[224] (RIA Data).

[225] *See* 8 U.S.C. 1154(j).

before such notice was provided have the most compelling reliance interests in the prior wage methodology.

5. Wage Data and Sources

a. OES

Summary of Comments

Some commenters expressed concern about the Department's exclusive reliance on the OES to determine prevailing wages. Citing an NFAP policy brief, a public policy organization commented the ''fundamental problem'' with prevailing wage determinations is that the ''process requires statistical precision that simply is not available'' because ''no government survey [ ] collects data within occupations with detailed wage levels, much less a survey that seeks to assemble data to calculate wage levels based on experience, education or level of supervision.'' The commenter further stated that the OES produces ''two average wage figures, neither of which is based on the collection of data connecting compensation to education, experience or supervision.'' The commenter expressed concern that this method is less reliable than ''asking employers directly what they pay employees at different levels of education, experience, or supervision'' and that ''a government agency can adjust the formula in a way that makes the required wages far higher than the market rate.'' An employer expressed concern the OES ''does not measure workers' skills or duties or ''reflect what workers in the survey are paid'' and instead ''simply records [the] set of DOL-established pay bands'' within which a worker can be classified.

Several commenters also expressed concern that the OES fails to consider total compensation, including stock options and bonuses, for example, resulting in an underestimation of the total earnings of U.S. and foreign workers. An individual commenter noted that many workers, particularly those in information technology occupations, earn much more than their base salary when accounting for total compensation and asserted that the IFR unfairly advantages ''companies with a cash-heavy pay structure'' and harms small start-ups that are more likely to compete by providing ''equity and stock options.'' A trade association asserted the IFR ignores an ''important evolution'' in the compensation of professionals ''whereby many employers add to annual salaries with variable compensation tied to productivity, performance, or other specific goals'' and may ''incentivize employers to abandon variable compensation schemes altogether, in order to use available resources in an attempt to meet the new required wages.'' Citing a Society for Human Resources Management article stating ''85% of employers use variable pay. . .'' an employer asserted that consideration of fixed pay exclusively is outdated because an increasingly important component of compensation packages is variable pay, including ''incentive plans, bonuses, profit-sharing plans, performance-sharing plans, and equity.''

Many commenters expressed concern that the Department would issue a prevailing wage of ''exactly $100 an hour, or $208,000 a year, for any occupation and geographic area'' for which the Department lacks sufficient OES wage data to determine a prevailing wage for each wage level. Many commenters cited a finding by a public policy organization that this $208,000 wage requirement would apply to at least 18,000 combinations of occupations and geographic locations. A university stated that assigning a ''default wage rate of $100'' per hour ''for each of the four wage levels . . . artificially inflates the wage data for each of the wage levels for affected occupations.'' A trade association expressed concern that OES wage data is ''skewed toward employers in large metro areas'' and that the failure to collect sufficient wage data would result in many non-metropolitan employers receiving a ''default'' prevailing wage of $208,000 under the IFR. A professional association believed the lack of BLS data and resulting ''default'' wage of $208,000 was due to the Department's decision to use data for a limited ''pool of workers who use the H–1B . . . and PERM programs,'' rather than using a ''prevailing wage data pool [ ] based on all wage data within the occupation, regardless of the number of years of education, experience, and level of responsibility.'' A second professional association asserted assignment of a $208,000 wage in this context violates the INA, 8 U.S.C. 1182(p)(4), because the Department provides only one wage level, despite the four levels of wages required by Congress, and that it is contrary to a 1990 Congressional directive that BLS must ''make determinations on prevailing wages'' and make this information ''readily available to employers and workers.'' Many of these commenters provided examples of prevailing wages far exceeding the market wage, such as a prevailing wage of $208,000 for an entry-level software developer in California, despite a private wage survey determination that the prevailing wage is approximately $70,600 per year.

A public policy organization and an academic commenter that supported the IFR wage increases urged the Department to clarify an employer's wage obligation in these cases, expressing concern that the policy created confusion that threatens necessary wage reform efforts. Specifically, one of the commenters requested clarification of whether the employer must pay the $208,000 salary, must ''use an alternative method to the OFLC-generated OES wage rates in these cases,'' or may choose either option.

Response to Comments

The Department received many comments regarding the prevalence of the use of the OES footnote wage to set prevailing wage rates under the IFR's wage levels. This issue arises when BLS cannot provide a wage estimate for a Level IV wage. BLS is unable, at times, to produce a wage estimate when the survey results at the upper end of the wage distribution exceed the highest wage interval BLS uses, which is $100 an hour or $208,800 annually. In such cases, BLS reports a default wage, or footnote wage, of $208,000 for the Level IV wage to OFLC as that is the highest wage value available. Currently, BLS collects actual wage data from employers and then converts the actual wage data into wage intervals, which range from under $9.25 an hour to $100.00 an hour and over.[226] In situations when BLS reports a footnote wage for the Level IV wage to the Department, the Department's standard practice has been to note that leveled prevailing wages for an occupation and/or geographic area was unavailable and only to provide the OES footnote wage for all four levels.

Under the Department's proposal in the IFR, the mean of the upper decile produced an OES footnote wage for more than 18,000 occupations, up from roughly 6,000 occupations under the old prevailing wage methodology. The higher prevalence of the use of the footnote wage under the IFR's methodology resulted in the default wage of $208,000 per year being used for a number of occupations where its use was likely not appropriate, as some commenters noted. The Department has therefore determined that it a change to its standard practice of not providing leveled wages in these situations is warranted.

Upon the effective date of this final rule, when BLS is able to report a Level

[226] *https://www.bls.gov/oes/2016/may/methods_statement.pdf* (accessed December 4, 2020).

I wage, the Department will utilize the OES footnote only as the Level IV wage estimate in cases where the 90th percentile wage value exceeds the highest wage interval value used by BLS. This change will allow the Department to provide leveled wages even where the footnote wage must be used for the Level IV wage and ensure that entry-level wages are not improperly inflated. In making this change, the Department expects there will be far fewer instances of the Department being unable to provide leveled wages than was the case under the IFR, or even the old wage methodology.

This change to how the Department handles situations where the footnote wage is used for the Level IV wage will ensure that leveled wages and an entry-level wage appropriately set at the 35th percentile will be provided wherever possible. This change will largely eliminate those incidents commenters expressed concern about, such as in healthcare occupations, where even an entry-level wage under the IFR was set at $208,000 per year, and is thereby inflated well above both the previous entry-level wage as well as what the Department has determined is an appropriate entry-level wage. Like its decision to move the entry-level wage to the 35th percentile, this change will ensure that prevailing wage rates more accurately reflect actual market wages and are more manageable for employers. Further, as discussed in more detail below, the changes the Department is making to how it calculates the Level IV wage—namely by using the 90th percentile as the Level IV wage instead of the mean of the upper decile—will eliminate the influence of extreme outlier at the upper end of the distribution, thereby reducing the reported Level IV rate to a level that is not inflated by anomalous data, and thus potentially reducing the frequency with which the footnote wage is used even for Level IV wage.

The Department acknowledges that there will continue to be instances, as there are currently, where BLS will report to OFLC an OES footnote wage for all levels in an occupation because the survey results received by BLS at and above the 35th percentile are all in the wage interval of $100.00 an hour and over. This will occur in a few very highly compensated occupations. Importantly, in such cases the use of the footnote wage will actually result in a lower prevailing wage rate than would otherwise be the case if actual wage data were available because BLS only reports up to the maximum interval of $100.00 an hour and in these situations the actual wages are at or over $100.00 an hour. Put another way, the use of the footnote wage in these cases, unlike its use under the IFR, will not result in wages that are inflated beyond what the actual market wage would be if actual wage data were available. Until BLS moves away from collecting all wage data in intervals this will continue to occur. But the Department believes that as BLS expands its collection of actual wage data this issue will cease to occur even in those few very highly compensated occupations. The Department anticipates that this change to its standard procedures will allow the Department to report leveled wages in more occupations and/or geographic areas than has historically been the case.

Relatedly, many commenters expressed concern that because the Department raised the Level IV wage to the mean of the upper decile, it caused more physician occupations, in particular, to default to the OES footnote wage of $100.00 an hour, or $208,000 annually at an especially high rate. As discussed above, the Department's changes to its standard procedures to use the OES footnote wage only as the Level IV wage estimate when a Level I wage is also reported from BLS will allow the Department to report leveled wages in these instances, thus reducing, if not altogether eliminating this concern.

Similarly, many commenters suggested that the failure of the Department to provide leveled wages would disproportionately harm employers outside of large urban areas and cause rural communities to lose access to healthcare. Many of these commenters suggested that under the IFR the Department is unable to provide leveled wage estimates for physicians and researchers in rural areas who would therefore be provided the OES footnote that is significantly higher than what some of those employees' supervisors are paid, which would be unsustainable and potentially result, among other things, in undermining the Conrad-30 program in certain areas. However, as previously stated, the Department has reviewed the commenters concerns and determined it is appropriate to make changes to the standard procedures of not providing leveled wage estimates in these situations. Instead, upon the effective date of this Final Rule the Department will use the OES footnote wage only as the Level IV wage estimate, allowing the Department to provide leveled wage estimates, except in those cases where the wage at the 35th percentile is also above the highest OES wage interval value. This will reduce if not eliminate the incidents of inappropriately high wages being provided for these specific occupations and areas.

The Department also acknowledges commenters' concerns with flaws in the OES collection of wage data from employers that result from BLS collecting data in 12 wage intervals as opposed to reporting actual wages. Though the OES survey does collect most wage data in wage intervals, BLS does collect actual wage data from employers in some instances and is exploring the ability to collect and report actual wage data from employers on a more consistent basis. As BLS phases in the collection of actual wage data from employers, wage estimates reported to the Department will become even more accurate and all instances of the OES footnote wage being used to set prevailing wage rates, which is a product of the current practice of using wage intervals, should cease. Further, even if BLS ultimately does not convert all wage data collection from employers to actual wages, this methodology of using wage intervals has been in place since the inception of the OES survey and has in most cases produced accurate wage estimates at the levels defined by the Department. Given the low incidence of the footnote wage being used; the modifications made by the Department to how it provides default wages that both further reduce the use of the footnote wage and eliminate its use in cases where it would result in an inappropriately inflated wage; and the other strengths of the OES data discussed below, the Department continues to believe that the OES survey serves as the best possible source of wage data for use in various foreign labor programs and that its reliance on wage intervals does not warrant the Department abandoning its longstanding practice of using the OES.

As noted above, the Department received several more general comments regarding the suitability of the BLS OES data for setting wages in the foreign labor certification programs. Some of the comments cited the fact that the OES data uses broad occupational classifications that encompass a wide range of different positions, some of which only fall at the lower end of the pay scale. Others commented that the OES data does not survey for education and experience, making it a poor fit for use in setting H–1B wage levels.

As the Department stated in the IFR, the Department reviewed the statutory framework of the INA and its interplay with the BLS OES survey data that the Department uses to calculate prevailing wages. This review demonstrated that, while the OES survey is the best source of wage data available for use in the Department's foreign labor certification programs, it is not specifically designed for such programs, and therefore does not account for the requirement that workers in the H–1B program possess highly specialized knowledge in how it gathers data about U.S. workers' wages. This fact necessarily shapes how the Department integrates the OES survey into its foreign labor programs.

The Department has long relied on OES data to establish prevailing wage levels. That is because it is a comprehensive, statistically valid survey that is the best source of wage data available for satisfying the Department's purposes in setting wages in most immigrant and nonimmigrant programs. As the Department has previously noted, the OES wage survey is among the largest continuous statistical survey programs of the federal government. BLS produces the survey materials and selects the nonfarm establishments to be surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over one million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be ascertained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. The features described above are unique to the OES survey, which is a comprehensive, statistically valid, and useable wage reference.[227] The OES survey's quality and characteristics have made it, and continue to make it, a useful tool for setting prevailing wage levels in the Department's foreign labor programs. There are no consistently and readily available alternative surveys or sources of wage data that would provide DOL with wage information at the same level of granularity needed to properly administer the H–1B and PERM programs. For these reasons, the Department continues to believe that the OES survey is the best possible source of wage data for use in various foreign labor programs.

The Department also notes that the OES survey is what is currently used to set prevailing wage rates in the H–1B and PERM programs. As a result, even if the modifications to the prevailing wage levels in this final rule were not adopted, the OES would continue to be the source used to produce prevailing wage rates by the Department. As explained, the Department believes that continuing to use the OES is the best way to advance the policy aims of the INA's wage protections. However, even if reconsideration of the Department's use of the OES were warranted, the Department believes that the more immediate goal of correcting how the wage levels are set is the appropriate focus of this rule.[228]

However, as noted, the OES survey is not specifically designed to serve these programs. For one thing, ''the OES survey captures no information about differences within the [occupational] groupings based on skills, training, experience or responsibility levels of the workers whose wages are being reported'' [229]—the factors the INA requires the Department to rely on in setting prevailing wage levels.[230] Relatedly, ''there are factors in addition to skill level that can account for OES wage variation for the same occupation and location.'' [231] Further, the geographic areas used by BLS to calculate local wages do not always match up exactly with the ''area of employment'' for which wage rates are set, as that term is defined by the INA for purposes of the H–1B program.[232] So while the OES survey is the best available source of wage data for the Department's purposes, it is not a perfect tool for providing wages in the H–1B, H–1B1, E–3, and PERM programs—a fact that the Department must take into consideration in how it uses the OES data.

The Department also acknowledged in the IFR that the universe of workers surveyed by the OES for some of the most common occupational classifications in which H–1B workers are employed is larger than the pool of workers who can be said to have levels of education and experience comparable to those of even the least skilled H–1B workers performing work in a specialty occupation. Commenters are therefore correct that BLS's occupational classifications are not delineated with the H–1B and PERM programs in mind. But, as explained in the IFR, the Department took steps to account for this potential mismatch. In particular, because the statutory scheme requires the Department to set the prevailing wage levels based on what workers similarly employed to foreign workers make, taking into account workers' qualifications and, as noted, the large majority of foreign workers are H–1B workers, the Department determined it would be inappropriate to consider the wages of the least educated and experienced workers in these common H–1B occupational classifications in setting the prevailing wage levels.

To address the fact that the OES survey does not itself contain information about experience and education, the Department sought to determine the wages typically earned by individuals having comparable levels of education, experience, and responsibility to the prototypical entry-level H–1B and EB–2 workers working in the most common H–1B and PERM occupations by looking to other credible government surveys that do gather such information and comparing their data to the OES data. In particular, the Department consulted a variety of data sources, most importantly wage data on individuals with master's degrees or higher and limited years of work experience from the 2016, 2017, and 2018 CPS [233] conducted by the U.S. Census Bureau, and data on the salaries of recent graduates of master's degree programs in STEM occupations garnered from surveys conducted by the NSF in 2015 and 2017. Both of these surveys represent the highest standards of data collection and analysis performed by the federal government. Both surveys have large sample sizes that have been methodically collected and are consistently used not just across the federal government for purposes of analysis and policymaking, but by academia and the broader public as well. Comparing their data to OES wage distributions thus allowed the Department to take into account education and experience in determining how to use OES data. Further, though the CPS and NSF surveys provide a good approximation

[227] *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3463 (Jan. 19, 2011).

[228] *See Ctr. for Biological Diversity* v. *EPA,* 722 F.3d 401, 410 (DC Cir. 2013) (observing that '' 'agencies have great discretion to treat a problem partially'' ') (quoting City of Las Vegas v. Lujan, 891 F.2d 927, 935 (DC Cir. 1989)).

[229] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 80 FR 24,146, 24,155 (Apr. 29, 2015).

[230] 8 U.S.C. 1182(p)(4).

[231] 80 FR 24,146, 24,159.

[232] 8 U.S.C. 1182(n)(4)(A).

[233] The CPS, sponsored jointly by the U.S. Census Bureau and BLS, is the primary source of labor force statistics for the population of the U.S. *See* United States Census Bureau, Current Population Survey, *available at https://www.census.gov/programs-surveys/cps.html.*

of where U.S. workers with similar skills to entry-level H–1B and EB–2 workers, fall within the OES distribution; they are not conducted on a regular basis with enough granularity as the OES survey to produce wage estimates at the occupational and geographic levels, nor are the produced frequently enough to provide the up to date wage data necessary to ensure accurate prevailing wages. They thus are useful for assessing how the OES data should be used in the Department's foreign labor programs, but could not be used as a substitute for the OES, which, as noted above, has unique attributes that make it, in the Department's judgment, the best possible source of wage data even though it does not survey for education and experience. The Department is therefore confident that its use of the OES continues to be appropriate in the H–1B and PERM programs, and that the IFR's methodology properly accounted for the fact that the OES does not survey for education and experience.

As noted, some commenters suggested that the BLS OES survey is flawed because it is a voluntary survey and some smaller or more rural employers are less likely to respond to the survey, which in turn means, according to commenters, that such employers will be given inappropriately high wages because they will be grouped in with establishments in metropolitan statistical areas with higher labor costs due to a lack of survey responses. The Department recognizes that the BLS OES survey is voluntary. However, BLS sends the OES survey to over 1 million establishments and those establishments are encouraged to respond to the survey. The survey is recognized as a statistically valid, comprehensive source of wages nationwide. As the Department has discussed, the OES survey is not the perfect tool for setting wages in the foreign labor certification programs, but it is the largest and best single source of wage data available for setting wages across hundreds of occupational classifications in hundreds of geographical areas. The Department endeavors to produce as many statistically valid wage estimates as possible and therefore will move to the next geographic area until it can report a statistically valid wage. While it may be the case that in some instances wage rates provided for areas of the country with fewer establishments responding to the survey will result in those areas being grouped in with adjacent regions, the Department believes, as elaborated on previously, that the value in having a single, uniform survey that produces consistent and reliable results for its foreign labor programs outweighs any benefits that might result from using different sources of wage data for specific areas of employment. Moreover, the fact that the Department permits employers to use alternative sources of wage data to set prevailing wage rates gives employers some recourse if they believe, in certain instances, that the OES prevailing wage rate is not accurate.

Some commenters suggested that the Department should use a separate survey for certain occupations, such as physicians, because there are better surveys for those specific occupations. The Department declines to make this change. As explained throughout, the Department has determined that the OES survey is the largest and best available survey to rely upon for setting wages in the foreign labor certification programs. The Department understands the shortfalls that a survey the size of the OES survey has, and, as discussed above, has taken various steps to account for the fact that the OES survey is not specifically designed for use in the Department's foreign labor programs. For administrative uniformity the Department believes that providing one set of data, from a government conducted survey, has more benefits than using on potentially less reliable surveys conducted by private organizations that could be discontinued or have changes to their methodology made without the Department's input. Further, as noted previously, employers already have a method for utilizing a survey other than the BLS OES survey. If employers believe there are better surveys for their occupations than the BLS OES survey, they may rely upon those surveys, either through the Prevailing Wage Determination process or listing a valid wage survey as the source of the prevailing wage when submitting an LCA in the FLAG system.[234] Indeed, the Department notes that the AAMC survey itself is often used by employers as the source of the prevailing wage on their LCAs and PWD applications.

6. The Upper and Intermediate Wage Levels

Summary of Comments

Several commenters expressed concern that use of the mean of the top decile of the OES distribution to approximate the prevailing wage for Level IV workers produces a Level IV wage above the 95th percentile due to outlier wages at the top of the distribution and that this, in turn, skews the intermediate wage levels because they are ''set by statute by interpolating the data for levels'' I and IV. Some commenters cited a Cato Institute finding that ''extreme outliers'' in the data used to determine the level IV wage resulted, in some cases, in Level II and III wage determinations ''up to 26 percent higher than predicted in'' the IFR. A university commenter and an anonymous commenter stated that this methodology resulted in situations where the Level II wage increases to the 78th percentile and the Level III wage increases to the 90th percentile. An employer stated that the IFR methodology would produce clearly inaccurate prevailing wages in industries with bi-modal salary distributions. An individual commenter stated that the 95th percentile represents workers ''nearing the end of their career, with decades of experience.''

Similarly, a few commenters expressed concern about specific errors or discrepancies in prevailing wages produced by the IFR at the intermediate levels. An individual commenter asserted that of ''437,593 Area Code-SOC Code combinations'' there are prevailing wage ''discrepancies in 228,836.'' As an example, the commenter noted that the Level II wage for SOC 15–2031 in ''[a]rea code 37980'' based on what the Department estimated would be at the 62nd percentile is higher than the pre-IFR Level IV wage, which the Department estimated to be at the 67th percentile. Similarly, a trade association stated that its members reported that the Level II 62nd percentile wage is higher in many cases than the pre-IFR Level IV 67th percentile wage. In these cases, commenters noted that the wage increases effected by the IFR appeared to be even greater than the Department anticipated or intended. By contrast, two commenters asserted that prevailing wages published in the Department's Online Wage Library clearly were too low in some cases, citing examples like a level I wage of $22,000 for Electrical Engineers in College Station, Texas, much lower than entry-level wages indicated in a NSF survey.

Response to Comments

To begin, the Department agrees with commenters that setting the top wage at the mean of the upper decile skews the wages of the intermediate wage levels by including, sometimes extreme, outliers. For the reasons given below, the Department continues to believe that the Level IV wage should be placed at the uppermost end of the OES

[234] 20 CFR 655.731(a)(2)(ii)(B) and (C).

distribution. However, to avoid the statistical issues that resulted in overly inflated wages at both the upper and intermediate wage levels under the IFR, the Department has adjusted the manner in which BLS will provide data for the Level IV wage.

As the Department explained in the IFR, the highest wage level should be commensurate with the wages paid to the most highly compensated workers in any given occupation because such workers are also generally the workers with the most advanced skills and competence in the occupation, and therefore the type of workers who are similarly employed to the most highly qualified H–1B and PERM workers.[235] Again, it is generally the case that, as a worker's education and experience increase, so too do his wages. Further, while the INA places baseline, minimum skills-based qualifications on who can obtain an H–1B or EB–2 visa, it does not place any limit on how highly skilled a worker can be within these programs. Thus, while the Department necessarily discounted the lower end of the OES wage distribution in determining the entry-level wage, full consideration must be given to the uppermost portion of the distribution in adjusting the Level IV wage.

H–1B workers can be, and at least in some cases already are among the most highly paid, and therefore likely among the most highly skilled workers within their respective occupations.[236] This is demonstrated by a review of the highest salaries paid to H–1B workers in the most common occupations in which H–1B workers are employed. In Fiscal Year (FY) 2019, for example, the most highly compensated H–1B nonimmigrants employed as Computer Systems Analysts commanded annual wages as high as $450,000. That figure was $357,006 for H–1B workers in other Computer Occupations. The wages of workers at the 90th percentile of the OES distribution for these occupations, by contrast, are significantly lower. Computer Systems Analysts at the 90th percentile in the OES distribution make approximately $142,220. That figure is $144,820 for workers in other computer occupations. In other words, H–1B workers in some instances make wages far in excess of those earned by 90 percent of all U.S. workers in the same occupation. Indeed, a review of the wages of the top five percent highest earners among H–1B nonimmigrants, and therefore the earners likely to have the highest levels of education, experience, and responsibility, in the 16 occupational classifications that account for one percent or more of all approved H–1B petitions in FY2019 shows that such workers make wages that are, on average, at least 20 percent higher than those made by workers at the 90th percentile in the OES wage distribution.

Further demonstrating that H–1B workers can be and sometimes are among the most skilled and competent workers in their occupations, an examination of the top end of the wage distribution within the H–1B program shows that, for H–1B nonimmigrants with graduate and bachelor's degrees, the association between education and income level begins to break down to some extent. Among the most highly compensated H–1B workers, the higher the income level, the more likely the foreign worker beneficiary only has a bachelor's degree.[237] This strongly suggests that individuals at the fourth wage level truly possess the most advanced skills and competence—the only remaining parameters that can reasonably account for significant wage differentials—within their occupations, as additional years of education are largely irrelevant in explaining wages among top earners. The U.S. workers who are similarly employed to the most highly qualified H–1B workers are, therefore, also likely to be among the most highly skilled, and, therefore, the most highly compensated workers within the OES wage distribution.

The high levels of pay that the most skilled H–1B workers can command is also shown by the fact that, due to their advanced skills, diversified knowledge, and competence, workers placed at the fourth wage level are likely to be far more productive than their less experienced and educated peers. Whereas experience itself generally increases on a linear basis, as a function of age and time spent in an occupation, productivity and an individual's supervisory responsibilities, as a function of experience and skills, do not. For example, the nature of senior management or supervisory roles, in particular, means workers who serve as productivity multipliers are more likely to fill such positions, which in turn translates to higher wages. Perhaps even more relevant to the Department's assessment of the wages paid to H–1B workers is the nature of the work these individuals do, which is highly specialized and typically occurs in computer or engineering-related fields. In such occupations, experience and abilities can result in exponentially divergent levels of productivity, which in turn means that workers with the most advanced skills and competence can command wages far above what other workers in those occupations do.[238]

All of these considerations strongly indicate that U.S. workers similarly employed to the H–1B and PERM workers with the most advanced skills and competence are themselves among the most highly skilled workers in any given occupation, and therefore the most highly compensated. Thus, because the INA requires wages for H–1B and PERM workers to be set based on the wages paid to similarly employed U.S. workers, taking into account education, experience, and responsibility, and the Level IV wage is used for job opportunities filled by the most highly skilled workers, the Level IV wage should, in the Department's judgment be placed at the uppermost end of the OES distribution.

Importantly, commenters by and large did not dispute the Department's conclusion that H–1B workers in some cases are among the most skilled and educated workers in an occupation, and therefore should be compensated at rates that reflect what the most skilled and educated U.S. workers in those occupations make. Rather, as noted, commenters' primary concern was with the statistical methodology the Department used to calculate the Level IV wage. Because the Department agrees with commenters that the methodology contained certain unforeseen flaws, it has decided to take a new approach in the final rule that, while still resulting in wage rates that reflect what some of the most highly skilled, and therefore the most highly compensated individuals in a given occupation, make will eliminate the influence of outliers on prevailing wage rates that result in anomalous and overly inflated rates at both the upper and intermediate wage levels. In consequence, the Department has determined that the Level IV should be calculated as the 90th percentile of the OES distribution, as opposed to the mean of the upper decile used in the IFR. This change will reduce

[235] Edward P. Lazear, *Productivity and Wages: Common Factors and Idiosyncrasies Across Countries and Industries,* National Bureau of Economic Research, 11/2019, Working Paper 26428, *available at http://www.nber.org/papers/w26428;* David H. Autor & Michael J. Handel, *Putting Tasks to the Test: Human Capital, Job Tasks and Wages,* National Bureau of Economic Research, 6/2009, Working Paper 15116, available at *http://www.nber.org/papers/w15116.*

[236] Data on the actual wages paid to H–1B workers shows that in some cases such workers are paid at or near the very top of the OES wage distribution.

[237] This analysis is based on data provided by U.S. Citizenship and Immigration Services and 2019 OFLC Disclosure Data.

[238] Andy Oram & Greg Wilson, Making Software: What Really Works, and Why We Believe It (2010).

significantly, if not eliminate, the influence of outliers on wage rates because outlier data at the very upper end of the distribution will no longer be a significant factor in how the Level IV wage is calculated.

In particular, as commenters noted, the extremely high wages paid to a few ''superstar'' outliers in an occupation in a geographic area may raise the mean of the upper decile of workers in that occupation and geographic area far above the median of the upper decile, which is the 95th percentile. Thus, using the mean of the upper decile to calculate Level IV wages and derive Level II and III wages may boost Level II, III, and IV wages higher than the Department anticipated or intended in the IFR. Changing to the 90th percentile to calculate the Level IV wages and derive Level II and III wages means the Level IV wages will more accurately reflect the wages paid to workers with levels of education, experience, and responsibility comparable to the typical U.S. worker at the high end of the distribution, rather than workers with abnormally high levels of compensation even for that part of the distribution. For example, a ''superstar'' senior software designer (OES code 15–1256) that makes over $750,000 per year working in San Jose, California in 2019 would affect the mean of the top decile, but would not affect the 90th percentile wage figure of software engineers in San Jose, California, which was $207,200 in 2019, according to OES statistics. Thus, using the mean of the top decile to calculate Level IV wages and derive Levels II and III wages allows the presence of a few ''superstar'' outliers in an occupation in a geographic area to inflate Level II, III, and IV wages for an occupation in a geographic area.

In addition, there are other considerations weighing against using the mean of the upper decile to calculate Level IV wages and derive Levels II and III wages. The extremely high wages that employers pay to ''superstar'' outliers in an occupation in a geographic area of course do not necessarily mean that employers also pay high wages to other workers in the same occupation in the same geographic area. Thus, using the mean of the top decile to calculate Level IV wages and derive Levels II and III wages not only inflate Level II, III and IV wages so that they do not accurately reflect the overall wage distribution for an occupation in a geographic area, but also introduces the potential for significant unpredictability in wages from year to year that is not based on any systemic change to the labor market. Consider the same ''superstar'' senior software designer that makes over $750,000 per year working in San Jose, California in 2019 and suppose his employer agreed to let him work remotely in 2020, and he moved to Salt Lake City, Utah. That decision would affect the mean of the top decile, reducing it in San Jose and increasing it in Salt Lake City, but would not affect the respective 90th percentiles of $207,200 in San Jose and $157,290 in Salt Lake City. Changing the work location for one ''superstar'' outlier would not affect the distribution of wages for 80 percent of software developers earning between the 10th and 90th percentiles in either San Jose or Salt Lake City. Software developers would still make more on average at the every level in San Jose than in Salt Lake City. Moreover, because the OES survey does not necessarily capture the same workers year-over-year, the unpredictability in wages that can result from the presence and then absence of an outlier in the wage data can occur even if that same worker has not changed locations. The weakening of the linkage between supply and demand factors affecting wages for most workers in an occupation and the Level II, III, and IV wages was not the Department's intention in the IFR, and is not consistent with the INA's wage provisions. Using the 90th percentile instead to calculate the Level IV wages and derive Level II and III wages for an occupation in a geographic area eliminates the distortions and minimizes the excessive and unintended variability in Levels II, III, and IV wages arising from the inclusion of a few ''superstar'' outliers in the mean of top decile.

Finally, the Department has decided to use a percentile calculation instead of a mean calculation because the Department can produce such data more efficiently. In addition, experience with the IFR's methodology has demonstrated that taking the mean of a small portion of the OES distribution, such as of a decile, can in some cases result in exceedingly small sample sizes being used to produce the wage figure, which make the figure produced potentially less reliable.

Based on its review of the comments received, the Department also believes that a percentile calculation will be easier for employers, workers, and the public to understand than a mean calculation. As noted above, some commenters challenged the wage figures provided under the IFR as being incorrect because some wages the Department estimated as falling at the 62nd percentile wage were significantly higher than what the Department had described as the 67th percentile wage under the old methodology. While, for the reasons given above, it is likely that this occurred in some cases due to the presence of outliers in the data used to calculate the Level IV wage, there is also another explanation. Specifically, describing the wage figures produced under the old methodology and the IFR's methodology as percentiles was, as explained in the IFR, simply a shorthand way of describing a rough approximation of what a mean calculation yields. For example, under the old methodology, the Level IV wage was provided as the mean of the upper two-thirds of the OES distribution, meaning the average of the wage data falling between the 33rd and 100th percentiles. The midpoint of that portion of the distribution is the 67th percentile, but its mean will not necessarily be the 67th percentile. Put more simply, the average of a set of numbers does not always fall at the median of those numbers. As a result, discussing two different means calculated based on different portions of the distributions by describing them as percentiles gives a false sense of comparability, as demonstrated by some of the discrepancies raised by commenters.

To avoid confusion about how it describes the wages it provides going forward, the Department will speak more clearly about the kinds of data it is providing and will consequently report the wage based on a percentile calculation. This means that the Department will no longer take the average of portion of the wage distribution, but instead will provide a wage that falls at a particular predetermined point within the distribution.

As to the precise values of the intermediate levels, the Department notes that it will continue to calculate the two intermediate wage levels in accordance with 8 U.S.C. 1182(p)(4), which provides that, in establishing a four-tier wage structure, ''[w]here an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.'' [239] The BLS OES survey is, as provided in the statute, an existing survey that has long provided two wage levels for Department's use in setting the prevailing wage rates.[240]

[239] 8 U.S.C. 1182(p)(4).

[240] BLS also produces data for the public from the OES survey that is divided into five different wage levels. However, the public data BLS produces is

Continued

The Department will apply the statutory formula as follows: the difference between the two levels provided by the OES survey data is 55 percentiles. Dividing this by three yields a quotient of 18.33. This quotient, added to the value of the Level I wage at the 35th percentile, yields a Level II wage at approximately the 53rd percentile. When subtracted from the value of the Level IV wage at the 90th percentile, the quotient yields a Level III wage at approximately the 72nd percentile of the OES distribution.

Finally, while eliminating the influence of outliers on how the upper level wage is calculated and moving to percentile calculations will reduce unpredictability in the data, prevent the inflation of wages beyond the levels the Department has determined appropriate, and make the wage structure easier to understand for the public, it is possible that there will continue to be anomalies as the Department moves from a mean-based to a percentile-based methodology. However, the Department does not expect these will be common.

*7. Other Suggested Alternatives and Additional Comments*

One public policy organization suggested the Department should require use of a government survey to determine prevailing wages, stating the INA does not require the Department to permit use of other sources and expressing concern that employers ''have routinely relied on LCA prevailing wage sources that do not fit the 'independent authoritative source' or 'another legitimate source of wage information.''

The Department believes that allowing employers the flexibility of choosing to use an independent authoritative source or another legitimate source of wage data provides a backstop for cases in which OES data on an occupation in a given region is insufficient or the OES data provides an anomalous result. This flexibility serves the goal of ensuring that the wage requirement actually reflects the market wage for the job.

Another public policy organization stated it is unclear how independent authoritative and other non-OES sources ''compare to OFLC-generated OES prevailing wage'' and urged the Department to conduct a study comparing OES-based wages and wages produced by private surveys and non-OES sources ''to identify whether there are any systematic biases'' in non-OES sources.

The quality of independent wage surveys is an important subject to which OFLC pays attention and will continue to pay attention. Although private surveys are conducted independently of the Department, the Department in its regulations and guidance has set standards that private surveys must attain. As discussed above, the regulations restrict independent authoritative sources to publications within 24 months of the application and require them to use recent and valid data.[241] Independent sources must be ''reasonable and consistent with recognized standards and principals in producing a prevailing wage.'' [242]

Guidance that the Department issued in 2009 requires that wage data collected by an independent authoritative source is for similarly employed workers, meaning workers having substantially similar levels of skills. The survey should contain a representative sample of wages within the occupation that comports with recognized statistical standards and principles in producing prevailing wages. The Department provides a set of minimum survey standards in Appendix E of the 2009 Guidance and encourages employers to reference these standards when seeking to use an independent authoritative source as the prevailing wage. Written documentation on the methodology used to conduct the survey and the validity of the methodology used in computing the occupational wage data covering the area of intended employment must be kept in the employer's data file and made available in the event of an investigation. Two commenters suggested the Department should combine data collected by the OES survey with ''certain data from private, independently published compensation surveys'' to produce prevailing wages that would more accurately reflect skill, education, and experience levels than wages determined using OES pay band data alone. One of these commenters suggested BLS could ''layer'' the private survey data ''over the OES data'' and asserted this would not be difficult because H–1B workers are heavily concentrated in IT occupations that are included in private surveys, though the commenter acknowledged private surveys are not available for all occupations and localities. Other general suggestions included applying a higher wage to ''tech companies'' or applying a higher wage as ''the number of visas grow for an employer.''

The Department does not believe that combining or layering data from studies that may not be measuring quite the same occupations in the same regions would yield more accurate results. OES data is comprehensive and reliable. As the commenter acknowledged, private survey data is not available for some occupations and localities. An advantage of the OES survey is that it allows uniformity in the Department's methodology. That advantage would be lost if the Department adopted the commenters' proposal. The system the Department has adopted allows for cases where private survey data may be more accurate. As discussed, using other authoritative or legitimate sources is an option available to employers.

Various commenters asserted increased wages under the IFR methodology would have negative macroeconomic impacts, including: Brain drain and loss of American competitiveness in a global economy, stifling innovation in areas like artificial intelligence and manufacturing 4.0; increased prices for or elimination of products and services; elimination or increased outsourcing of jobs and a general reduction in labor demand; and reduced revenues, including local, State, and Federal tax revenue and reduced consumer spending from foreign workers and students. Many commenters also expressed concern that the higher IFR wages would result in increased outsourcing of jobs, rather than increased opportunities for U.S. workers. One of these commenters noted that U.S. employers can hire workers through foreign affiliates and cited a Wharton School of Business study finding H–1B restrictions ''caused foreign affiliate employment increases at the intensive and extensive margins.''

The Department does not anticipate that the harms the commenters envisage will be the consequences of more accurately calculating prevailing wages of H–1B and PERM workers. Some of the consequences are possible, but in setting wage requirements, Congress accepted that there would be costs resulting from its chosen means of protecting U.S. workers. The Department has not been assigned the function of reconsidering Congress's decision. Rather, the Department's obligation under the INA is to match as closely as possible workers' pay with their occupations and qualifications.

Two public policy organizations believed the Department must address employer misclassification of job opportunities by reviewing ''the qualifications of individual workers

not broken down with the level of granularity by area of employment needed to administer the Department's immigrant and nonimmigrant programs, which is why BLS has also long produced a separate dataset with two wage levels for the Department's use.

[241] 20 CFR 655.731 (b)(3)(iii).

[242] *Id.* at 655.731 (b)(3)(iii)(C)(4).

before DHS petitions are approved to ensure that wage levels match up with age, education, and experience'' to ensure the employer is paying an accurate prevailing wage. One of these commenters asserted some employer petitions contain the same prevailing wage for different job opportunities, such as listing the same wage for a software engineer and a senior software engineer.

These comments propose actions that may be undertaken by DHS but not by the Department. The Department cannot review DHS petitions before DHS approves them.

Some commenters suggested new definitions of the terms 'employer' and 'employment,' enhanced regulation of foreign labor recruiters, a ban of staffing companies from the H–1B program, and enhanced wage protections in the H–2A program. Other commenters expressed concerns related to DHS regulations and recent rulemaking either unrelated or not directly related to this rulemaking, including a DHS IFR regarding specialty occupation determinations.

These comments express concerns or provide suggestions that exceed the scope of this rulemaking. Accordingly, they need not be addressed in this preamble.

## IV. Amendments to the Computation of Prevailing Wage Levels Created by the Final Rule

In light of the foregoing, this final rule amends the Department's regulations at part 20, sections 656.40 and 655.731 to reflect the wage level computations the Department will use to determine prevailing wages in the H–1B, H–1B1, E–3, EB–2, and EB–3 classifications. These amendments are in accordance with the President's Executive Order (E.O.) 13788, ''Buy American and Hire American,'' which instructed the Department to ''propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system.'' [243] Additionally, the Department has determined that the existing prevailing wage levels were artificially low and provided an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts earn, creating an incentive to prefer foreign workers to U.S. workers, an incentive that is at odds with the statutory scheme and causes downward pressure on the wages of the domestic workforce. Therefore, the amendments discussed below revising the wage provisions at 20 CFR 655.731 and 656.40 will ensure the prevailing wage levels reflect the wages paid to U.S. workers with similar experience, education, and responsibility to those possessed by similarly employed foreign workers.

### *1. Prevailing Wage Levels Based on the OES in the Permanent Labor Certification Program (20 CFR 656.40)*

The IFR amended this section to codify the practice of using four prevailing wage levels and to specify the manner in which the wages levels are calculated. Additionally, the IFR incorporated minor technical amendments to clarify the prevailing wage process and to codify the Department's practice of having the OFLC Administrator announce, via a notice of implementation, annual updates to OES wage data. After a careful review of the comments and as discussed above, this final rule adopts a revised wage level computation methodology and other clarifying and technical amendments to § 656.40.

Paragraph (b)(2)(ii)(A) describes the computation of the Level I Wage following implementation of transition wage rates specified under paragraph (b)(2)(iii). This first wage level—calculated as the mean of the fifth decile of the OES wage distribution under the IFR—will now be calculated as the 35th percentile of the wage distribution for the most specific occupation and geographic area available. Roughly speaking, this means that the Level I Wage will be adjusted downward from the approximate 45th percentile under the IFR to the exact 35th percentile of the relevant OES wage distribution in this final rule.

Next, paragraph (b)(2)(ii)(D) provides that the Level IV Wage—calculated as the mean of the upper decile of the OES wage distribution—will now be calculated as the exact 90th percentile of the wage distribution for the most specific occupation and geographic area available. This means the Level IV Wage will decrease approximately from the 95th percentile under the IFR to exactly the 90th percentile of the relevant OES wage distribution. Further, where the Department is unable to compute a Level IV Wage for an occupation and geographic area due to wage values exceeding the uppermost interval of the OES wage interval methodology, the Level IV Wage will be the highest of: (1) The current hourly wage rate applicable to the highest OES wage interval for the specific occupation and geographic area (also known as the footnote wage), or (2) the mean of the wages of all workers for the most specific occupation and geographic area available.

For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA.[244] Thus, new paragraph (b)(2)(ii)(B) states that the Level II Wage shall be determined by first dividing the difference between Levels I and IV by three and then adding the quotient to the computed value for Level I. The Level III Wage is defined in new paragraph (b)(2)(ii)(C) as a level determined by first dividing the difference between Levels I and IV by three and then subtracting the quotient from the computed value for Level IV. This yields second and third wage levels at approximately the 53rd and 72nd percentiles, respectively, under this final rule as compared to the computations under the IFR, which placed Level II Wage at approximately the 62nd percentile and Level III Wage at approximately the 78th percentile.

Section 656.40(b)(2)(ii) in the IFR explained that the OFLC Administrator will publish the prevailing wage rates at least once in each calendar year, on a date to be determined by the Administrator, codifying the Department's current practice of announcing updates to OES wage data via a notice of implementation, rather than publishing multiple prevailing wage rates in the **Federal Register**. The Department has adopted the language of the provision without change, but has made a minor technical change moving the provision to paragraph (b)(2)(iv) in order to accommodate revisions to the wage level computation provisions in this final rule.

The Department is adopting without change revisions to § 656.40(b)(2) that provide greater precision in the language used by changing the term ''DOL'' to ''BLS'' when describing which entity administers the OES survey and eliminate redundancy by deleting the language ''except as provided in (b)(3) of this section.'' Because the Department is now specifying within the regulation exactly how the prevailing wage levels are calculated, the revised text also removes the existing reference to how the levels are calculated—namely the reference to the ''arithmetic mean''—and will instead read: ''If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers

[243] *See* Exec. Order 13788, 82 FR 18,837 (Apr. 18, 2017).

[244] *See* 8 U.S.C. 1182(p)(4) (''Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.'').

similarly employed using the wage component of the OES survey, in accordance with subparagraph (b)(2)(i), unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4) of this section.'' The Department also is adopting without change the revisions to paragraph (a) that remove an out-of-date reference to the role of the SWAs in the prevailing wage determination process and an unnecessary reference to ''arithmetic mean'' that is specified in other paragraphs.

*2. Amending the Wage Requirement for LCAs in the H–1B, H–1B1, and E–3 Visa Classifications (20 CFR 655.731)*

The IFR made minor technical amendments to this section to remove out-of-date references, clarify use of the BLS's OES survey and other permissible wage sources to determine prevailing wages, and specify that these determinations will be made in a manner consistent with the amended section 656.40(b)(2). After a careful review of the comments and as discussed above, this final rule adopts, without change, these clarifying and technical amendments to § 656.731.

This final rule adopts amendments to paragraph (a)(2)(ii)(A) that removes an out-of-date reference to SWAs' role in the prevailing wage determination process to reflect current practice and to provide for operational flexibilities in the future with respect to where PWD requests are processed. Non-agricultural PWD requests are no longer processed by SWAs; since 2010 they have solely been processed by the Department at a National Processing Center (NPC). PWD requests are primarily adjudicated by the NPWC, located in Washington, DC, but through interoperability, they may be processed by any NPC. The regulatory text is amended to reflect current DOL practice and to provide maximum flexibility for DOL to ensure PWDs are issued in a timely manner.

The Department also adopts without change revised language in § 655.731 that more clearly explains the Department will use BLS's OES survey to determine the prevailing wages under this paragraph, as well as an additional sentence that specifies these determinations will be made in a manner consistent with amended § 656.40(b)(2). The revised language in paragraphs (a)(2)(ii), (a)(2)(ii)(A), and (a)(2)(ii)(A)(2) also includes technical and clarifying revisions regarding other permissible wage sources (*i.e.,* applicable wage determinations under the Davis-Bacon Act or McNamara-O'Hara Service Contract Act), as well as other independent authoritative or legitimate sources of wage data in accordance with paragraph (a)(2)(ii)(B) or (C).

This final rule adopts without change language that removed the reference to ''arithmetic mean'' in paragraph (a)(2)(ii) and now states ''. . . the prevailing wage shall be based on the wages of workers similarly employed as determined by the OES survey in accordance with 20 CFR. 656.40(b)(2)(i) . . .'' The revisions also correct an error referencing ''H–2B nonimmigrant(s)'' by changing the reference to ''H–1B nonimmigrant(s)'' in paragraph (a)(2)(ii)(A)(2). The revisions further provide that an NPC will continue to determine whether a job is covered by a collective bargaining agreement that was negotiated at arms-length, but in the event the occupation is not covered by such agreement, an NPC will determine the wages of workers similarly employed using the wage component of the BLS OES, unless the employer provides an acceptable wage survey. An NPC will determine the prevailing wage in accordance with sections 212(n) and 212(t) of the INA and in a manner consistent with the newly revised 20 CFR 656.40(b)(2).

*3. Transition Wage Rates for Implementing Changes Created by the Final Rule*

As stated in the IFR, the Department applied the new regulations to applications for prevailing wage determination pending with the NPWC as of the effective date of the regulation; applications for prevailing wage determinations filed with the NPWC on or after the effective date of the regulation; and LCAs filed with the Department on or after the effective date of the regulation where the OES survey data is the prevailing wage source, and where the employer did not obtain the PWD from the NPWC prior to the effective date of the regulation. However, the Department received a number of comments expressing concerns that immediate implementation of the revised wage levels may have a significant negative impact on the economy, and that a phased implementation of the revised wage levels is appropriate to allow employers to adjust to the new computation methodology and plan payroll, budget, and contractual obligations accordingly.

To address these concerns and support an orderly and seamless transition between the rules, the Department is adding paragraph (b)(2)(iii) to this section to provide a phased implementation period to the new prevailing wage levels. A short transition period also allows the Department to implement necessary changes to program operations, OES wage databases, and technology systems, and to provide training and technical assistance to the NPC, employers, and other stakeholders in order to familiarize them with changes required by this final rule. The wage level computations contained in this section will only apply to applications for prevailing wage determination pending with the NPWC on or during the effective date(s) of each transition period; applications for prevailing wage determinations filed with the NPWC on or during the effective date(s) of each transition period; and LCAs filed with the Department on or during the effective date(s) of each transition period where the OES survey data is the prevailing wage source, and where the employer did not obtain the PWD from the NPWC prior to the effective date(s) of each transition period.

Accordingly, paragraph (b)(2)(iii)(A) describes the computations of the wage levels for the period beginning on the effective date of this final rule through June 30, 2021. The Level I Wage will continue to be calculated as the mean of the lower one-third of the wage distribution for the most specific occupation and geographic area available, which roughly approximates the 17th percentile of the wage distribution. The Level IV Wage will continue to be calculated as the mean of the upper two-thirds of the wage distribution for the most specific occupation and geographic area available, which roughly approximates the 67th percentile of the wage distribution. For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA.

Paragraph (b)(2)(iii)(B) describes the computations of the wage levels for the period beginning on July 1, 2021, through June 30, 2022. The Level I Wage will be set as either (1) 90 percent of the wage value calculated at the 35th percentile of the wage distribution under paragraph (b)(2)(ii)(A), or (2) the mean of the lower one-third of the wage distribution under paragraph (b)(2)(iii)(A)(1), whichever is highest. The Level IV Wage will be set as either (1) 90 percent of the wage value calculated at the 90th percentile of the wage distribution under paragraph (b)(2)(ii)(D), or (2) the mean of the upper two-thirds of the wage distribution under paragraph (b)(2)(iii)(A)(2), whichever is highest. For the two intermediate levels, II and III, the

Department will continue to rely on the mathematical formula Congress provided in the INA based on the wage levels derived under this paragraph.

Paragraph (b)(2)(iii)(C) describes transition wage rates that will apply only to LCAs and, as applicable, applications for prevailing wage determinations submitted by employers seeking to employ a H–1B nonimmigrant worker in job opportunity where such H–1B nonimmigrant worker was, as of October 8, 2020, the beneficiary of an approved I–140 Petition or eligible for an extension of his or her H–1B visa status under AC21, and eligible to be granted immigrant status but for application of the per country visa limitations or remains eligible for an extension of his or her H–1B visa status at the time the LCA is filed.

Where these requirements pertaining to job opportunities for which LCAs are filed are met, paragraph (b)(2)(iii)(C)(1) describes the computations of the wage levels for the period beginning on July 1, 2021, through June 30, 2022. The Level I Wage will be set as either (1) 85 percent of the wage value calculated at the 35th percentile of the wage distribution under paragraph (b)(2)(ii)(A), or (2) the mean of the lower one-third of the wage distribution under paragraph (b)(2)(iii)(A)(1), whichever is highest. The Level IV Wage will be set as either (1) 85 percent of the wage value calculated at the 90th percentile of the wage distribution under paragraph (b)(2)(ii)(D), or (2) the mean of the upper two-thirds of the wage distribution under paragraph (b)(2)(iii)(A)(2), whichever is highest. For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA based on the wage levels derived under this paragraph.

Paragraph (b)(2)(iii)(C)(2) describes the computations of the wage levels for the period beginning on July 1, 2022, through June 30, 2023. The Level I Wage will be set as either (1) 90 percent of the wage value calculated at the 35th percentile of the wage distribution under paragraph (b)(2)(ii)(A), or (2) the wage value provided from the calculation specified under paragraph (b)(2)(iii)(C)(1)(i), whichever is highest. The Level IV Wage will be set as either (1) 90 percent of the wage value calculated at the 90th percentile of the wage distribution under paragraph (b)(2)(ii)(D), or (2) the wage value provided from the calculation specified under paragraph (b)(2)(iii)(C)(1)(ii), whichever is highest. For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA based on the wage levels derived under this paragraph.

Paragraph (b)(2)(iii)(C)(3) describes the computations of the wage levels for the period beginning on July 1, 2023, through June 30, 2024. The Level I Wage will be set as either (1) 95 percent of the wage value calculated at the 35th percentile of the wage distribution under paragraph (b)(2)(ii)(A), or (2) the wage value provided from the calculation specified under paragraph (b)(2)(iii)(C)(2)(i), whichever is highest. The Level IV Wage will be set as either (1) 95 percent of the wage value calculated at the 90th percentile of the wage distribution under paragraph (b)(2)(ii)(D), or (2) the wage value provided from the calculation specified under paragraph (b)(2)(iii)(C)(2)(ii), whichever is highest. For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA based on the wage levels derived under this paragraph.

Following this transition period and beginning on July 1, 2024, paragraph (b)(2)(iii)(C)(4) requires that all prevailing wage calculations for job opportunities for which LCAs are filed shall be provided by the OFLC Administrator as specified under paragraph (b)(2)(ii) of this section. Where the Department is unable to compute a Level IV Wage under paragraph (b)(2)(iii) for an occupation and geographic area due to wage values exceeding the uppermost interval of the OES wage interval methodology, paragraph (b)(2)(iii)(D) specifies that the OFLC Administrator shall determine the Level IV Wage as the highest of: (1) The current hourly wage rate applicable to the highest OES wage interval for the specific occupation and geographic area, or (2) the mean of the wages of all workers for the most specific occupation and geographic area available.

## V. Statutory and Regulatory Requirements

### *A. Executive Orders 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)*

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* Pursuant to E.O. 12866, OIRA has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A). Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated that this rule is a ''major rule,'' as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and qualitatively discuss values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

#### Outline of the Analysis

Section III.B.1 describes the need for the final rule, and section III.B.2 describes the process used to estimate the costs of the rule and the general inputs used to reach these estimates, such as wages and number of affected entities. Section III.B.3 explains how the provisions of the final rule will result in costs and transfer payments and presents the calculations the Department used to reach the cost and transfer payment estimates. In addition, this section describes the qualitative transfer payments and benefits of the changes contained in this final rule. Section III.B.4 summarizes the estimated first-year and 10-year total and annualized costs, perpetuated costs, and transfer payments of the final rule. Finally, section III.B.5 describes the regulatory alternatives that were considered during the development of the final rule.

Summary of the Analysis

The Department expects that the final rule will result in costs and transfer payments. As shown in Exhibit 1, the final rule will have an annualized cost of $2.90 million and a total 10-year cost of $20.34 million at a discount rate of 7 percent in 2019 dollars.[245] The final rule will result in annualized transfer payments of $14.97 billion and total 10-year transfer payments of $105.16 billion at a discount rate of 7 percent in 2019 dollars.[246] When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost of this final rule is $1.86 million at a discount rate of 7 percent in 2016 dollars.[247]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE FINAL RULE

[2019 $ millions]

| | Costs | Transfer payments |
|---|---|---|
| 10-Year Total with a Discount Rate of 3% | $23.47 | $130,830 |
| 10-Year Total with a Discount Rate of 7% | 20.34 | 105,157 |
| Annualized at a Discount Rate of 3% | 2.75 | 15,337 |
| Annualized at a Discount Rate of 7% | 2.90 | 14,972 |
| Perpetuated Costs* with a Discount Rate of 7% (2016 $ Millions) | | 1.86 |

The total cost associated with the final rule includes only rule familiarization. The rule is not expected to result in any cost savings. Transfer payments are the result of changes to the computation of prevailing wage rates for employment opportunities that U.S. employers seek to fill with foreign workers on a temporary basis through H–1B, H–1B1, and E–3 nonimmigrant visas.[248] See the costs and transfer payments subsections of section III.B.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some transfer payments and benefits of the final rule. The Department describes them qualitatively in section III.B.3 (Subject-by-Subject Analysis).

1. Need for Regulation

The Department has determined that this rulemaking is needed to update the computation of prevailing wage levels under the existing four-tier wage structure to better reflect the actual wages earned by U.S. workers similarly employed to foreign workers, eliminate economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States, and further the goals of E.O. 13788, Buy American and Hire American. *See* 82 FR 18837. The "Hire American" directive of the E.O. articulates the executive branch policy to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests. *Id.* sec. 2(b). It directs Federal agencies, including the Department, to propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers. *Id.* sec. 5.

The Department is therefore amending its regulations at Sections 656.40 and 655.731 to update the methodology it will use to determine prevailing wages using wage data from the BLS OES survey for job opportunities in the H–1B, H–1B1, E–3, and permanent labor certification programs. The reports discussed and analyses provided in the preamble above explain how application of the current wage methodology for the four-tier OES wage structure fails to produce prevailing wages at a level consistent with the actual wages earned by U.S. workers similarly employed to foreign workers and, therefore, has a suppressive effect on the wages of U.S. workers similarly employed. The Department has a statutory mandate to protect the wages and working conditions of U.S. workers similarly employed from adverse effects caused by the employment of foreign workers in the United States on a permanent or temporary basis.

2. Analysis Considerations

The Department estimated the costs and transfer payments of the final rule relative to the baseline (the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the final rule (*i.e.,* costs and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2021 through 2030) to ensure it captures major costs and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2019 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

Exhibit 2 presents the number of entities affected by the final rule. The number of affected entities is calculated using OFLC performance data from fiscal years (FY) 2018, 2019, and 2020. The Department uses them throughout this analysis to estimate the costs and transfer payments of the final rule.

[245] The final rule will have an annualized net cost of $2.75 million and a total 10-year cost of $23.47 million at a discount rate of 3 percent in 2019 dollars.

[246] The final rule will result in annualized transfer payments of $15.34 billion and total 10-year transfer payments of $130.83 billion at a discount rate of 3 percent in 2019 dollars.

[247] To comply with E.O. 13771 accounting, the Department multiplied the initial and then constant rule familiarization costs (initial cost of $4,077,113; constant costs of $2,316,661 in 2019$) by the GDP deflator (0.94242) to convert the cost to 2016 dollars (initial cost of $4,077,113; constant costs of $2,316,661 in 2019$). The Department used this result to determine the perpetual annualized cost ($2,431,831) at a discount rate of 7 percent in 2016 dollars. Assuming the rule takes effect in 2020, the Department divided $2,431,831 by $1.07^4$, which equals $1,855,232. This amount reflects implementation of the rule in 2020.

[248] As explained, *infra,* the Department did not quantify transfer payments associated with new certifications under the Permanent Labor Certification Program (*e.g.,* EB–2 and EB–3 classifications) because they are expected to be *de minimis.*

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE
[FY 2018–2020 average]

| Entity type | Number |
|---|---|
| Unique H–1B Program Certified Employers [249] | 58,750 |
| H–1B Program Certified Worker Positions with Prevailing Wage Set by OES [250] | 904,445 |
| Unique PERM Employers [251] | 24,563 |

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of foreign worker applicants and the change in burden hours required for rule familiarization in section III.B.3 (Subject-by-Subject Analysis).

Compensation Rates

In section III.B.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with implementation of the provisions contained in this final rule. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the final rule. The Department used the BLS mean hourly wage rate for private sector human resources specialists.[252] Wage rates were adjusted to reflect total compensation, which includes non-wage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We used an overhead rate of 17 percent [253] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2019. For the private sector employees, we used a fringe benefits rate of 42 percent.[254]

The Department received one comment on the adjustment of wage rates to reflect total compensation. One commenter said the Department had underestimated the cost of the program because fringe and overhead were included in calculations of costs and transfers. In response to the commenter's concern, the wage transfer calculations in the IFR and the final rule do not include overhead or fringe benefits; they are raw wages. Overhead and fringe benefits were only applied to staffing wages in the cost section. The commenter's calculation of fringe and overhead application was incorrect when suggesting how they were applied. The 17 percent overhead rate is not applied after calculating the fringe rate; instead, the fringe rate and the overhead rates are applied simultaneously to wages as shown in Exhibit 3.

The fringe wage rate is based on Employer Costs for Employee Compensation data which includes paid leave; supplemental pay (*i.e.,* overtime and premium, shift differentials, and nonproduction bonuses); insurance (*i.e.,* life, health, short-term disability, and long-term disability); retirement and savings; and legally required benefits (*i.e.,* Social Security, Medicare, federal unemployment insurance, state unemployment insurance, and workers' compensation). As wages increase the costs associated with paid leave, retirement savings, and supplemental pay will also increase.

The Department used the hourly compensation rates presented in Exhibit 3 to estimate the labor costs.

EXHIBIT 3—COMPENSATION RATES
[2019 dollars] [255]

| Position | Base hourly wage rate<br>(a) | Fringe rate<br>(b) | Overhead costs<br>(c) | Hourly compensation rate<br>d = a + b + c |
|---|---|---|---|---|
| HR Specialist | $32.58 | $13.81 ($32.58 × 0.42) | $5.54 ($32.58 × 0.17) | $51.93 |

3. Subject-by-Subject Analysis

The Department's analysis below covers the estimated costs and transfer payments of the final rule. In accordance with Circular A–4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society. The regulatory impact analysis focuses on the costs and transfer payments that can be attributed exclusively to the new requirements in the final rule.

Costs

The following section describes the costs of the final rule.

Rule Familiarization

When the final rule takes effect, existing employers of foreign workers with H–1B, H–1B1, E–3 visas, and those employers sponsoring foreign workers for permanent employment, will need to familiarize themselves with the new regulations. Consequently, this imposes a one-time cost for existing employers in the temporary and permanent visa programs in the first year. Each year, there are new employers that participate in the temporary and permanent visa programs. Therefore, in each year subsequent to the first year, new employers will need to familiarize themselves with the new regulations.

To estimate the first-year cost of rule familiarization, the Department calculated the average (83,312) number of unique employers requesting H–1B certifications and PERM

[249] The total unique LCA employers in 2018, 2019, and 2020 were 57,682, 63,027, and 55,540, respectively.

[250] The total number of worker positions associated with LCA certifications that use OES prevailing wages in 2018, 2019, and 2020 were 1,022,908, 907,732, and 782,696, respectively.

[251] The unique employers in 2018, 2019, and 2020 were 28,856, 23,596, and 21,236, respectively.

[252] Bureau of Labor Statistics. (2019). May 2019 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist. Retrieved from: *https://www.bls.gov/oes/current/oes131071.htm.*

[253] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' June 10, 2002, *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[254] BLS. (2019). ''2019 Employer Costs for Employee Compensation.'' Retrieved from: *https://www.bls.gov/news.release/ecec.toc.htm.* Ratio of total compensation to wages and salaries for all private industry workers.

[255] Numbers may slightly differ due to rounding.

certifications.[256] The average number of unique H–1B and PERM employers (83,312) was multiplied by the estimated amount of time required to review the rule (1 hour).[257] This number was then multiplied by the hourly, fully loaded compensation rate of Human Resources Specialists ($51.93 per hour). This calculation results in an initial cost of $4.33 million in the first year after the final rule takes effect. Each year after the first year the same calculation is done for the average number of new unique employers requesting H–1B and PERM certifications in FY 2019 and FY 2020 (47,339).[258] This calculation results in a continuing annual undiscounted cost of $2.46 million in years 2–10 of the analysis. The one-time and continuing cost yields a total average annual undiscounted cost of $2.65 million. The annualized cost over the 10-year period is $2.75 million and $2.90 million at discount rates of 3 and 7 percent, respectively.

Transfer Payments

Quantifiable Transfer Payments

This section discusses the quantifiable transfer payments related to changes to the computation of the prevailing wage levels.

As discussed in the preamble, the Department determined that current wage level methodology results in prevailing wage rates for temporary and permanent workers that are far below what their U.S. counterparts are likely paid, which has a suppressive effect on the wages of similarly employed U.S. workers. While allowing employers to access higher-skilled H–1B workers to fill specialized positions can help U.S. workers' job opportunities in some instances, the benefits of this policy diminish or disappear when the prevailing wage levels do not accurately reflect the wages paid to similarly employed workers in the U.S. labor market. The distortions resulting from a poor calculation of the prevailing wage allow some firms to replace qualified U.S. workers with lower-cost foreign workers.

Under this final rule, the Department will compute the Level I Wage for PERM labor certifications and LCAs as the 35th percentile of the OES wage distribution for the most specific occupation and geographic area available, rather than the mean of the fifth decile used in the IFR. Roughly speaking, this means that the first wage level will be decreased from the 45th percentile to the 35th percentile. The Department will compute the Level IV Wage as the 90th percentile of the OES wage distribution for the most specific occupation and geographic area available, rather than the arithmetic mean of the upper decile used in the IFR. This means the fourth wage level will decrease approximately from the 95th percentile to the 90th percentile.

Consistent with the formula provided in the INA, the Level II Wage will be calculated by dividing by three, the difference between Levels I and IV, and adding the quotient to the computed value for Level I. The Level III Wage will be calculated by dividing by three the difference between Levels I and IV, and subtracting the quotient from the computed value for Level IV. This yields a Level II Wage at approximately the 53rd percentile and a Level III Wage at approximately the 72nd percentile, as compared to the current computation, which places Level II at approximately the 34th percentile and Level III at approximately the 50th percentile.

This final rule also provides for a transition period from the current wage methodology to the wage methodology contained in this final rule to give foreign workers and their employers time to adapt to the new wage rates. For most job opportunities, the transition will occur in two steps, following a short delayed implementation period, and conclude on July 1, 2022. For job opportunities that will be filled by workers who are the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or is eligible for an extension of his or her H–1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106–313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273 (2002), the transition will occur in four steps, following a short delayed implementation period, and conclude on July 1, 2024.

For the two-step transition the current wage levels will be in effect from January 1, 2021 through June 30, 2021. From July 1, 2021 through June 30, 2022, the prevailing wage will be 90 percent of the final wage level. From July 1, 2022 and onward the prevailing wage will be the final wage levels. For the three and a half year transition the current wage levels will be in effect from January 1, 2021 through June 30, 2021. From July 1, 2021 through June 30, 2022 the prevailing wage will be 85 percent of the final wage levels; from July 1, 2022 through June 30, 2023 the prevailing wage will be 90 percent of the final wage levels; from July 1, 2023 through June 30 2024 the prevailing wage will be 95 percent of the final wage levels; and from July 1, 2024 onwards the prevailing wage will be the final wage levels.

Finally, the Department is revising § 655.731 to explain that it will use the BLS's OES survey wage data to establish the prevailing wages in the H–1B, H–1B1, and E–3 visa classifications. The Department added a sentence to explain that these determinations will be made by the OFLC NPC in a manner consistent with § 656.40(b)(2).

The Department calculated the impact on wages that will occur from implementation of the prevailing wage computation changes contained in the final rule. It is expected that the increase in prevailing wages under the final rule will incentivize some employers to employ U.S. workers instead of foreign workers from the H–1B program, but nonetheless, the Department still expects that the same number of H–1B visas will be granted under the annual caps. For many years, the Department has observed that the number of petitions exceeds the numerical cap, as the annual H–1B cap was reached within the first five business days each year from FY 2014 through FY 2020, and higher prevailing wage levels do not necessarily mean that demand for temporary foreign labor will fall below the available supply of visas. Under existing prevailing wage levels, which the Department has shown are too low and do not accurately reflect the wages paid to similarly employed U.S. workers, demand for temporary foreign labor far exceeds the statutory limits on supply. Usually prices rise in a market when demand exceeds supply. However, given the statutory framework of the H–1B system, along with the lower wages for comparable work in many other countries and the non-pecuniary benefits of participating the H–1B program, prices for temporary foreign labor under the H–1B program have stayed too low to depress overall employer demand.

Under the final rule, wage transfers will still occur in cases where U.S. workers are employed instead of H–1B workers; therefore, no adjustments to the wage estimates are necessary due to this effect. However, it is possible that prevailing wage increases will induce some employers to train and provide

[256] The total number of unique employers requesting H–1B certifications and PERM certifications in FY18 (57,682 + 28,856 = 86,538), FY19 (63,027 + 23,596 = 86,623), and FY20 (55,540 + 21,236 = 76,776).

[257] This final rule amends parts of an existing regulation. Therefore, the Department estimates 1-hour to review the rule assuming a high number of readers familiar with the existing regulation.

[258] The total number of new employers in FY19 was 51,289 (35,790 H1B + 15,499 PERM), and in FY20 was 43,389 (29,051 H1B + 14,338 PERM).

more working hours to incumbent workers, resulting in no increase in employment but an increase in earnings. It is also possible that prevailing wage increases will induce some employers to not hire a worker at all (either a U.S. worker or a worker from the H–1B program that is subject to the annual cap or not subject to the annual cap), resulting in a decrease in employment of guest workers. However, given that participation in temporary labor certification programs is voluntary, and there exists an alternative labor market of U.S. workers who are not being prevented from accepting work offered at potentially lower market-based wages, there is some reason to doubt whether an increase in prevailing wages will lead to an efficiency loss from decreased labor demand. Due to data limitations on the expected change in labor demand and supply of U.S. workers, the Department cannot accurately measure the efficiency gains or losses to the U.S. labor market created by the new prevailing wage system. The Department discusses this potential impact qualitatively; the Department invited comment on how to estimate changes to efficiency from the new prevailing wage levels, but did not receive any such comment.

The Department received two comments suggesting that the transfers of the rule were underestimated.

One commenter suggests that the analysis in the IFR underestimates the transfer payments of the IFR. They cite a 2020 Cato Institute study that found the wage increases, using interpolated wages from the publicly available BLS OES dataset resulted in underestimates of the wage impacts of the IFR. In addition, they suggested that the use of the 90th percentile as a proxy for the 95th percentile significantly underestimated wages.

In response to the commenter's concern, the IFR estimate of wages was based on BLS OES data publicly available at the time of publication. Therefore, the estimated wage impacts in the IFR were conservative, particularly for workers with wages set at the 95th percentile where wage impacts were calculated based on the publicly available 90th percentile. In this final rule the Department revises its wage tier methodology, including setting the Level IV percentile at the 90th percentile. The change in methodology will result in wage tiers that are set at percentiles that are lower than those presented in the IFR and that will be phased in over a period of 2 years for applicants that are new to the H–1B program, and three and a half years for applicants on track for lawful permanent residency (LPR).

Another commentator suggested the transfers were underestimated and they calculated that the IFR was based on wage increases of $4,825 to $9,651 per worker based on Exhibit 5 and Exhibit 6 of the IFR.

In response to the commenter's concern, Exhibit 5 and Exhibit 6 of the IFR contained illustrative wage data for a particular SOC-code and area in BLS OES and do not reflect the average impact of the IFR. They instead serve the purpose of illustrating the Department's wage impact calculations. Wage increases vary by SOC code and geographic area and therefore can be higher than these examples. The analysis for the IFR estimated that workers facing a wage increase (*i.e.,* those that were offered less under the baseline than required by the IFR) had an average increase of $27,000.

Under this final rule the Department revises the wage level percentiles of the IFR with some modifications to account for the two-step and three and a half year transition periods that are new to the final rule. Therefore, the final rule wage impact estimation follows four main steps: Step 1—simulate wage impacts with the revised percentiles for each transition wage level using historical certification data and adjust wage impacts for USCIS approval rates. Step 2—project 10-year series wage impacts incorporating the transition schedule. Step 3—during the transition period adjust the population of workers eligible for the two-step transition versus the three and a half year transition. Step 4—Estimate total transfers by combining adjusted two-step and three and a half year transition total wage impacts. This methodology is described in more detail below.

*Step 1—simulate wage impacts with the revised percentiles for each transition wage level and adjusted based on USCIS approval rates.*[259] For each H–1B certification in FY 2018, FY 2019, and FY 2020, the Department used the difference between the estimated prevailing wage level under the final rule and the wage offered under the current baseline to establish the wage impact of the prevailing wage computation changes in each calendar year of the certification's employment period. Under the H–1B visa classification, employment periods for certifications can last for up to three years in length and generally begin up to six months after a certification is issued by the Department. Therefore, a given fiscal year can have wage impacts that start in that calendar year and last up to three years, or wage impacts that could start in the following calendar year and have an end-date up to four calendar years past the fiscal year. For example, an employment start date in March of 2019 may be associated with an H–1B application certified by the Department during FY 2018 and, if that certified application contains a three-year employment period, the wage impacts on the employer will extend through March of 2022. This final rule does not retroactively impact certified wages, so there will be new H–1B applications certified by the Department during FY 2020 that may extend well into the analysis period. Therefore, the first year of the rule will only impact new certifications, in the second year new and continuing certifications from year 1 will be impacted, and in the third year and beyond both new and continuing certifications from years 1 and 2 will be impacted.

To account for this pattern of wage impacts, we classify certifications into three length cohorts and calculate annual wage impacts for each length cohort based on FY 2018 through FY 2020 data. The length cohorts are: Certifications lasting less than 1 year, certifications lasting 1–2 years, and certifications lasting 2–3 years. For each length cohort we calculate wage impacts for their first calendar year (''new''), their second calendar year (''ongoing''), and third or more calendar year (''ongoing +'')

H–1B, H–1B1, or E–3 applications certified by the Department do not necessarily result in employer wage obligations. After obtaining a certification, employers applying under the H–1B and H–1B1 programs, and in certain situations, the E–3 program must then submit a Form I–129, Petition for a Nonimmigrant Worker for approval by U.S. Citizenship and Immigration Services (USCIS). USCIS may approve or deny the H–1B visa petition. USCIS approval data represents approvals of petitions based on both certifications issued by the Department that used OES data for the prevailing wage, or certifications that were based on other approved sources to determine the prevailing wage (*e.g.,* Collective Bargaining Agreements, employer-provided surveys). Exhibit 4 summarizes FY 2018 and FY 2019 data on H–1B, H–1B1, and E–3 certifications with their prevailing wage based on the OES survey, adjusted USCIS approvals,

[259] Not all E–3 applicants need to file an I–129 with USCIS.

and approval rate.[260] To account for approval rates that may differ by geographic location and whether a certification is new or continuing, we adjust each certification's wage impact by the approval rate of the State of intended employment for the employer's certification and whether it is a new or continuing application.[261]

EXHIBIT 4—LCA AND I–129 H–1B, H–1B1, AND E–3 APPROVALS AND DENIALS

| | FY 2018 | | | FY 2019 | | | Average percent approved |
|---|---|---|---|---|---|---|---|
| | LCA certified | USCIS approved + | Percent approved | LCA certified | USCIS approved + | Percent approved | |
| Total | 1,023,552 | 308,147 | 30 | 908,218 | 368,811 | 41 | 35 |
| New | 423,174 | 80,855 | 19 | 378,175 | 132,965 | 35 | 27 |
| Continuing * | 600,378 | 227,292 | 38 | 530,043 | 235,846 | 44 | 41 |

* Includes: ''Continued Employment'', ''Change Previous Employment'', ''Change Employer'', ''Amended Petition'', ''New Concurrent Employment''.
+ Approval numbers adjusted by 92% to account for approvals with prevailing wages set by sources other than OES.

To estimate the wage impacts of new percentiles contained in this final rule, the Department used publicly available BLS OES data that reports the 10th, 25th, 50th, 75th, and 90th percentile wages by SOC code and metropolitan or non-metropolitan area.[262] In order to estimate wages for the new final rule levels of 35th, 53rd, 72nd, and 90th percentiles, the Department linearly interpolated between relevant percentiles for reported wages at each SOC code and geographic area combination.[263] For each certification from FY 2018 through FY 2020 the new wage was estimated for the final rule wage levels as well as all transition periods (*i.e.,* 90 percent for the two-step transition; 85 percent, 90 percent, and 95 percent for the three and a half year transition).

An illustrative example of calculations used to calculate wage impacts under the final rule is provided in Exhibit 5 and Exhibit 6 below. In Exhibit 5, to calculate projected wage impacts under the final rule, the Department first multiplied the number of certified workers by the number of hours worked in each calendar year (2,080 hours) and the new prevailing wage for the level the workers were certified at for their particular SOC and the geographic area combination. The examples in Exhibit 5 set forth how the Department calculated the final rule wage impact for an individual case of each length cohort.

EXHIBIT 5—PREVAILING WAGE UNDER THE FINAL RULE
[Example cases]

| Length cohort | Number of certified workers | Prevailing wage (hour) | Number of hours worked in 2018 | Number of hours worked in 2019 | Number of hours worked in 2020 | Total wages 2018 | Total wages 2019 | Total wages 2020 | Total wages 2018–2020 | USCIS approval rate | Adjusted total wages |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | (a) | (b) | (c) | (d) | (e) | (a*b*c) = (f) | (a*b*d) = (g) | (a*b*e) = (h) | (f+g+h) = (i) | (j) | (i*j) |
| <1 Year | 100 | $44.27 | 648 | 1,032 | 0 | $2,868,437 | $4,568,251 | $0 | $7,436,688 | 33% | $2,444,080 |
| 1–2 Years | 100 | 34.76 | 0 | 2,080 | 2,080 | 0 | 7,230,496 | 7,230,496 | 14,460,992 | 49 | 7,097,181 |
| 2–3 Years | 100 | 27.37 | 528 | 2,080 | 2,080 | 1,445,030 | 5,692,544 | 5,692,544 | 12,830,118 | 31 | 4,002,637 |

After the total wages for the final rule was determined, the Department calculated the baseline wage. The baseline wage is always equal to or greater than the baseline prevailing wage because some certifications offer a wage higher than the prevailing wage. The methodology is the same as that used to estimate the projected wages under the final rule: Number of certified workers is multiplied by the number of hours worked in each calendar year (based on 2,080 hours in a full year) of certified employment and the actual offered wage for the certified workers (Exhibit 6 provides an example of the calculation of the baseline wages for the same case as in Exhibit 5).

EXHIBIT 6—CURRENT PREVAILING WAGE
[Example cases]

| Length cohort | Number of certified workers | Prevailing wage (year) | Prevailing wage | Number of hours worked in 2018 | Number of hours worked in 2019 | Number of hours worked in 2020 | Total wages 2018 | Total wages 2019 | Total wages 2020 | Total wages 2018–2020 | USCIS approval rate | Adjusted total wages |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | (a) | (b) | (b/2080) = (c) | (d) | (e) | (f) | (a*c*d) = (g) | (a*c*e) = (h) | (a*c*f) = (i) | (g+h+i) = (j) | (k) | (j*k) |
| <1 Year | 100 | $77,459 | $37.24 | 648 | 1,032 | 0 | $2,413,146 | $3,843,158 | $0 | $6,256,304 | 33% | $2,056,144 |
| 1–2 Years | 100 | 41,163 | 19.79 | 0 | 2,080 | 2,080 | 0 | 4,116,300 | 4,116,300 | 8,232,600 | 49 | 4,040,404 |
| 2–3 Years | 100 | 43,846 | 21.08 | 528 | 2,080 | 2,080 | 1,113,014 | 4,384,600 | 4,384,600 | 9,882,214 | 31 | 3,082,973 |

Once the baseline offered wage was obtained, the Department estimated the wage impact of the final rule prevailing wage levels by subtracting the baseline offered wage for each calendar year from the final rule prevailing wage. The total

[260] Form I–129 data for H–1B is obtained from the USCIS H–1B data hub. Retrieved from: *https://www.uscis.gov/tools/reports-and-studies/h-1b-employer-data-hub.*

[261] Both USCIS H–1B data and LCA data indicate the state for which the work is to be completed. Therefore, approval rates are calculated separately for each state and used in the analysis.

[262] BLS OES data for Metropolitan and Nonmetropolitan Areas acquired for each year required for the analysis: May 2016-May 2019. Retrieved from *https://www.bls.gov/oes/current/oessrcma.htm*

[263] For example, if OES reports a wage of $30 per hour at the 25th25th percentile and $40 per hour at the 50th50th percentile then the 35th35th percentile is interpolated as $30 + ($40 − $30)*((35 − 25)/(50 − 35)) = $36.66 per hour.

wage impact was then multiplied by the average USCIS petition beneficiary approval rate for the State of intended employment. Here, the Department presents the wage impacts for the examples in Exhibits 5 and 6, above. For the length cohort less than 1 year, the impact in 2018 was $149,632 (($2,868,437 − $2,413,146) * 0.33) and $238,303 in 2019 (($4,568,251 − $3,843,158) * 0.33). For the length cohort of 1–2 years, the impact in 2019 was $1,528,388 (($7,230,496 − $4,116,300) * 0.49), and in 2020 was $1,528,388 (($7,230,496 − $4,116,300) * 0.49). The example for length cohort 2–3 years had wage impacts in 2018, 2019, and 2020. In the 2018 the wage impact was $103,580 (($1,445,030 − $1,113,014) * 0.31), $408,042 in 2019 (($5,692,544 − $4,384,600) * 0.31), and $2,947,905 in 2020 (($5,692,544 − $4,384,600) * 0.31).

Existing prevailing wage data from the Foreign Labor Certification (FLC) Data Center, accessible at *http://www.flcdatacenter.com,* contains wage data for each SOC code and geographic area combination that are not readily available in the public OES data used to estimate new prevailing wage levels. For example, when an OES wage is not releasable for a geographic area, the prevailing wage available through the FLC Data Center may be computed by BLS for the geographic area plus its contiguous areas. Additionally, in publicly available OES data, some percentiles are missing for certain combinations of SOC codes and geographic areas. These two factors result in a small number of certifications having no match with a new prevailing wage level.[264] To estimate wage impacts for workers associated with these certifications, the average wage impact per worker, for the given cohort and fiscal year the certification is associated with, is calculated and then applied to an adjusted number of workers associated with the certification that does not match. It is unlikely that all unmatched certifications will have a wage impact so the calculated wage impact per worker is applied to 85 percent of workers associated with unmatched certifications.[265] This produces a series of estimated wage impacts for workers that are not matched with new prevailing wages in the public OES data for each calendar year for which they have employment. These imputed wage impacts are then added to the calculated wage impact to produce a final total wage impact for each length cohort and percentile group in each calendar year.

Exhibit 7 summarizes the wage impacts of each length cohort for all percentile groups involved in the two wage transitions based on FY 2018 through FY 2020 certification data. The result of this analysis is an annual average wage impact for each length cohort and percentile group that is used in following steps to construct projected 10-year wage impacts. In Exhibit 7 some calendar years do not have values because the cohort, based on FY 2018 through FY 2020 data, does not have a full year of data for those years. For example, calendar year 2021 does have new entries from FY 2020 data but it is not a complete year of data as FY 2021 would also have new entries, and therefore it is not included.

EXHIBIT 7—WAGE TRANSFERS BY PERCENTILE GROUP AND LENGTH COHORT

[2019$ millions]

| Wage level transition group | Length cohort | | CY18 | CY19 | CY20 | CY21 | CY22 | Annual average |
|---|---|---|---|---|---|---|---|---|
| 85 Percent | <1 Year | New | $7.89 | $9.06 | $5.21 | NA | NA | $7.39 |
| | | Ongoing | 1.28 | 7.11 | 5.96 | 2.89 | NA | 4.31 |
| | 1–2 Years | New | 29.58 | 24.59 | 12.43 | NA | NA | 22.20 |
| | | Ongoing | NA | 59.89 | 61.09 | 30.43 | NA | 50.47 |
| | 2–3 Years | New | 831 | 742 | 352 | NA | NA | 642 |
| | | Ongoing | NA | 1,711 | 1,522 | 644 | NA | 1,292 |
| | | Ongoing + | NA | NA | 1,901 | 2,386 | 1,404 | 1,897 |
| 90 Percent | <1 Year | New | 13.92 | 16.71 | 8.85 | NA | NA | 13.16 |
| | | Ongoing | 2.88 | 12.11 | 10.32 | 4.38 | NA | 7.42 |
| | 1–2 Years | New | 65.74 | 51.67 | 24.13 | NA | NA | 47.18 |
| | | Ongoing | NA | 134.46 | 129.80 | 59.59 | NA | 107.95 |
| | 2–3 Years | New | 2,007 | 1,820 | 829 | NA | NA | 1,552 |
| | | Ongoing | NA | 4,133 | 3,693 | 1,505 | NA | 3,110 |
| | | Ongoing + | NA | NA | 4,625 | 5,785 | 3,347 | 4,586 |
| 95 Percent | <1 Year | New | 21.30 | 25.64 | 13.26 | NA | NA | 20.07 |
| | | Ongoing | 4.82 | 18.24 | 15.61 | 6.25 | NA | 11.23 |
| | 1–2 Years | New | 109.28 | 84.09 | 38.43 | NA | NA | 77.27 |
| | | Ongoing | NA | 224.73 | 212.31 | 95.55 | NA | 177.53 |
| | 2–3 Years | New | 3,386 | 3,075 | 1,405 | NA | NA | 2,622 |
| | | Ongoing | NA | 6,979 | 6,238 | 2,537 | NA | 5,251 |
| | | Ongoing + | NA | NA | 7,830 | 9,771 | 5,648 | 7,749 |
| 100 Percent (Final Wage Level). | <1 Year | New | 29.61 | 35.57 | 18.05 | NA | NA | 27.74 |
| | | Ongoing | 6.99 | 25.12 | 21.56 | 8.30 | NA | 15.49 |
| | 1–2 Years | New | 158.13 | 119.63 | 54.32 | NA | NA | 110.70 |
| | | Ongoing | NA | 325.78 | 270.70 | 135.79 | NA | 244.09 |
| | 2–3 Years | New | 4,861 | 4,426 | 2,029 | NA | NA | 3,772 |
| | | Ongoing | NA | 10,022 | 8,983 | 3,653 | NA | 7,553 |
| | | Ongoing + | NA | NA | 11,258 | 14,056 | 8,135 | 11,150 |

*Step 3—project 10-year series of wage impacts incorporating transition schedule.* To project 10-year wage transfers the average annual values from Exhibit 7 are used to construct a 10-year series that incorporates the transition schedule and change in worker population eligible for the two-step transition or three and a half year transition. Based on data provided by USCIS there are approximately 266,500 workers in backlog for a Green Card that

[264] In FY 2018, 7 percent of certifications do not match, in FY 2019 9 percent, and FY 2020 21 percent.

[265] Approximately 85 percent of matched workers in FY 2019 certification data have wage impacts.

are on continuing H–1B visas and are therefore eligible for the three and a half year transition. On average from FY 2018 to FY 2020 316,845 workers were approved annually by USCIS.[266] Therefore, approximately 84 percent of applications are currently eligible for the three and a half year transition and the remaining 16 percent will use the two-step transition.[267] Over time USCIS estimates that 30,000 workers would be processed through the backlog every year resulting in a declining population of workers eligible in each subsequent year for wages under the three and a half year transition. The Department assumes that the total population of applicants will not change, therefore the percent of applicants applying to the H–1B visa program for two-step transition wages (or the final wage level after the transition) will grow over time and the population of workers eligible for wages under the three and a half year transition will decline. A summary of this population transition as well as the wage transition for each group is presented in Exhibit 8.

EXHIBIT 8—WAGE AND POPULATION TRANSITION FOR THE TWO APPLICATION GROUPS

| Year | Months | Wage transition | | Population transition | |
|---|---|---|---|---|---|
| | | Two-step | Three and a half year | Two-step (%) | Three and a half year (%) |
| 2021 | Jan–Jun | *Baseline* | *Baseline* | 16% | 84% |
| | Jul–Dec | 90% | 85% | 16 | 84 |
| 2022 | Jan–Jun | 90% | 85% | 25 | 75 |
| | Jul–Dec | *Final Wage Level* | 90% | 25 | 75 |
| 2023 | Jan–Jun | *Final Wage Level* | 90% | 35 | 65 |
| | Jul–Dec | *Final Wage Level* | 95% | 35 | 65 |
| 2024 | Jan–Jun | *Final Wage Level* | 95% | 44 | 56 |
| | Jul–Dec | *Final Wage Level* | *Final Wage Level* | * NA | * NA |
| 2025–2030 | | *Final Wage Level* | *Final Wage Level* | * NA | * NA |

* Beginning July 1, 2024, the transitions are both complete and all workers are at the final wage level.

To illustrate the application of the wage and population transitions to the average annual wages provided above in Exhibit 7 we describe an example of this calculation for new applications in 2021. Exhibit 9, below, provides an example calculation for new applicants in 2021 under the two-step transition wage (90 percent of final wage levels).

EXHIBIT 9—WAGE IMPACTS FOR TWO-STEP TRANSITION APPLICANTS IN 2021

| Length Cohort: | Annual average wage impact * | | | Adjustments | | Projected wage impact | | | |
|---|---|---|---|---|---|---|---|---|---|
| | <1 Year | 1–2 Years | 2–3 Years | Transition | Population | <1 Year | 1–2 Years | 2–3 Years | Total |
| | (a) | (b) | (c) | (d) | (e) | (f) = (a * d * e) | (g) = (b * d * e) | (h) = (c * d * e) | (f + g + h) |
| **Length Cohort: New** | | | | | | | | | |
| 2021 | $13.16 | $47 | $1,552 | 50.60% | 16% | $1.07 | $3.82 | $125.62 | $130.51 |
| **Length Cohort: Ongoing** | | | | | | | | | |
| 2022 | $7.42 | $104 | $3,110 | 50.60% | 16% | $0.60 | $8.39 | $251.82 | $260.81 |
| **Length Cohort: Ongoing +** | | | | | | | | | |
| 2023 | NA | NA | $4,586 | 50.60% | 16% | NA | NA | $371.25 | $371.25 |

* Average annual wage impacts from Exhibit 7 for 90 percent wage level transition group.

Average annual wage impacts for each length cohort represent a full year of wage impacts, however the wage transition does not begin until July 1, 2021. Therefore, the proportion of working days in July 1, 2021 through December 31, 2021 (50.6%) is used to adjust each length cohort's average annual wage impact. A second adjustment is made to account for the population transition (16% of the total applicant population faces wages under the two-step transition in 2021).[268] Ongoing wages from new applications in 2021 occur in 2022 and 2023. Therefore, the estimates of ongoing wages from Exhibit 7 are included in 2022 and 2023 and also adjusted by 2021 transition and population adjustments (because these ongoing wages are associated with the 2021 new applicants).

This process was repeated for each year of 2021–2024 to account for each new year of applicants (*i.e.,* in 2022, under the two-step transition, half of applicants have impacts at 90 percent of final wage levels and half at the final wage levels). In addition, the population of applicants under the two-step transition increases from 16 percent in 2021 to 25 percent in 2022. From 2025 onwards all new applicants are subject to the final wage levels.

*Step 4—estimate total transfer payments.* The Department determined

[266] Based on applying the average approval rate of USCIS LCA and I–129 H–1B, H–1B1, and E–3 applications (35%) to the average of annual certifications by DOL (905,271).

[267] 84 percent derived from 266,500 workers divided by 316,845 total workers approved annually.

[268] See Exhibit 8 transition schedule.

the total impact of the final rule by summing wage impacts from new applicants in each year and ongoing wage impacts from new applicants in prior years. The results of this is presented below in Exhibit 10.

EXHIBIT 10—TOTAL TRANSFER PAYMENTS OF THE FINAL RULE
[2019$ millions]

| Cohort | <1 | | 1–2 Years | | 2–3 Years | | | Total |
|---|---|---|---|---|---|---|---|---|
| | New | Ongoing | New | Ongoing | New | Ongoing | Ongoing + | |
| 2021 | $4 | $0 | $13 | $0 | $398 | $0 | $0 | $416 |
| 2022 | 13 | 2 | 46 | 29 | 1,495 | 782 | 0 | 2,368 |
| 2023 | 20 | 7 | 79 | 103 | 2,674 | 2,992 | 1,150 | 7,026 |
| 2024 | 26 | 11 | 101 | 178 | 3,451 | 5,356 | 4,419 | 13,542 |
| 2025 | 28 | 14 | 111 | 226 | 3,772 | 6,911 | 7,903 | 18,964 |
| 2026 | 28 | 15 | 111 | 244 | 3,772 | 7,553 | 10,201 | 21,924 |
| 2027 | 28 | 15 | 111 | 244 | 3,772 | 7,553 | 11,150 | 22,872 |
| 2028 | 28 | 15 | 111 | 244 | 3,772 | 7,553 | 11,150 | 22,872 |
| 2029 | 28 | 15 | 111 | 244 | 3,772 | 7,553 | 11,150 | 22,872 |
| 2030 | 28 | 15 | 111 | 244 | 3,772 | 7,553 | 11,150 | 22,872 |
| 10-year Total | 230 | 113 | 904 | 1,756 | 30,652 | 53,803 | 68,272 | 155,730 |

The changes in prevailing wage rates constitute a transfer payment from employers to employees. The Department estimates the total transfer over the 10-year period is $130.83 billion and $105.16 billion at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $15.34 billion and $14.97 billion at discount rates of 3 and 7 percent, respectively.

With the increases in prevailing wage levels under the final rule, some employers may decide not to hire a U.S. worker or a foreign worker on a temporary or permanent basis. The prevailing wage increase may mitigate labor arbitrage and induce some employers to train and provide more working hours to incumbent workers, resulting in no increase in employment. The Department is unable to quantify the extent to which these two factors will occur and therefore discusses them qualitatively.

The labor economics literature has a significant volume of research on the impact of wages on demand for labor. Of interest in the context of the H–1B program is the long-run own-wage elasticity of labor demand that describes how firms demand labor in response to marginal changes in wages. There is significant heterogeneity in estimates of labor demand elasticities that can depend on industry, skill-level, region, and more.[269] A commonly cited value of average long-run own-wage elasticity of labor demand is $-0.3$.[270] This would mean that a one percent increase in wage would reduce demand for labor by 0.3 percent. The average annual increase in wage transfers is anan 18.8 percent increase in wage payments,[271] which would imply a potential reduction in labor demand by 5.64 percent (18.8 * .3). It is likely that U.S. employers will pay higher wages to H–1B workers or replace them with U.S. workers to the extent that is possible. However, we can approximate that, if U.S. employers were limited in the ability to pay higher wages and did reduce demand for workers in these roles, it would reduce the transfer payment by approximately 5.64 percent. The annual average undiscounted wage transfer estimate of $15.57 billion would therefore be reduced to $14.69 billion.

Non-Quantifiable Transfer Payments

This section discusses the non-quantifiable transfer payments related to changes to the computation of the prevailing wage levels. Specifically, the Department did not quantify transfer payments associated with new certifications under the Permanent Labor Certification Program because they are expected to be *de minimis.*

The PERM programs have a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification and would have changes to wages under the final rule prevailing wage. Prior to the PERM certification, these beneficiaries are typically working under H–1B, H–1B1, and E–3 temporary visas and wage transfers for these PERM certifications are therefore already factored into our wage transfer calculations for H–1B, H–1B1, and E–3 temporary visas. Below, Exhibit 11 illustrates the percentage of PERM certifications that are on H–1B, H–1B1, or E–3 temporary visas, the percent that are not on a temporary visa and/or are not currently in the U.S. and would therefore enter on an EB–2 or EB–3 visa, and all other visa classes.

EXHIBIT 11—PERM CERTIFICATIONS BY CLASS OF ADMISSION, FY18–FY20

| Category | FY18 | FY19 | FY20 | Average percent of total |
|---|---|---|---|---|
| Not on a temporary visa/not currently residing in the United States | 10,047 | 9,841 | 9,166 | 10.1% |
| H–1B visa | 74,454 | 63,976 | 58,390 | 68.0% |
| H–1B1 visa | 109 | 81 | 83 | 0.1% |
| E–3 visa | 471 | 280 | 280 | 0.4% |

[269] For a full discussion of labor demand elasticity heterogeneity see Lichter, A., Peichl, A., & Siegloch, S. (2015). The own-wage elasticity of labor demand: A meta-regression analysis. European Economic Review, 94–119: Retrieved from: *https://www.econstor.eu/bitstream/10419/93299/1/dp7958.pdf.*

[270] This value is the best-guess in seminal work by Hamermesh, D. H. (1993). Labor Demand. Princeton University Press. Values around –0.3 have been further estimated by additional studies including in meta-analysis studies as cited in footnote 10.

[271] The average unadjusted total wages paid to employees impacted by the final rule in the FY18–FY20 datasets is $225.5 billion. The average unadjusted total wages paid to those same employees in the baseline in the FY18–FY20 datasets is $189.8 billion. This represents an 18.8 percent increase in wages. Not all of these wages are paid due to USCIS approval rates, but the wages would adjust proportionally (*i.e.,* the percentage increase would remain the same).

EXHIBIT 11—PERM CERTIFICATIONS BY CLASS OF ADMISSION, FY18–FY20—Continued

| Category | FY18 | FY19 | FY20 | Average percent of total |
|---|---|---|---|---|
| All other visa classifications* | 24,469 | 12,907 | 18,128 | 21.5% |
| Total | 109,550 | 87,085 | 86,047 | 100% |

Other visa classes include: A1/A2, L–1, F–1, A–3, B–1, C–1, TN, C–3, E–2, B–2, D–1, D–2, H–4, O–1, E–1, EWI, J–1, TPS, F–2, L–2, G–4, H–2A, G–1, G–5, H–1A, Parolee, P–1, J–2, H–3, I, M–1, R–1, O–2, M–2, P–3, O–3, VWT, TD, P–2, P–4, Q, VWB, R–2, N, S–6, T–1, V–2, T–2, K–4, U–1.

Approximately 10 percent of PERM certifications are issued annually by OFLC to foreign beneficiaries who do not currently reside in the U.S. and would enter on immigrant visas in the EB–2 or EB–3 preference category. Employment-based immigrant visa availability and corresponding wait times change regularly for different preference categories and countries. Foreign workers from countries with significant visa demand consistently experience delays, at times over a decade. Therefore, employers would not have wage obligations until, at the earliest, the very end of the 10-year analysis period, and the number of relevant certifications is a relatively small percent of all PERM certifications; the Department therefore has not included associated wage transfers in the analysis.

Benefits Discussion

This section discusses the non-quantifiable benefits related to changes to the computation of the prevailing wage levels.

The Department's increase in the prevailing wages for the four wage levels is expected to result in multiple benefits that the Department is unable to quantify but discusses qualitatively. One benefit of the final rule's increase in prevailing wages is the economic incentive to increase employee retention, training, and productivity which will increase benefits to both employers and U.S. workers. The increase in prevailing wages is expected to induce employers—particularly those using the permanent and temporary visa programs—to fill critical skill shortages, to minimize labor costs by implementing retention initiatives to reduce employee turnover, and/or to increase the number of work hours offered to similarly employed U.S. workers. Furthermore, for employers in the technology and health care sectors, this could mean using higher wages to attract and hire the industry's most productive U.S. workers and to provide them with the most advanced equipment and technologies to perform their work in the most efficient manner.

This high-wage, high-skill approach to minimizing labor costs is commonly referred to as the ''efficiency wage'' theory in labor economics—a well-established strategy that allows companies employing high-wage workers to minimize labor costs and effectively compete with companies employing low-wage workers. The efficiency wage theory supports the idea that increasing wages can lead to increased labor productivity because workers feel more motivated to work at higher wage levels. Where these jobs offer wages that are significantly higher than the wages and working conditions of alternative jobs, workers will have a greater incentive to be loyal to the company, impress their supervisors with the quality of their work, and exert an effort that involves no shirking. Thus, if employers increase wages, some, or even all, of the higher wage costs can be recouped through increased staff retention, lower costs of supervision, and higher labor productivity.

Strengthening prevailing wages will also help promote and protect jobs for American workers. By ensuring that the employment of any foreign worker is commensurate with the wages paid to similarly employed U.S. workers, the Department will be protecting the types of white-collar, middle-class jobs that are critical to ensuring the economic viability of communities throughout the country.

There is some evidence that the existing prevailing wage levels offer opportunities to use lower-cost alternatives to U.S. workers doing similar jobs by offering at the two wage levels below the median wage. For example, in FY 2019, 60 percent of H–1B workers were placed at either the first or second wage level, meaning a substantial majority of workers in the program could be paid wages well below the median wage for their occupational classification.[272] By setting the Level I wage level at the 35th percentile, employers using the H–1B and PERM programs will have less of an incentive to replace U.S. workers doing similar jobs at lower wage rates when there are available U.S. workers. This will increase earnings and standards of living for U.S. workers. It also will level the playing field by reducing incentives to replace similarly employed U.S. workers with a low-cost foreign alternative.

In addition, because workers with greater skills tend to be more productive, and as a result can command higher wages, raising the prevailing wage levels will lead to the limited number of H–1B visas going to higher-skilled foreign workers, which will likely increase the spillover economic benefits associated with high-skilled immigration.

Finally, ensuring that skilled occupations are not performed at below-market wage rates by foreign workers will provide greater incentives for firms to expand education and job training programs. These programs can attract and develop the skills of a younger generation of U.S. workers to enter occupations that currently rely on elevated levels of foreign workers.

4. Summary of the Analysis

Exhibit 12 below summarizes the costs and transfer payments of the final rule. The Department estimates the annualized cost of the final rule at $2.90 million and the annualized transfer payments (from H–1B, H–1B1, and E–3 employers to workers) at $14.97 billion, at a discount rate of 7 percent.[273] The Department did not estimate any cost savings. For the purpose of E.O. 13771, the annualized cost, when perpetuated, is $1.86 million at a discount rate of 7 percent in 2016 dollars.

[272] Costa and Hira (2020), H–1B Visas and Prevailing Wage Levels, Economic Policy Institute: Retrieved August 12, 2020 from *https://files.epi.org/pdf/186895.pdf.*

[273] The reduction of the transfer payments in this final rule compared to the IFR is likely understated due to the fact that the Department used the 90th percentile instead of the 95th percentile wage for the Level IV in analyzing the economic impact of the IFR. This resulted in underestimation of the transfer payment in the IFR.

EXHIBIT 12—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE FINAL RULE
[2019$ millions]

| Year | Costs | Transfer payments |
| --- | --- | --- |
| 2021 | $4.33 | $416 |
| 2022 | 2.46 | 2,368 |
| 2023 | 2.46 | 7,026 |
| 2024 | 2.46 | 13,542 |
| 2025 | 2.46 | 18,964 |
| 2026 | 2.46 | 21,924 |
| 2027 | 2.46 | 22,872 |
| 2028 | 2.46 | 22,872 |
| 2029 | 2.46 | 22,872 |
| 2030 | 2.46 | 22,872 |
| Undiscounted Total | 26.45 | 155,730 |
| 10-Year Total with a Discount Rate of 3% | 23.47 | 130,830 |
| 10-Year Total with a Discount Rate of 7% | 20.34 | 105,157 |
| 10-Year Average | 2.65 | 15,573 |
| Annualized with a Discount Rate of 3% | 2.75 | 15,337 |
| Annualized with a Discount Rate of 7% | 2.90 | 14,972 |
| Perpetuated Net Costs with a Discount Rate of 7% (2016$ Millions) | | 1.86 |

5. Regulatory Alternatives

The Department considered two alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately 35th percentile, the 45nd percentile, the 72nd percentile, and the 90th percentile with a transition period.

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, prevailing wages would be set for Levels I through III at the 35th, 72nd, and 90th percentile, respectively. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be easier for employers and employees to understand due to decreased complexity to matching wage tiers with position experience. A three-tiered prevailing wage structure would maintain the minimum entry-level and fully competent experience levels and simplify the intermediate level of experience by combining the current qualified and experienced distinctions. The Department prefers the chosen methodology over this alternative because the chosen four-tiered prevailing wage structure is likely to produce more accurate prevailing wages than a three-tiered structure due to the ability to have two intermediate wage levels. In addition, creating a three-tiered prevailing wage structure would require a statutory change.

The Department considered a second alternative that would modify the geographic levels for assigning prevailing wages for the SOC code within the current four-tiered prevailing wage structure, which ranges from local MSA or BOS areas to national, to a two-tiered geographic area structure containing only statewide or national area estimates. By assigning prevailing wages at a statewide or, where statewide averages cannot be reported by the BLS, national geographic area, this second alternative would again simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS and provide employers with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a state or regional area. This process would also reduce variability in prevailing wages within a state for the same occupations across time, making prevailing wages more consistent and uniform. However, this method would not account for wage variability that may occur within states and that can account for within-state differences in labor market dynamics, industry competitiveness, or cost of living.

The Department prefers the chosen methodology because it preserves important differences in county and regional level prevailing wages and better aligns with the statutory requirement that the prevailing wage be the wage paid in the area of employment.

The Department received one comment on the regulatory alternatives considered in the IFR. One commenter representing 23 organizations suggested that the Department consider an alternative where data from private sector compensation surveys is layered on top of BLS OES data to provide more accurate prevailing wage data for certain occupations and localities where private sector compensation surveys may have coverage.

Supplementing BLS OES data from private sector compensation surveys may result in an increased ability to quantitatively connect education, experience, or employee responsibility with wages for certain occupations and localities. However, this introduction of fidelity in certain locales and not others could lead to inconsistent treatment of wages in the same occupation in different geographic areas depending on whether prevailing wages are based on BLS OES or the private sector compensation survey. In addition, such an approach would reduce transparency of prevailing wages by introducing additional complexity in the wage determination as well as non-public data sources.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment.[274] The Chief Counsel for Advocacy of the Small Business Administration submitted

[274] See 5 U.S.C. 604.

public comment on the Initial Regulatory Flexibility Analysis (IRFA) which is addressed below.

The Department believes that this final rule will have a significant economic impact on a substantial number of small entities and therefore the Department publishes this FRFA.

1. Objectives of and Legal Basis for the Final Rule

The Department has determined that new rulemaking is needed to better protect the wages and job opportunities of U.S. workers, minimize incentives to hire foreign workers over U.S. workers on a permanent or temporary basis in the United States under the H–1B, H–1B1, and E–3 visa programs and the PERM program, and further the goals of Executive Order 13788, Buy American and Hire American. Accordingly, this final rule revises the computation of wage levels under the Department's four-tiered wage structure based on the OES wage survey administered by the BLS to ensure that wages paid to immigrant and nonimmigrant workers are commensurate with the wages of U.S. workers with comparable levels of education, experience, and levels of supervision in the occupation and area of employment.

The Department is amending its regulations at Sections 656.40 and 655.731 to reflect the methodology the Department will use to determine prevailing wages based on the BLS's OES survey for job opportunities in the H–1B and PERM programs. The revised methodology will establish the prevailing wage for Levels I through IV, respectively, at approximately the 35th percentile, the 53rd percentile, the 72nd percentile, and the 90th percentile. In addition, the final rule allows for a transition period by setting an interim year of wages at 90 percent of the above wage levels for new H–1B visas, and a three and a half year transition period of 85 percent, 90 percent, 95 percent of the above wage levels for workers on track for lawful permanent residency (LPR).

The INA assigns responsibilities to the Secretary relating to the entry and employment of certain categories of employment-based immigrants and nonimmigrants. This rule relates to the labor certifications that the Secretary issues for certain employment-based immigrants and to the LCAs that the Secretary certifies in connection with the temporary employment of foreign workers under the H–1B, H–1B1, and E–3 visa classifications.[275] The Department has a statutory mandate to protect the wages and working conditions of similarly employed U.S. workers from adverse effects caused by the employment of foreign workers in the U.S. on a permanent or temporary basis.

2. The Agency's Response to Public Comments

The Department did not receive public comment on the IRFA.

3. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

The Department received a comment on the IRFA by the Chief Counsel for Advocacy of the Small Business Administration that suggested the Department underestimated the economic impacts of the IFR, and therefore underestimated the significant impacts on small entities. The comment suggested that the IFR underestimated impacts based on IFR RIA Exhibits 5 and 6 which indicated a wage increase of $4,825 to $9,651 per worker and the comment provided examples from the Department's online wage library showing examples of higher wage increases.

IFR RIA Exhibit 5 and Exhibit 6 contain illustrative wage data for a particular SOC-code and area in BLS OES and do not reflect the average impact of the IFR. They instead serve the purpose of illustrating the Department's wage impact calculations. Wage increases vary by SOC code and geographic area and therefore can be higher than these examples. The analysis for the IFR estimated that workers facing a wage increase (*i.e.,* those that were offered less under the baseline than required by the IFR) had an average increase of approximately $27,000.

Under the final rule the Department revises its wage tier estimates so that wages will be transitioned over a period of two to three and a half years reducing impacts in some years. In addition, the final wage levels (after transition) will be set at lower percentiles than the IFR resulting in reduced wage obligations from the IFR, therefore reducing impacts on small businesses. Finally, Department wage estimates are based on DOL H–1B disclosure data. However, USCIS does not approve all certifications contained in the disclosure data. As a result, the estimated wage obligations for some small entities may be overestimated, and the overall number of impacted small entities at all levels of impact may be overestimated.

4. Description of the Number of Small Entities to Which the Final Rule Will Apply

i. Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by SBA, in effect as of August 19, 2019, to classify entities as small.[276] SBA establishes separate standards for individual 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets (small defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[277]

ii. Number of Small Entities

[275] *See* 8 U.S.C. 1101(a)(5), 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1182(n), 1182(t)(1), 1184(c).

[276] Small Business Administration *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[277] See *http://www.sba.gov/advocacy/regulatoryflexibility-act* for details.

The Department collected employment and annual revenue data from the business information provider Data Axle and merged those data into the H–1B, H–1B1, and E–3 visa program disclosure data (H–1B disclosure data) for FY 2019.[278] This process allowed the Department to identify the number and type of small entities using the H–1B program and their annual revenues. A single employer can apply for H–1B workers multiple times; therefore, unique employers were identified. The Department was able to obtain data matches for 34,203 unique H–1B employers. Next, the Department used the SBA size standards to classify 26,354 of these employers (or 77.1 percent) as small.[279] These unique small employers had an average of 75 employees and average annual revenue of approximately $18.61 million. Of these unique employers, 22,430 of them had revenue data available from Data Axle. The Department's analysis of the impact of this final rule on small entities is based on the number of small unique employers (22,430 with revenue data).

To provide clarity on the types of industries impacted by this regulation, Exhibit 13 shows the number of unique H–1B small entity employers with certifications in FY 2019 within the top 10 most prevalent industries at the 6-digit and 4-digit NAICS code level. Depending on when their employment period starts and the length of the employment period (up to 3 years), small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023.

EXHIBIT 13—NUMBER OF H–1B AND PERM SMALL EMPLOYERS BY NAICS CODE

| | Description | Number of employers | | | | | |
|---|---|---|---|---|---|---|---|
| | | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
| 6-Digit NAICS: | | | | | | | |
| 511210 | Software Publishers | 435 (12%) | 1,570 (6%) | 1,577 (6%) | 1,555 (6%) | 1,463 (6%) | 119 (14%) |
| 541511 | Custom Computer Programming Services. | 394 (11%) | 1,149 (4%) | 1,155 (4%) | 1,141 (5%) | 1,072 (5%) | 95 (11%) |
| 621111 | Offices of Physicians (except Mental Health Specialists). | 132 (4%) | 1,091 (4%) | 1,097 (4%) | 1,081 (4%) | 998 (4%) | 36 (4%) |
| 541330 | Engineering Services | 90 (3%) | 973 (4%) | 979 (4%) | 965 (4%) | 910 (4%) | 13 (1%) |
| 611310 | Colleges, Universities, and Professional Schools. | 106 (3%) | 639 (2%) | 644 (2%) | 627 (2%) | 588 (3%) | 35 (4%) |
| 541110 | Offices of Lawyers | 60 (2%) | 606 (2%) | 606 (2%) | 596 (2%) | 548 (2%) | 13 (1%) |
| 611110 | Elementary and Secondary Schools | 43 (1%) | 625 (2%) | 621 (2%) | 577 (2%) | 508 (2%) | 10 (1%) |
| 541310 | Architectural Services | 23 (1%) | 501 (2%) | 503 (2%) | 499 (2%) | 464 (2%) | 1 (0%) |
| 541714 | Research and Development in Biotechnology (except Nanobiotechnology). | 49 (1%) | 444 (2%) | 445 (2%) | 435 (2%) | 405 (2%) | 13 (1%) |
| 541614 | Process, Physical Distribution, and Logistics Consulting Services. | 87 (2%) | 394 (2%) | 399 (2%) | 392 (2%) | 368 (2%) | 25 (3%) |
| Other NAICS | | 2,090 (60%) | 1,7692 (69%) | 17,755 (69%) | 17,347 (69%) | 15,755 (68%) | 513 (59%) |
| 4-Digit NAICS: | | | | | | | |
| 5112 | Software Publishers | 435 (12%) | 1,570 (6%) | 1,577 (6%) | 1,555 (6%) | 1,463 (6%) | 119 (14%) |
| 5413 | Architectural, Engineering, and Related Services. | 121 (3%) | 1,679 (7%) | 1,689 (7%) | 1,668 (7%) | 1,568 (7%) | 17 (2%) |
| 5415 | Computer Systems Design and Related Services. | 500 (14%) | 1,518 (6%) | 1,526 (6%) | 1,507 (6%) | 1,415 (6%) | 120 (14%) |
| 5416 | Management, Scientific, and Technical Consulting Services. | 300 (9%) | 1,437 (6%) | 1,448 (6%) | 1,425 (6%) | 1,313 (6%) | 59 (7%) |
| 6211 | Offices of Physicians | 132 (4%) | 1091 (4%) | 1097 (4%) | 1081 (4%) | 998 (4%) | 36 (4%) |
| 5417 | Scientific Research and Development Services. | 93 (3%) | 659 (3%) | 663 (3%) | 650 (3%) | 600 (3%) | 28 (3%) |
| 6113 | Colleges, Universities, and Professional Schools. | 106 (100%) | 639 (2%) | 644 (2%) | 627 (2%) | 588 (3%) | 35 (4%) |
| 5239 | Other Financial Investment Activities | 68 (2%) | 635 (2%) | 638 (2%) | 628 (2%) | 564 (2%) | 16 (2%) |
| 5411 | Legal Services | 61 (2%) | 614 (2%) | 614 (2%) | 604 (2%) | 555 (2%) | 13 (1%) |
| 5412 | Accounting, Tax Preparation, Bookkeeping, and Payroll Services. | 41 (1%) | 595 (2%) | 598 (2%) | 585 (2%) | 551 (2%) | 12 (1%) |
| Other NAICS | | 1,652 (47%) | 15,247 (59%) | 15,287 (59%) | 14,885 (59%) | 13,464 (58%) | 418 (48%) |

iii. Projected Impacts to Affected Small Entities

The Department has considered the incremental costs for small entities from the baseline (the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H) to this final rule. We estimated the cost of (a) the time to read and review the final rule and (b) wage costs. These estimates are consistent with those presented in the E.O. 12866 section.

The Department estimates that small entities using the H–1B program, 22,430 unique employers would incur a one-time cost of $51.93 to familiarize themselves with the rule.[280] [281]

In addition to the total first-year cost above, each small entity using the H–1B program may have an increase in annual wage costs due to the revisions to the wage structure if they currently offer a wage lower than the final rule's prevailing wage levels. For each small entity, we calculated the likely annual wage cost as the sum of the total final

[278] The PERM program has a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification. Prior to the PERM certification, these beneficiaries are typically working under H–1B, H–1B1, and E–3 temporary visas. Therefore, the Department has not included estimates for PERM employers in the IRFA, consistent with the analysis and estimates contained in the E.O. 12866 section. The Department considered PERM employers for purposes of calculating one-time costs in the E.O. 12866 section but did not consider these employers for purposes of cost transfers.

[279] Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[280] $51.93 = 1 hour × $51.93, where $51.93 = $32.58 + ($32.58 × 42%) + ($32.58 × 17%).

[281] The Department considered PERM employers for purposes of calculating one-time costs in the E.O. 12866 section.

rule wage minus the total baseline wage for each small entity identified from the H–1B disclosure data in FY 2019. We added this change in the wage costs to the total first-year costs to measure the total impact of the final rule on the small entity. Small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023, depending on when their employment period starts and the length of the employment period (up to 3 years). Because USCIS does not approve all certifications, the estimated wage obligations for some small entities may be overestimated. The Department is unable to determine which small entities had certifications approved or not approved by USCIS and therefore estimates the total wage obligation with no adjustment for USCIS approval rates. As a result, estimates of the total cost to small entities are likely to be inflated. The Department sought public comments on how to best estimate which small entities had certifications approved by USCIS but did not receive any comments that discussed a method for estimating certification approval by USCIS. Exhibit 14 presents the number of small entities with a wage impact in each year, as well as the average wage impact per small entity in each year.

EXHIBIT 14—WAGE IMPACTS ON H–1B PROGRAM SMALL ENTITIES

| Proportion of revenue impacted | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|---|
| Number of H–1B Small Entities with Wage Impacts | 2,577 | 19,948 | 20,036 | 19,679 | 18,293 | 635 |
| Average Wage Impact per Entity | $14,178 | $96,828 | $183,463 | $179,455 | $92,531 | $19,464 |

The Department determined the proportion of each small entity's total revenue affected by the costs of the final rule to determine if the final rule would have a significant and substantial impact on small entities. The cost impacts included estimated first-year costs and the wage costs introduced by the final rule. Wage costs are based on the final wage levels as these represent the largest annual impacts a small entity would face (as opposed to wage impacts during the transition to the final wage levels). The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities.

The Department has used a threshold of three percent of revenues in prior rulemakings for the definition of significant economic impact.[282] This threshold is also consistent with that sometimes used by other agencies.[283] The Department also maintains that 15 percent of small entities experiencing a significant impact represents an appropriate threshold to determine whether the rule has a substantial impact on small entities generally. The Department has used the same threshold in prior rulemakings for the definition of substantial number of small entities.[284]

Of the 22,430 unique small employers with revenue data, up to 13 percent of employers would have more than 3 percent of their total revenue affected in 2019, up to 22 percent in 2020 and 2021, and up to 16 percent in 2022. Exhibit 15 provides a breakdown of small employers by the proportion of revenue affected by the costs of the final rule.

EXHIBIT 15—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

| Proportion of revenue impacted | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|---|
| <1% | 2,689 (88%) | 16,418 (75%) | 13,286 (61%) | 13,286 (61%) | 13,705 (69%) | 699 (95%) |
| 1%–2% | 168 (6%) | 1,884 (9%) | 2,349 (11%) | 2,349 (11%) | 2,013 (10%) | 23 (3%) |
| 2%–3% | 70 (2%) | 847 (4%) | 1314 (6%) | 1314 (6%) | 1036 (5%) | 5 (1%) |
| 3%–4% | 22 (1%) | 503 (2%) | 794 (4%) | 794 (4%) | 567 (3%) | 1 (0%) |
| 4%–5% | 24 (1%) | 325 (1%) | 549 (3%) | 549 (3%) | 372 (2%) | 2 (0%) |
| >5% | 69 (2%) | 2,036 (9%) | 3,352 (15%) | 3,352 (15%) | 2,172 (11%) | 7 (1%) |
| Total >3% | 115 (4%) | 2,864 (13%) | 4,695 (22%) | 4,695 (22%) | 3,111 (16%) | 10 (1%) |

5. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

The final rule does not have any reporting, recordkeeping, or other compliance requirements impacting small entities.

6. Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

The RFA directs agencies to assess the effects that various regulatory alternatives would have on small entities and to consider ways to minimize those effects. Accordingly, the Department considered two regulatory alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately the 35th percentile, the 53rd percentile, the 72nd percentile, and the 90th percentile with a transition period.

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, the Department attempted to set the prevailing wages for Levels I through III,

[282] *See, e.g.,* 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors), 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex), and 84 FR 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H–2A Nonimmigrants in the United States).

[283] *See, e.g.,* 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

[284] *See, e.g.,* 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 84 FR 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H–2A Nonimmigrants in the United States).

respectively, at the 35th, 72nd, and 90th percentile. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be easier for small entities and their employees to understand due to decreased complexity to matching wage tiers with position experience. The Department decided not to pursue this alternative because the chosen four-tiered wage methodology is likely to be more accurate than the three-tiered wage level because it has two intermediate wage levels. In addition, creating a three-tiered wage level would require a statutory change. Although the Department recognizes that legal limitations prevent this alternative from being actionable, the Department nonetheless presents it as a regulatory alternative in accord with OMB guidance.[285]

The Department considered a second alternative that attempted to modify the geographic levels for assigning prevailing wages for the occupation from the current four-tiered structure, which ranges from local MSA or BOS areas to national, to a two-tiered structure containing statewide or national levels. By assigning prevailing wages at a statewide or national level (depending on whether statewide averages can be reported by BLS), this second alternative attempted to simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS. It would also provide small entities with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a State or regional area. The Department decided not to pursue this alternative because the chosen methodology preserves important differences in county and regional level prevailing wages, and because it would require a statutory change.

*C. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of $100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is approximately $168 million based on the Consumer Price Index for All Urban Consumers.[286]

While this final rule may result in the expenditure of more than $100 million by the private sector annually, the rulemaking is not a ''Federal mandate'' as defined for UMRA purposes.[287] The cost of obtaining prevailing wages, preparing labor condition and certification applications (including all required evidence) and the payment of wages by employers is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.[288] This final rule does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DOL has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

*D. Congressional Review Act*

The Office of Information and Regulatory Affairs, of the Office of Management and Budget, has determined that this final rule is a major rule as defined by 5 U.S.C. 804, also known as the ''Congressional Review Act,'' as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868, *et seq.*

*E. Executive Order 13132 (Federalism)*

This final rule would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*F. Executive Order 12988 (Civil Justice Reform)*

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*G. Regulatory Flexibility Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

This final rule does not have ''tribal implications'' because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

*H. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501, *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This final rule does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

**List of Subjects**

*20 CFR Part 655*

Administrative practice and procedure, Australia, Chile, Employment, Employment and training, Immigration, Labor, Migrant labor, Wages.

*20 CFR Part 656*

Administrative practice and procedure, Employment, Foreign workers, Labor, Wages.

[285] OMB Circular A–4 advises that agencies ''should discuss the statutory requirements that affect the selection of regulatory Approach. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.''

[286] *See* U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, available at https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf (last visited June 2, 2020).*

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2019 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(255.657 − 152.383)/152.383] * 100 = (103.274/152.383) * 100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded).

Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.68 = $168 million in 2019 dollars.

[287] *See* 2 U.S.C. 658(6).

[288] *See* 2 U.S.C. 658(7)(A)(ii).

**DEPARTMENT OF LABOR**

Accordingly, for the reasons stated in the preamble, the Department of Labor amends parts 655 and 656 of Chapter V, Title 20, Code of Federal Regulations, as follows:

## PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 is revised to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Public Law 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Public Law 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p), and (t), and 1184(g) and (j); sec. 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Public Law 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Public Law 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Public Law 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Amend § 655.731 by revising paragraphs (a)(2)(ii) introductory text, (a)(2)(ii)(A) introductory text, and (a)(2)(ii)(A)(*2*) to read as follows:

### § 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(a) * * *

(2) * * *

(ii) If the job opportunity is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be based on the wages of workers similarly employed as determined by the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with 20 CFR 656.40(b)(2)(i); a current wage as determined in the area under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see 29 CFR part 4); an independent authoritative source in accordance with paragraph (a)(2)(ii)(B) of this section; or another legitimate source of wage data in accordance with paragraph (a)(2)(ii)(C) of this section. If an employer uses an independent authoritative source or other legitimate source of wage data, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of this section. The prevailing wage rate shall be based on the best information available. The following prevailing wage sources may be used:

(A) *OFLC National Processing Center (NPC) determination.* The NPC shall receive and process prevailing wage determination requests in accordance with these regulations and Department guidance. Upon receipt of a written request for a PWD, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arm's length, and, if not, determine the wages of workers similarly employed using the wage component of the BLS OES and selecting an appropriate wage level in accordance with 20 CFR 656.40(b)(2)(i), unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with secs. 212(n), 212(p), and 212(t) of the INA and in a manner consistent with 20 CFR 656.40(b)(2). If an acceptable employer-provided wage survey provides an arithmetic mean then that wage shall be the prevailing wage; if an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

* * * * *

(*2*) If the employer is unable to wait for the NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the NPC, that the information relied upon produced a wage below the final PWD and the employer was not paying the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

* * * * *

## PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 3. The authority citation for part 656 is revised to read as follows:

**Authority:** 8 U.S.C. 1182(a)(5)(A), 1182(p); sec.122, Pub. L. 101–649, 109 Stat. 4978; and Title IV, Pub. L. 105–277, 112 Stat. 2681.

■ 4. Amend § 656.40 by revising paragraphs (a) and (b)(2) and (3) to read as follows:

### § 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. The NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(p) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) * * *

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers similarly employed using the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with subparagraph (b)(2)(i), unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4) of this section.

(i) The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area, which is computed and assigned at levels set commensurate with the education, experience, and level of supervision of similarly employed workers, as determined by the Department.

(ii) Except as provided under paragraph (b)(2)(iii) of this section, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(A) The Level I Wage shall be computed as the 35th percentile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(B) The Level II Wage shall be determined by first dividing the difference between Levels I and IV by three and then adding the quotient to the computed value for Level I and assigned for the most specific occupation and geographic area available.

(C) The Level III Wage shall be determined by first dividing the difference between Levels I and IV by three and then subtracting the quotient from the computed value for Level IV and assigned for the most specific occupation and geographic area available.

(D) The Level IV Wage shall be computed as the 90th percentile of the OES wage distribution and assigned for the most specific occupation and geographic area available. Where the Level IV Wage cannot be computed due to wage values exceeding the uppermost interval of the OES wage interval methodology, the OFLC Administrator shall determine the Level IV Wage using the current hourly wage rate applicable to the highest OES wage interval for the specific occupation and geographic area, or the arithmetic mean of the wages of all workers for the most specific occupation and geographic area available, whichever is highest.

(iii) Transition Wage Rates:

(A) For the period from the effective date of this rule through June 30, 2021, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(*1*) The Level I Wage shall be computed as the arithmetic mean of the lower one-third of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(*2*) The Level IV Wage shall be computed as the arithmetic mean of the upper two-thirds of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(*3*) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the Level I and Level IV values in paragraphs (b)(2)(iii)(A)(*1*) and (*2*) of this section.

(B) For the period from July 1, 2021, through June 30, 2022, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(*1*) The Level I Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(*1*) of this section, whichever is higher.

(*2*) The Level IV Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(D) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(*2*) of this section, whichever is higher.

(*3*) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(B)(*1*) and (*3*) of this section.

(C) Notwithstanding any other provision of this section, if the employer submitting the Form ETA–9035/9035E, *Labor Condition Application for Nonimmigrant Workers* and, as applicable, the Form ETA–9141, *Application for Prevailing Wage Determination,* will employ an H–1B nonimmigrant in the job opportunity subject to the *Labor Condition Application for Nonimmigrant Workers* who was, as of October 8, 2020, the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or is eligible for an extension of his or her H–1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106–313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273 (2002), and the H–1B nonimmigrant is eligible to be granted immigrant status but for application of the per country limitations applicable to immigrants under paragraphs 203(b)(1), (2), and (3) of the INA, or remains eligible for an extension of the H–1B status at the time the *Labor Condition Application for Nonimmigrant Workers* is filed:

(*1*) For the period from July 1, 2021, through June 30, 2022, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(*i*) The Level I Wage shall be 85 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(*1*) of this section, whichever is higher.

(*ii*) The Level IV Wage shall be 85 percent of the wage provided under paragraph (b)(2)(ii)(D) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(*2*) of this section, whichever is higher.

(*iii*) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(C)(*1*)(*i*) and (*ii*) of this section.

(*2*) For the period from July 1, 2022, through June 30, 2023, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(*i*) The Level I Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(C)(*1*)(*i*) of this section, whichever is higher.

(*ii*) The Level IV Wage shall be 90 percent of the wage established under paragraph (b)(2)(ii)(D) of this section, or the wage established under paragraph (b)(2)(iii)(C)(*1*)(*ii*) of this section, whichever is higher.

(*iii*) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(C)(*2*)(*i*) and (*ii*) of this section.

(*3*) For the period from July 1, 2023, through June 30, 2024, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(*i*) The Level I Wage shall be 95 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(C)(*2*)(*i*) of this section, whichever is higher.

(*ii*) The Level IV Wage shall be 95 percent of the wage provided under paragraph (b)(2)(ii)(D) of this section, or the wage provided under paragraph (b)(2)(iii)(C)(*2*)(*ii*) of this section, whichever is higher.

(*iii*) The Level II Wage and III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(C)(3)(*i*) and (*ii*) of this section.

(*4*) Beginning July 1, 2024, the prevailing wage shall be provided by the OFLC Administrator in accordance with the computations under paragraph (b)(2)(ii) of this section.

(*5*) Where the Level I Wage or Level IV Wage provided under paragraphs (b)(2)(iii)(C)(*1*) through (*3*) of this section exceeds the Level I Wage or Level IV Wage provided under paragraph (b)(2)(ii) of this section in a given period, the Level I Wage or Level IV Wage for that period shall be the wage provided under paragraph (b)(2)(ii), and the Level II Wage and Level III Wage for that period shall be adjusted by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section.

(D) Where a Level IV Wage provided under paragraph (b)(2)(iii) of this section cannot be computed due to wage values exceeding the uppermost interval of the OES wage interval methodology, the OFLC Administrator shall determine the Level IV Wage using the current hourly wage rate applicable to the highest OES wage interval for the specific occupation and geographic area or the arithmetic mean of the wages of all workers for the most specific occupation and geographic area available, whichever is highest.

(iv) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage levels under paragraphs (b)(2)(ii) and (iii) of this section as a notice posted on the OFLC website.

(3) If the employer provides a survey acceptable under paragraph (g) of this section, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment. If an otherwise acceptable survey provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

* * * * *

Signed in Washington, DC.

**John P. Pallasch,**

*Assistant Secretary for Employment and Training, Labor.*

[FR Doc. 2021–00218 Filed 1–13–21; 8:45 am]

BILLING CODE P

# FEDERAL REGISTER


Vol. 86 Thursday,

No. 9 January 14, 2021


Part V

## Department of Defense

## General Services Administration

## National Aeronautics and Space Administration

48 CFR Chapter 1

Federal Acquisition Regulations; Final Rules

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**[Docket No. FAR–2020–0051, Sequence No. 8]**

## Federal Acquisition Regulation; Federal Acquisition Circular 2021–03; Introduction

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of final rules.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2021–03. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

**DATES:** For effective dates see the separate documents, which follow.

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below in relation to the FAR case. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

RULES LISTED IN FAC 2021–03

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| I | Violations of Arms Control Treaties or Agreements with the United States | 2017–018 | Jackson. |
| II | Lowest Price Technically Acceptable Source Selection Process | 2018–016 | Jackson. |
| III | Individual Sureties | 2017–003 | Delgado. |
| IV | Technical Amendments. | | |

**ADDRESSES:** The FAC, including the SECG, is available via the internet at *https://www.regulations.gov.*

**SUPPLEMENTARY INFORMATION:** Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2021–03 amends the FAR as follows:

### Item I—Violations of Arms Control Treaties or Agreements With the United States (FAR Case 2017–018)

This final rule adopts as final with changes, an interim rule published on June 15, 2018. The interim rule amended the FAR to implement 22 U.S.C. 2593e, as added by section 1290 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). The final rule makes technical edits clarifying the suspension and debarment remedies for determination of a false certification pursuant to 22 U.S.C. 2593e, and other minor edits.

### Item II—Lowest Price Technically Acceptable Source Selection Process (FAR Case 2018–016)

This final rule amends the FAR to implement section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. Specifically, this rule amends: (1) FAR part 15 to specify the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation, and require solicitations predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable; and (2) FAR parts 12, 13, 16, and 37 to point to the text in FAR part 15, as applicable.

### Item III—Individual Sureties (FAR Case 2017–003)

This final rule changes the kind of assets that an individual surety must pledge as security for an individual surety bond. A pledge of assets must consist only of eligible obligations, *i.e.,* public debt obligations of the United States Government. The rule implements section 874 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), codified at 31 U.S.C. 9310, Individual Sureties.

This final rule will not have a significant economic impact on a substantial number of small entities.

### Item IV—Technical Amendments

Editorial changes are made at FAR 2.101, 15.209, 17.502–1, 37.103, 52.212–3, 52.212–5, 52.213–4, 52.222–18, 52.223–3, 52.225–2, 52.225–4, 52.225–6, 52.225–9, 52.225–13, and 52.229–12.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

Federal Acquisition Circular (FAC) 2021–03 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2021–03 is effective January 14, 2021 except for Items I through IV, which are effective February 16, 2021.

Linda W. Neilson,

*Director, Defense Acquisition Regulations System, Department of Defense.*

William F. Clark,

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

William G. Roets, II,

*Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.*

[FR Doc. 2020–29085 Filed 1–13–21; 8:45 am]

**BILLING CODE 6820–EP–P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 9 and 52**

**[FAC 2021–03; FAR Case 2017–018; Item I; Docket No. FAR–2017–0018; Sequence No. 1]**

**RIN 9000–AN57**

## Federal Acquisition Regulation: Violations of Arms Control Treaties or Agreements With the United States

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are adopting as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses measures against persons involved in activities that violate arms control treaties or agreements with the United States.

**DATES:** *Effective:* February 16, 2021.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or *michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2021–03, FAR Case 2017–018.

**SUPPLEMENTARY INFORMATION:**

### I. Background

DoD, GSA, and NASA issued an interim rule at 83 FR 28145 on June 15, 2018, to implement 22 U.S.C. 2593e, as added by section 1290 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). 22 U.S.C. 2593e addresses measures against persons involved in activities that violate arms control treaties or agreements with the United States and applicable remedies for determining that a person has submitted a false certification regarding such activities. One respondent submitted comments on the interim rule.

### II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes to the rule as a result of those comments are provided as follows:

*A. Summary of Changes*

The final rule:

1. Clarifies, at FAR 9.405, the effect of an ineligibility determination under 22 U.S.C. 2593e. Conforming changes are made at FAR 9.400(b) and 9.405–2(a).

2. Enumerates causes of suspension and debarment at FAR 9.406–2(b)(1)(vii) and 9.407–2(a)(9).

3. Clarifies at FAR 9.406–4(a)(1)(iii) that the minimum period of debarment of not less than two years, as statutorily mandated by 22 U.S.C. 2593e, for violation of arms control treaties or agreements with the United States is inclusive of any suspension period, if suspension precedes the debarment per FAR 9.406–4(a)(2). A conforming change is also made at FAR 9.109–4(d).

4. Corrects the threshold at FAR 52.209–13 regarding application of the certification requirement.

*B. Analysis of Public Comments*

1. Causes for suspension and debarment.

*Comment:* The respondent recommended addition of new causes to the lists of causes for debarment and suspension at FAR 9.406–2 and 9.407–2, respectively, to include determination of a false certification regarding violations of arms control treaties or agreements with the United States under FAR 52.209–13.

*Response:* The Councils have added the causes at FAR 9.406–2(b)(1)(vii) and 9.407–2(a)(9), as recommended. This change is in line with FAR 9.109–4(d) and reflects statutory remedies under 22 U.S.C. 2593e.

2. Period of debarment.

*Comment:* The respondent recommended that FAR 9.406–4(a)(1)(iii) should also specify that the statutory requirement for the 2-year minimum debarment period is inclusive of a suspension period, if suspension precedes a debarment. This is consistent with FAR 9.406–4(a)(2), which states that if suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

The respondent also recommended changing the reference in this paragraph from ''9.109–4(d)'' to the newly proposed ''9.406–2(b)(1)(vii)'', because any suspension or debarment resulting from determination of a false certification under FAR 52.209–13 will be pursued under FAR subpart 9.4.

*Response:* The Councils are making the changes to FAR 9.406–4(a)(1)(iii) as recommended by the respondent. Suspension as a remedy for determination of a false certification under FAR 52.209–13 continues to follow FAR 9.407–4(b), which limits the maximum period of suspension to 18 months.

3. Certification by the offeror.

*Comment:* The respondent recommended an edit to FAR 9.109–4(d) to refer more broadly to FAR subpart 9.4, rather than specifying ''subject to procedures set forth in subpart 9.4 (including 9.406–1 and 9.407–1)''. The respondent was concerned that the reference to ''procedures'' set forth in FAR subpart 9.4 might be too narrowly interpreted as only applying to the ''Procedures'' subheading titles of FAR 9.406–3 and 9.407–3.

*Response:* The Councils are removing ''the procedures'' language to have FAR 9.109–4(d) refer generally to subpart 9.4.

4. Effect of listing.

*Comment:* The respondent commented that the change to FAR 9.405(b) in the interim rule was unnecessary, because FAR 9.405(b) already states that contractors included in System for Award Management (SAM) exclusions as being ineligible on the basis of statutory procedures are excluded under the conditions and period set forth in the regulation. Specific statutory prohibitions that are not issued under FAR subpart 9.4 procedures to date have not been incorporated into FAR subpart 9.4, and the scope of those debarments are not specifically addressed in FAR section 9.405. The respondent further recommended that if the interim rule revisions to FAR 9.405 are retained, then the provisions should be edited to mirror the statutory language, which also prohibits agencies from entering into and renewing contracts with these entities.

*Response:* The Councils decided to retain the language at FAR 9.405 and adopted the respondent's change by adding ''enter into'' and ''renew''. Also, the Councils adopted the respondent's recommendation to break out the paragraph by adding a new paragraph (c).

### III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

Consistent with 41 U.S.C. 1905—1907, the interim rule did not apply the certification required by 22 U.S.C. 2593e to contracts at or below the simplified acquisition threshold (SAT), or to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. However, when acquiring products or services, the Government is still prohibited from contracting with entities listed as excluded in the SAM. Similarly, this final rule does not affect the applicability of the certification required by 22 U.S.C. 2593e, as implemented in FAR 52.209–13, to contracts at or below the SAT, or to contracts for the acquisition of commercial items, including COTS items.

**IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**V. Executive Order 13771**

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

**VI. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule is necessary to implement changes to the interim rule published at 83 FR 28145. The interim rule amended the FAR to implement section 1290 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). The objective of this rule is to provide a response to public comments on the interim rule by clarifying the suspension and debarment remedies for determination of a false certification under 22 U.S.C. 2593e. In addition to the aforementioned, this final rule makes some other technical corrections to the interim rule.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This final rule makes changes to the interim rule published at 83 FR 28145 on June 15, 2018. The objective of this rule is to provide a response to public comments on the interim rule by clarifying the suspension and debarment remedies for determination of a false certification under 22 U.S.C. 2593e, specifically those related to suspension and debarment under FAR subpart 9.4. No significant issues were raised by public comments in response to the initial regulatory flexibility analysis.

Using FPDS data for FY 2017, 2018, and 2019, this rule applies to 19,511 small entities. Of this number, an average of 6,504 small entities annually are required to fill out the certification.

This final rule requires certification from each offeror that submits an offer in response to a Government solicitation that exceeds the simplified acquisition threshold and is not for the acquisition of a commercial item, including COTS items.

Estimated burden hours are 11,106 hours per year for the first certification by an average of 6,504 small entities. The final rule adds determination of a false certification under FAR 52.209–13 as an enumerated cause for both suspension and debarment. It was clear from the interim rule that cause for suspension and debarment was part of the remedy for determination of a false certification, however, the cause was not enumerated under FAR 9.407–2 and 9.406–2, respectively. This revision has no impact (or low impact) on small business entities as it provides additional clarifications without adding a new burden.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD, GSA, and NASA considered whether to apply the certification provision to contracts at or below the SAT and to the acquisition of commercial items, including COTS items, or to exempt such acquisitions in accordance with 41 U.S.C. 1905—1907. The FAR Council and the Administrator for Federal Procurement Policy did not sign determinations that the provision should apply to contracts at or below the SAT and to the acquisition of commercial items, including COTS items, thus minimizing the impact on small business to the extent permitted by law.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

**VII. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0198, titled: Violations of Arms Control Treaties or Agreements.

**List of Subjects in 48 CFR Parts 9 and 52**

Government procurement.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

Therefore, DoD, GSA, and NASA adopt the interim rule published June 15, 2018, as final with amendments to 48 CFR parts 9 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 9 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

## PART 9—CONTRACTOR QUALIFICATIONS

■ 2. Amend section 9.109–4 by—

■ a. Removing from the last sentence in paragraph (a)(1)(i) ''via the internet at'' and adding ''at'' in its place; and

■ b. Revising paragraph (d).

The revision reads as follows:

**9.109–4 Certification by the offeror.**

* * * * *

(d) Upon the determination of a false certification under 52.209–13, an offeror will be subject to such remedies as suspension or debarment under subpart 9.4, or termination of any contract resulting from the false certification. Debarments pursued as a remedy under subpart 9.4 shall be for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see 9.406–4(a)(1)(iii) and (a)(2)).

* * * * *

**9.400 [Amended]**

■ 3. Amend section 9.400 by removing from paragraph (b) ''(9.405(b))'' and adding ''(9.405)'' in its place.

■ 4. Amend section 9.405 by—

■ a. Removing the last sentence from paragraph (b);

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

■ c. Adding a new paragraph (c) to read as follows:

**9.405 Effect of listing.**

* * * * *

(c) Agencies shall not enter into, renew, or extend contracts with contractors that have been declared ineligible pursuant to 22 U.S.C. 2593e.

* * * * *

**9.405–2 [Amended]**

■ 5. Amend section 9.405–2 by removing from paragraph (a) ''9.405(b)'' and adding ''9.405'' in its place.

■ 6. Amend section 9.406–2 by adding paragraph (b)(1)(vii) to read as follows:

**9.406–2 Causes for debarment.**

* * * * *

(b) * * *

(1) * * *

(vii) Determination of a false certification under 52.209–13, Violation of Arms Control Treaties or Agreements-Certification.

* * * * *

■ 7. Amend section 9.406–4 by revising paragraph (a)(1)(iii) to read as follows:

**9.406–4 Period of debarment.**

(a) * * *

(1) * * *

(iii) Debarments under 9.406–2(b)(1)(vii) shall be for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see paragraph (a)(2) of this section).

* * * * *

■ 8. Amend section 9.407–2 by—

■ a. Redesignating paragraph (a)(9) as (a)(10); and

■ b. Adding a new paragraph (a)(9) to read as follows:

**9.407–2 Causes for suspension.**

(a) * * *

(9) Determination of a false certification under 52.209–13, Violation of Arms Control Treaties or Agreements-Certification.

* * * * *

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.209–13 by—

■ a. Revising the date of the provision;

■ b. Removing from paragraph (a) ''acquisitions below'' and adding ''acquisitions at or below'' in its place;

■ c. Removing from paragraph (b)(1)(i) ''available via the internet at'' and adding ''available at'' in its place; and

■ d. Removing from paragraph (b)(1)(ii) ''available via the internet at'' and adding ''available at'' in its place.

The revision reads as follows:

**52.209–13 Violation of Arms Control Treaties or Agreements-Certification.**

* * * * *

**Violation of Arms Control Treaties or Agreements—Certification (Feb 2021)**

* * * * *

[FR Doc. 2020–29086 Filed 1–13–21; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 12, 13, 15, 16, and 37

**[FAC 2021–03; FAR Case 2018–016; Item II; Docket No. FAR–2018–0016, Sequence No. 1]**

**RIN 9000–AN75**

## Federal Acquisition Regulation: Lowest Price Technically Acceptable Source Selection Process

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 that applies criteria for and limitations on the use of the lowest price technically acceptable source selection criteria in solicitations.

**DATES:** *Effective:* February 16, 2021.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or *Michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at (202) 501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2021–03, FAR Case 2018–016.

**SUPPLEMENTARY INFORMATION:**

### I. Background

DoD, GSA, and NASA published a proposed rule at 84 FR 52425 on October 2, 2019, to implement section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note). Section 880 specifies the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and requires solicitations predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable. Nine respondents submitted public comments in response to the proposed rule.

### II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule.

*A. Summary of Significant Changes From the Proposed Rule*

No changes were made to the final rule as a result of public comments. Minor edits were made to the final rule to account for baseline updates and to add the full name of the applicable statute. A discussion of the comments is provided as follows:

*B. Analysis of Public Comments*

*Comment:* Respondents expressed support for the rule and advised that the rule is beneficial to the small business community and provides them with a greater opportunity to compete in the Federal marketplace.

*Response:* The Councils acknowledge support for the rule.

*Comment:* Respondents expressed support for using the LPTA source selection process, when its use is appropriate and the selection criteria can be well-defined.

*Response:* The Councils agree that use of the LPTA source selection process is a valuable part of the best value continuum and an acceptable and appropriate source selection approach for many acquisitions.

*Comment:* Respondents expressed concern that the rule will be considered a complete ban on the use of the LPTA source selection process. A respondent is specifically concerned that the use of the LPTA source selection process is prohibited for a significant number of information technology (IT) supplies and services that can be appropriately purchased using the process. As a result, the respondent recommends that the rule not be implemented, or be revised to narrow the scope of IT products and services to which the rule applies, because the rule, as proposed, will result in increased acquisition lead times and higher prices without a corresponding increase in quality of services.

*Response:* It is not the intent of the rule to prohibit the use of the LPTA source selection process. Instead, the intent of the rule is to implement the statutory language, which aims to identify circumstances that must exist for an acquisition to use the LPTA source selection process and certain types of requirements that will regularly benefit from the use of tradeoff source selection procedures. Specifically, section 880 requires use of the LPTA source selection process to be avoided, to the maximum extent practicable, in acquisitions for various services and/or supplies, including acquisitions for ''information technology services'' or ''telecommunications devices and services.'' The statute does not further define or narrow these categories; as such, the rule implements the law, as written. With the exception of telecommunications devices, the rule does not preclude buying IT supplies on an LPTA basis.

*Comment:* Respondents recommended that sections 813, 822, and 880, to the maximum extent practicable, be harmonized in the FAR and the DoD-unique requirements be addressed in the Defense Federal Acquisition Regulation Supplement (DFARS). Another respondent recommended revising the proposed FAR rule text to add cross-references to the DFARS, when DoD-unique requirements exist, in order to avoid confusion for individuals that are unaware of the DFARS requirements.

*Response:* The intent of this rule is to implement section 880 of the NDAA for FY 2019 in the FAR. Sections 813 of the NDAA for FY 2017 and 822 of the NDAA for FY 2018, which prescribe limitations on the use of the LPTA source selection process for DoD, are implemented in the DFARS. These statutes, as codified, are similar, but not identical, in text. As such, the statutes are implemented separately, and in their entirety, in the FAR and DFARS, respectively, in order to provide contracting officers with a single, complete, clear, and uniform policy on the use of the LPTA source selection process, as it applies to their agency. Contracting officers are responsible for being aware of and complying with acquisition policies and procedures, including the FAR and other applicable agency regulations; therefore, it is not necessary to make cross-references to agency supplements in the FAR.

*Comment:* Respondents asserted that section 880(c) applies to DoD because the term ''executive agencies'' does not appear in that paragraph of the statute; as such, the DoD should also be excluded from using the LPTA source selection process to acquire health care services and records and telecommunications devices and services, as directed in section 880(c). Respondents advised that because section 813, as amended by section 822, existed at the time section 880 was written, it is the intent of section 880 to clarify and/or add to the limitations of section 813, which apply only to DoD.

*Response:* Section 813 (Pub. L. 114–328, enacted December 23, 2016) and section 822 (Pub. L. 115–91, enacted December 12, 2017) apply to DoD and are codified at 10 U.S.C. 2305 note. Section 880 (Pub. L. 115–132, enacted August 13, 2018) applies to executive agencies, other than DoD, and is codified at 41 U.S.C. 3701 note. The text of sections 813 and 822 are implemented in the DFARS as they currently appear in law. 10 U.S.C. 2305 note has not been revised, via subsequent legislation, to amend the list of procurements for which the use of LPTA should be avoided to the maximum extent practicable.

*Comment:* A respondent suggested that future Federal acquisition guidance emphasize the importance of effectively conveying clear technical and performance requirements.

*Response:* The Councils agree that it is important to clearly identify and communicate the functional, performance, and physical requirements of a supply or service being acquired by an agency. To facilitate this goal, guidance, tools, and training are available to acquisition personnel on a variety of acquisition topics (*e.g.,* market research techniques, describing agency needs, and encouraging competition) to support the requirements outlined in the FAR. Additionally, agencies have internal controls and procedures to monitor and evaluate contract performance and compliance.

*Comment:* A respondent advised on the importance of robust oversight of contract performance when services are provided on a contract awarded using the LPTA source selection process.

*Response:* The Councils agree that it is essential to exercise appropriate and adequate oversight of contractor performance on all contracts. Contracting officers are responsible for ensuring compliance with the terms of the contract, while safeguarding the interests of the United States in its contractual relationships. In addition, agencies are required to establish effective management practices to monitor and evaluate contract performance and compliance, and prevent fraud, waste, and abuse in service contracting.

*Comment:* A respondent recommended establishing adequate monitoring systems to ensure LPTA is applied appropriately and only when the requirements of a contract meet the rule's criteria. The respondent also suggested that public accountability should be established, possibly through the System for Award Management (SAM) at SAM.gov contract opportunities notice, when a contracting officer uses the LPTA source selection process.

*Response:* Contracting officers are responsible for ensuring that the requirements of this rule are met when issuing a solicitation that includes the LPTA source selection process. Agencies have internal controls and procedures to monitor and evaluate their compliance with acquisition rules, regulations, and policies. To maintain public accountability, the respondent suggests that agencies publish the LPTA determination in the SAM.gov contract opportunities notice. However, section 880 does not require public notice or publication of the documented determination to use LPTA source selection criteria, and the Councils do not believe additional oversight protocols are required at this time.

*Comment:* A respondent expressed concern that the rule is not being applied to the GSA Federal Supply Schedules (FSS) Program and recommends aligning the Program with the rule to avoid inconsistent application and use of LTPA source selection criteria across the Federal and contractor communities when placing orders under FSS contracts.

*Response:* GSA will separately address, outside of this rule, the applicability of section 880 to the GSA FSS Program.

*Comment:* A respondent advised against using LPTA source selection criteria in solicitations for multiple award IT supply contracts that require contractors to bid on a notional supply list. The respondent advised that this approach leads to unrealistically low-priced offers for the items on the initial supply list, but substantially higher-priced offers for supplies added to the contracts or refreshed after contract award. As a result, the Government does not realize the cost savings that is implied during the initial contract award.

*Response:* Contracting officers are responsible for ensuring that the requirements of this rule are met when issuing a solicitation that includes the LPTA source selection process. Section 880 does not prohibit the use of the LPTA source selection process when issuing multiple-award indefinite-delivery, indefinite-quantity contracts. Section 880 does require contracting officers to avoid, to the maximum extent practicable, using the LPTA source selection process in the case of a procurement that is predominantly for the acquisition of telecommunications devices and services. The rule reflects this statutory requirement.

In addition, contracting officers consider price or cost when issuing or modifying multiple-award indefinite-delivery indefinite-quantity supply contracts, or placing orders under these contracts in accordance with FAR subpart 16.5. When issuing or modifying these contracts, contracting officers must evaluate the reasonableness of the offered prices, in accordance with the procedures of FAR part 13 or 15, as applicable. When placing orders under these contracts, FAR subpart 16.5 requires contracting officers to consider price or cost as part of their selection decision for each order. These procedures help to ensure that the contracted price and the price paid under each order is fair and reasonable to the Government.

*Comment:* One respondent recommended that the DoD budget be reduced by 30%.

*Response:* This comment is outside the scope of this rule.

## III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This final rule does not create any new provisions or clauses, nor does it change the applicability or burden of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT, or for commercial items, including COTS items.

## IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

## VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule is necessary to implement section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). The objective of this rule is to avoid the use of lowest price technically acceptable (LPTA) source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process. No public comments were received in response to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The rule primarily affects internal Government requirements determination decisions, acquisition strategy decisions, and contract file documentation requirements. The Government does not collect data on the total number of solicitations issued on an annual basis that do or do not specify the use of the LPTA source selection process. However, the Federal Procurement Data System (FPDS) provides the following information for FY 2018:

• Federal competitive contracts and orders awarded using FAR parts 13, 15, or subpart 16.5 procedures. In FY 2018, the Federal Government, excluding DoD, awarded approximately 82,337 new contracts and orders using the competitive procedures of FAR parts 13, 15, or subpart 16.5. This data excludes acquisitions for the supply/service categories identified in section 880(c) of the NDAA for FY 2019. Of the 82,337 contracts and orders, approximately 69 percent (or 56,622 contracts and orders) were awarded to approximately 27,029 unique small businesses. It is important to note that FPDS does not collect data on solicitations. FPDS can identify contracts that are awarded using competitive procedures, but did not begin collecting data on the source selection process used to award those contracts until 2020. Therefore, the data described above represents all competitively awarded contracts, including those using other than the LPTA source selection process.

• Federal competitive contracts and orders awarded for specific services and supplies. In FY 2018, the Federal Government, excluding DoD, awarded approximately 22,581 new contracts and orders potentially for the supplies and services identified in section 880(c) of the NDAA for FY 2019 using the competitive procedures of FAR parts 13, 15, and subpart 16.5, of which approximately 63 percent (or 14,285 contracts and orders) were awarded to approximately 10,129 unique small businesses.

This rule does not include any new reporting, recordkeeping, or other compliance requirements on any small entities.

There are no known significant alternative approaches to the rule that would meet the stated objectives of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## List of Subjects in 48 CFR Parts 12, 13, 15, 16, and 37

Government procurement.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 15, 16 and 37 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 15, 16 and 37 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

## PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Revise section 12.203 by redesignating the text as paragraph (a) and adding paragraph (b) to read as follows:

### 12.203 Procedures for solicitation, evaluation, and award.

* * * * *

(b) Contracting officers shall ensure the criteria at 15.101–2(c) are met when using the lowest price technically acceptable source selection process.

## PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Amend section 13.106–1 by adding paragraphs (a)(2)(v) and (a)(2)(vi) to read as follows:

### 13.106–1 Soliciting competition.

(a) * * *

(2) * * *

(v) Except for DoD, contracting officers shall ensure the criteria at 15.101–2(c)(1)–(5) are met when using the lowest price technically acceptable source selection process.

(vi) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101–2(d).

* * * * *

■ 4. Amend section 13.106–3 by—

■ a. In paragraph (b)(3) introductory text, removing ''statements—'' and adding ''statements, when applicable— '' in its place;

■ b. In paragraph (b)(3)(i), removing ''; or'' and adding '';'' in its place;
■ c. In paragraph (b)(3)(ii), removing ''supplier.'' and adding ''supplier; and''
■ d. Adding paragraph (b)(3)(iii).

The addition reads as follows:

**13.106–3 Award and documentation.**

* * * * *

(b) * * *

(3) * * *

(iii) Except for DoD, when using lowest price technically acceptable source selection process, justifying the use of such process.

* * * * *

## PART 15—CONTRACTING BY NEGOTIATION

■ 5. Amend section 15.101–2 by adding paragraphs (c) and (d) to read as follows:

**15.101–2 Lowest price technically acceptable source selection process.**

* * * * *

(c) Except for DoD, in accordance with section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note), the lowest price technically acceptable source selection process shall only be used when—

(1) The agency can comprehensively and clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(2) The agency would realize no, or minimal, value from a proposal that exceeds the minimum technical or performance requirements;

(3) The agency believes the technical proposals will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(4) The agency has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit to the agency;

(5) The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired; and

(6) The contracting officer documents the contract file describing the circumstances that justify the use of the lowest price technically acceptable source selection process.

(d) Except for DoD, in accordance with section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominantly for the acquisition of—

(1) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;

(2) Personal protective equipment; or

(3) Knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

## PART 16—TYPES OF CONTRACTS

■ 6. Amend section 16.505 by—
■ a. Removing from the end of paragraph (b)(1)(ii) ''must—'' adding ''shall—'' in its place;
■ b. Removing from paragraph (b)(1)(ii)(D) ''contract; and'' and adding ''contract;'' in its place;
■ c. Removing from paragraph (b)(1)(ii)(E) ''decision.'' and adding ''decision;'' in its place;
■ d. Adding paragraphs (b)(1)(ii)(F) and (b)(1)(ii)(G); and
■ e. Adding paragraph (b)(7)(iii).

The additions read as follows:

**16.505 Ordering.**

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(F) Except for DoD, ensure the criteria at 15.101–2(c)(1)–(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101–2(d).

* * * * *

(7) * * *

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

* * * * *

## PART 37—SERVICE CONTRACTING

■ 7. Amend section 37.102 by adding paragraph (j) to read as follows:

**37.102 Policy.**

* * * * *

(j) Except for DoD, see 15.101–2(d) for limitations on the use of the lowest price technically acceptable source selection process to acquire certain services.

[FR Doc. 2020–29087 Filed 1–13–21; 8:45 am]

BILLING CODE 6820–EP–P

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 19, 28, 32, 52, and 53

**[FAC 2021–03; FAR Case 2017–003; Item III; Docket FAR–2017–0003, Sequence No. 1]**

**RIN 9000–AN39**

## Federal Acquisition Regulation: Individual Sureties

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 to change the kinds of assets that individual sureties must pledge as security for their bonds.

**DATES:** *Effective:* February 16, 2021.

**FOR FURTHER INFORMATION CONTACT:** Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov*. Please cite FAC 2021–03, FAR Case 2017–003.

**SUPPLEMENTARY INFORMATION:**

### I. Background

DoD, GSA, and NASA published a proposed rule at 85 FR 7910 on February 12, 2020, to implement section 874 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), codified at 31 U.S.C. 9310, Individual Sureties.

FAR subpart 28.2 requires agencies to obtain adequate security for bonds when bonds are used with a contract. A corporate or individual surety is an acceptable form of security for a bond. Corporate sureties are vetted by the Department of the Treasury to ensure they are sufficiently capitalized and are listed on Department of the Treasury's Listing of Approved Sureties (Treasury Department Circular 570). Individual sureties are not listed on Treasury Department Circular 570; currently contracting officers determine if an individual surety is acceptable.

Under 31 U.S.C. 9310, when Federal law permits acceptance of a surety bond from a surety not subject to 31 U.S.C. 9305 and 9306 (*i.e.,* an individual surety that is not a corporate surety), the individual surety must pledge assets that are eligible obligations. Eligible obligations are public debt obligations of the United States Government whose principal and interest are unconditionally guaranteed by the United States Government. The requirements of 31 U.S.C. 9310 are intended to strengthen the assets pledged by individual sureties, thereby mitigating risk to the Government.

This rule requires individual sureties to support their bond obligations with stable U.S.-backed securities as specified in 31 CFR part 225 and requires the Department of the Treasury, Bureau of the Fiscal Service to review those assets to ensure they meet established eligibility requirements. This rule is expected to provide some benefit to subcontractors (adequate security in case of default), and contracting officers (easier to determine value of assets pledged), to the extent that individual surety bonds are used, but there was some concern as to whether small businesses would have a more difficult time obtaining surety bonds if fewer individual sureties were providing bonds. DoD, GSA, and NASA requested public input, specifically from subcontractors, prime contractors, and individual sureties to more fully understand the impact of this regulation on affected parties. Individual sureties and prime contractors (including small businesses) did not provide input and did not indicate any concerns with the rule. One respondent representing subcontractors and suppliers in the construction industry had positive comments about the rule (see section II.B.1. of this preamble), confirming the anticipated benefits. Several respondents expressed the view that the rule will not negatively impact the availability of bonding for small construction businesses, noting the bonding assistance of the Small Business Administration and that the standard surety market has significantly expanded in recent years, providing many and varied avenues for small businesses to obtain bonding.

Therefore, based on public comments received, DoD, GSA, and NASA have concluded that the initial assessment is correct that there is very limited use of individual sureties on Federal construction contracts and the impact of this rule is not significant, and any impact is predominantly positive.

Six respondents submitted comments on the proposed rule.

## II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule.

### *A. Summary of Significant Changes From the Proposed Rule*

There are no significant changes made to the rule as a result of the public comments. One website reference has been corrected.

### *B. Analysis of Public Comments*

Of the six responses received, most strongly supported the rule, and none provided negative comments on the rule. One respondent noted a nonfunctioning link to a website, and one provided comments of a political nature that did not address the rule.

1. Strong support for the rule.

*Comment:* Many respondents strongly supported the proposed rule. These respondents noted positive factors regarding this rule as follows:

- Protects the Government from fraud.
- Eliminates the gamesmanship by unlicensed persons acting as sureties.
- Ensures a level playing field for small businesses.
- Ensures adequate and reliable security is in place to guarantee payment to subcontractors and suppliers on Federal construction projects and protect them against default.
- Eliminates the burden on contracting officers in determining the true value of proposed assets, streamlining the procurement process.

Several respondents noted that the rule will not negatively impact the availability of bonding for small construction businesses, noting the bonding assistance of the Small Business Administration and that the standard surety market has significantly expanded in recent years, providing many and varied avenues for small businesses to obtain bonding. The rule does not eliminate individual surety bonds as an option; it just ensures that the bonds will be backed by stable and secure assets in the control of the Federal Government.

*Response:* Noted.

2. Treasury website for list of acceptable assets.

*Comment:* One respondent stated that the link to the website provided at FAR 28.203–1(a) for the Treasury list of acceptable assets entitled ''Acceptable Collateral for 31 CFR part 225'' does not work.

*Response:* The directions for accessing the website have been amended as follows: ''A list of acceptable assets entitled ''Acceptable Collateral for 31 CFR part 225'' may be accessed by going to *https://www.treasurydirect.gov/instit/statreg/collateral/collateral.htm* and clicking on ''Acceptable Collateral for 31 CFR part 225''.

## III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

Although applicability of this rule to acquisitions below the SAT will be rare, DoD, GSA, and NASA do intend to apply the requirements of this rule to solicitations for contracts valued at or below the SAT. FAR 28.102–1(b) gives an example of when a bond could be required for an acquisition under the SAT. As noted in FAR 28.102–1(b), 40 U.S.C. 3132 requires the contracting officer to select two or more payment protections for construction contracts greater than $35,000, but not greater than $150,000, one of the possible protections being a payment bond. Individual sureties may provide security for a payment bond in this situation. The FAR Council has determined that it is not in the best interest of the Government to waive the applicability of section 874 below the SAT, because the new requirement will create greater certainty of payment for subcontractors. Applying the rule below the SAT will continue the FAR uniformity in the type of assets allowed to be pledged, whether the acquisition is above or below the SAT.

Although applicability of this rule to acquisitions of commercial items will be rare, DoD, GSA, and NASA do intend to apply the requirements of this rule to solicitations for the acquisition of commercial items. FAR 28.103–1(a) states that ''Generally, agencies shall not require performance and payment bonds for other than construction contracts.'' However, performance and payment bonds may be used for other than construction contracts as permitted in FAR 28.103–2 and 28.103–3.

The FAR Council has determined that it is not in the best interest of the Government to waive the applicability of section 874 to acquisitions of commercial items because the new requirement will create greater certainty of payment for subcontractors. Applying the rule to the acquisition of commercial items will continue the FAR uniformity in the type of assets allowed to be pledged, whether the acquisition is for the acquisition of commercial or other than commercial items.

**IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a not a significant regulatory action and therefore, this rule was not subject to the review of the Office of Information and Regulatory Affairs under section 6(b) of E.O. 12866. This rule is not a major rule under 5 U.S.C. 804.

**V. Executive Order 13771**

This rule is not subject to E.O. 13771, because this rule is not significant under E.O. 12866.

**VI. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This FAR rule changes the kinds of assets that individual sureties must pledge as security for their individual surety bonds. The objective of the FAR rule is to implement section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016 (FY 2016) (Pub. L. 114–92), which adds 31 U.S.C. 9310, Individual sureties, and limits the security for an individual surety bond to eligible obligations, *i.e.,* cash and/or Government obligations. This section was intended to strengthen coverage for individual sureties, thereby mitigating risk to the Government.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The final rule applies to all offerors and contractors who wish to use an individual surety as security for bonds required under a solicitation or contract for supplies or services (including construction). The number of solicitations and contracts requiring the submission of bid guarantees, performance bonds, or payment bonds, correlates roughly to the number of contract awards containing FAR clause 52.228–11, Pledge of Assets. Based on FY 2017 data contained in the Electronic Document Access system (DoD official contract file system), 8,603 DoD contract awards, containing FAR clause 52.228–11 with an obligated amount of over $35,000, were made to 1,990 unique vendors; of these 1,672 were small business entities. These contractors could be using corporate sureties under 28.202, individual sureties under 28.203, or pledging the contractor's own assets under 28.204; this FAR case only covers individual sureties under 28.203. Therefore, based on contracting officers' experience in the field DoD, GSA, and NASA estimate that less than 0.1 percent of contractors are using individual sureties to meet the required bonding under contracts.

This final rule does not include additional reporting or recordkeeping requirements. Although the rule creates a new provision to distinguish instructions to offerors from instructions to a contractor by relocating the ''offeror'' language from the existing FAR clause at 52.228–11, Pledge of Assets, the net effect of projected reporting and recordkeeping is unchanged. The use of Standard Form (SF) 28, Affidavit of Individual Surety, an existing reporting requirement under 52.228–11, is covered under the Office of Management and Budget (OMB) Control No. 9000–0001. The SF 28 is revised as a result of this rule. However, this will have a negligible impact on offerors, contractors, and respondents.

The effect on small business is that individual sureties will no longer be able to pledge real property, corporate stocks, corporate bonds, or irrevocable letters of credit. DoD, GSA, and NASA anticipate that some individual sureties may not want to transform their assets into the kind that qualify under the new legislation, and so there will be fewer individual sureties available to meet the needs of small business offerors and contractors. This may mean that some small businesses that have been using individual sureties will have their costs change, as they go to a different individual surety, or to a corporate surety.

There are no available alternatives to the rule to accomplish the desired objective of the statute.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities because this only applies to (1) offerors and contractors who are using an individual surety as security for bonds required under a solicitation or contract for supplies or services (including construction), and (2) individual sureties, a small number of whom may not want to transform their assets into the kind that qualify under the new legislation.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

**VII. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply; however, the changes to the FAR do not impose additional information collection requirements. This rule modifies the SF 28, which is used by all executive agencies to obtain information from individuals wishing to serve as sureties to Government bonds. However, the modification merely updates the language in the form to be consistent with the changes to the FAR text; it will have no impact on offerors or contractors.

The modification of the SF 28 does not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0001, Standard Form 28, Affidavit of Individual Surety.

**List of Subjects in 48 CFR Parts 19, 28, 32, 52, and 53**

Government procurement.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 19, 28, 32, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 28, 32, 52, and 53 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

## PART 19—SMALL BUSINESS PROGRAMS

**19.602–1 [Amended]**

■ 2. Amend section 19.602–1 by removing from paragraph (a) ''and 28.203(c))'' and adding ''and 28.203–1(e))'' in its place.

## PART 28—BONDS AND INSURANCE

**28.102–2 [Amended]**

■ 3. Amend section 28.102–2 by removing from paragraph (e) ''of 28.203–5(c)'' and adding ''of 28.203–3(c)'' in its place.

■ 4. Amend section 28.106–1 by removing paragraph (o); redesignating paragraph (p) as paragraph (o); and revising the new redesignated paragraph (o) to read as follows.

**28.106–1 Bonds and bond related forms.**

* * * * *

(o) OF 91, Release of Personal Property from Escrow (see 28.203–3).

■ 5. Amend section 28.202 by—

■ a. Revising paragraph (a)(1);

■ b. Revising the first sentence of paragraph (a)(2);
■ c. Removing from paragraph (a)(3) ''Department of the Treasury regulations'' and adding ''Department of the Treasury (Treasury) regulations'' in its place;
■ d. Removing from paragraph (a)(4) ''Standard Form 273'', ''Standard Form 274'' and ''Standard Form 275'' and adding ''Standard Form (SF) 273'', ''SF 274'', and ''SF 275'' in their places, respectively;
■ e. Revising the first sentence of paragraph (c); and
■ f. Revising paragraph (d).

The revisions read as follows:

**28.202 Acceptability of corporate sureties.**

(a)(1) Corporate sureties offered for bonds furnished with contracts performed in the United States or its outlying areas must appear on the list contained in the Department of the Treasury's Listing of Approved Sureties (Treasury Department Circular 570), ''Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies.''

(2) The penal amount of the bond should not exceed the surety's underwriting limit stated in the Treasury Department Circular 570. * * *

* * * * *

(c) Treasury issues supplements to Treasury Department Circular 570, notifying all Federal agencies of new approved corporate surety companies and the termination of the authority of any specific corporate surety to qualify as a surety on Federal bonds. * * *

(d) Treasury Department Circular 570 may be obtained from the U.S. Department of the Treasury, Bureau of the Fiscal Service, Surety Bond Branch, 3201 Pennsy Drive, Building E, Landover, MD 20785 or at *https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm.*

■ 6. Revise section 28.203 to read as follows:

**28.203 Individual sureties.**

**28.203–1 Acceptability of individual sureties.**

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. Assets pledged by an individual surety shall meet the eligibility requirements of Treasury's Bureau of the Fiscal Service. Per 31 U.S.C. 9310, individual sureties must pledge eligible obligations, which Treasury refers to as acceptable collateral or eligible collateral. A list of acceptable assets, entitled ''Acceptable Collateral for 31 CFR part 225,'' may be accessed by going to *https://www.treasurydirect.gov/instit/statreg/collateral/collateral.htm* and clicking on ''Acceptable Collateral for 31 CFR part 225''.

(b)(1) An individual surety shall execute the bond (*e.g.,* bid bond (SF 24), performance bond (SF 25), payment bond (SF 25A)).

(2) The net adjusted value of unencumbered assets is their market value minus the margin. The margin tables are available at *www.treasurydirect.gov.* The net adjusted value of unencumbered assets pledged by the individual surety must equal or exceed the penal amount (*i.e.,* face value) of each bond.

(3) The individual surety shall execute the SF 28, Affidavit of Individual Surety, and provide a security interest. One individual surety is adequate support for a bond, provided the net adjusted value of unencumbered assets pledged by that individual surety equals or exceeds the amount of the bond.

(4) An offeror or contractor may submit up to three individual sureties for each bond, in which case the net adjusted value of the pledged unencumbered assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety is jointly and severally liable to the extent of the penal amount of the bond.

(c) Using the information from the SF 28 submitted by the offeror or contractor, the contracting officer shall notify the Treasury's collateral operations support team by email at *BMT@fiscal.treasury.gov* or by phone at 888–568–7343, of the individual surety, the assets to be pledged, and the amount necessary to cover the individual surety bond, *i.e.,* the required amount to be collateralized. Treasury will advise the contracting officer whether the assets are eligible to be pledged, consistent with 28.203–1(a), and of the valuation of the assets offered to be pledged, consistent with the valuation standards in 28.203–1(b)(2). If after 3 business days the contracting officer has not received a response from Treasury, the contracting officer may seek assistance from the Director, Bank Policy and Oversight, at 202–504–3502. The contracting officer shall determine whether the individual surety bond is acceptable as to the amount necessary to cover the individual surety bond based on the asset eligibility and valuation assessment from Treasury. The contracting officer shall notify both the offeror or contractor and the individual surety of this determination.

(d) If the contracting officer determines the individual surety is acceptable, the contracting officer shall request the Treasury's collateral operations support team set up the necessary individual surety pledged asset collateral account.

(e) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable, the offeror utilizing the individual surety shall be rejected as nonresponsible, except as provided in 28.101–4. A finding of nonresponsibility based on unacceptability of an individual surety, need not be referred to the Small Business Administration for a Certificate of Competency. (See 19.602–1(a) and 61 Comp. Gen. 456 (1982).)

(f) If a contractor submits an unacceptable individual surety, or one that Treasury could not assess the asset eligibility and valuation within a reasonable time, then the contracting officer may permit the contractor to substitute an acceptable surety within a reasonable time.

(g) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the appropriate agency official in accordance with agency procedures.

**28.203–2 Substitution of assets.**

An individual surety may request the Government to accept a substitute asset for that currently pledged by submitting a written request, including a revised SF 28, to the responsible contracting officer. Following the requirements set forth in 28.203–1, the contracting officer may agree to the substitution of assets upon determining that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obligations.

**28.203–3 Release of security interest.**

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a)(1) and (2) of this section. A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release.

(1) *Contracts subject to the Bonds statute.* See section 1.110 and section

28.102–1, paragraph (a). The security interest shall be maintained for the later of—

(i) 1 year following final payment;

(ii) Until completion of any warranty period (applicable only to performance bonds); or

(iii) Pending resolution of all claims filed against the payment bond during the 1 year period following final payment.

(2) *Contracts subject to alternative payment protection.* See section 28.102–1, paragraph (b)(1). The security interest shall be maintained for the full contract performance period plus 1 year.

(3) *Other contracts not subject to the Bonds statute.* The security interest shall be maintained for 90 days following final payment or until completion of any warranty period (applicable only to performance bonds), whichever is later.

(b) Upon written request by the individual surety, the contracting officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(c) Upon written request by the individual surety, the contracting officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the contractor's obligations under its performance bond. Release of the security interest in support of a payment bond must comply with the subparagraphs (a)(1) through (3) of this section. In making this determination, the contracting officer will give consideration as to whether the unreleased portion of the security is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

### 28.203–4 Solicitation provision and contract clause.

(a) Insert the provision at 52.228–17, Individual Surety—Pledge of Assets (Bid Guarantee), in solicitations that require the submission of a bid guarantee.

(b) Insert the clause at 52.228–11, Individual Surety—Pledge of Assets, in solicitations and contracts that require the submission of performance or payment bonds.

### 28.203–5 Exclusion of individual sureties.

(a) An individual may be excluded from acting as a surety on bonds submitted by offerors on procurement by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in subpart 9.4. The exclusion shall be for the purpose of protecting the Government.

(b) An individual may be excluded for any of the following causes:

(1) Failure to fulfill the obligations under any bond.

(2) Failure to disclose all bond obligations.

(3) Misrepresentation of the value of available assets or outstanding liabilities.

(4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.

(5) Any other cause affecting responsibility as a surety of such serious and compelling nature as may be determined to warrant exclusion.

(c) An individual surety excluded pursuant to this section shall be entered as an exclusion in the System for Award Management (see 9.404).

(d) Contracting officers shall not accept the bonds of individual sureties whose names appear in an active exclusion record in the System for Award Management (see 9.404) unless the acquiring agency's head or a designee states in writing the compelling reasons justifying acceptance.

(e) An exclusion of an individual surety under this section will also preclude such party from acting as a contractor in accordance with subpart 9.4.

### 28.204 [Amended]

■ 7. Amend section 28.404 by removing from paragraph (b) ''lien in 28.203–5(c)'' and adding ''security in 28.203–3(c)'' in its place.

### 28.204–1 [Amended]

■ 8. Amend section 28.204–1 by removing from the first sentence of the text ''dated July 1, 1978''.

## PART 32—CONTRACT FINANCING

### 32.202–4 [Amended]

■ 9. Amend section 32.202–4 by removing from paragraph (c) ''28.203–2, 28.203–3, and'' and adding ''28.203 and'' in its place.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Revise section 52.228–11 to read as follows:

### 52.228–11 Individual Surety—Pledge of Assets.

As prescribed in 28.203–4(b), insert the following clause:

**Individual Surety—Pledge of Assets (Feb 2021)**

(a) The Contractor shall obtain from each person acting as an individual surety on a performance bond or a payment bond—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203–1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) The Contracting Officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the Contractor's obligations under its performance bond. The security interest in support of a performance bond shall be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding $150,000 (40 U.S.C. 3131).* Until completion of any warranty period, or for 1 year following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102–1(b)(1)).* For the full contract performance period plus 1 year.

(3) *Other contracts not subject to the requirements of paragraph (b)(1) of this clause.* Until completion of any warranty period, or for 90 days following final payment, whichever is later.

(c) A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release. The security interest on the individual surety's assets in support of a payment bond shall be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding $150,000 which require performance and payment bonds (40 U.S.C. 3131).* For 1 year following final payment, or until resolution of all pending claims filed against the payment bond during the 1-year period following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102–1(b)(1)).* For the full contract performance period plus 1 year.

(3) *Other contracts not subject to the requirements of paragraph (c)(1) of this clause.* For 90 days following final payment.

(d) The Contracting Officer may allow the Contractor to substitute an individual surety, for a performance or payment bond, after contract award. The Contractor shall comply with the requirements of paragraph (a) of this clause within the timeframe established by the Contracting Officer.

(End of clause)

■ 11. Add section 52.228–17 to read as follows:

#### 52.228–17 Individual Surety—Pledge of Assets (Bid Guarantee).

As prescribed in 28.203–4(a), insert the following provision:

**Individual Surety—Pledge of Assets (Bid Guarantee) (Feb 2021)**

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203–1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) The Offeror shall include with its offer the information required at paragraph (a) of this provision within the timeframe specified in the provision at FAR 52.228–1, Bid Guarantee, or as otherwise established by the Contracting Officer.

(c) The Contracting Officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(End of provision)

### PART 53—FORMS

#### 53.228 [Amended]

■ 12. Amend section 53.228 by—

■ a. Removing from paragraph (e) ''(Rev. 6/2003)'' and ''28.203(b).)'' and adding ''''(Rev. Feb 2021)'' and ''28.203–1(b)(3).)'' in their places, respectively;

■ b. Removing paragraph (o);

■ c. Redesignating paragraph (p) as paragraph (o); and

■ d. Removing from the newly redesignated paragraph (o) ''(See 28.106–1(p) and 28.203–5(a).)'' and adding ''(See 28.106–1(o) and 28.203–3(a).)'' in its place.

#### 53.300 [Amended]

■ 13. Amend section 53.300 by removing from the table 53–1 in paragraph (a) ''OF 90 Release of Lien on Real Property.''

[FR Doc. 2020–29088 Filed 1–13–21; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 2, 15, 17, 37 and 52

[FAC 2021–03; Item IV; Docket No. FAR–2020–0052; Sequence No. 4]

## Federal Acquisition Regulation; Technical Amendments

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make needed editorial changes.

**DATES:** *Effective:* February 16, 2021.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lois Mandell, Regulatory Secretariat Division (MVCB), at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2021–03, Technical Amendments.

**SUPPLEMENTARY INFORMATION:** In order to update certain elements in 48 CFR parts 2, 15, 17, 37, and 52 this document makes editorial changes to the FAR.

**List of Subjects in 48 CFR Parts 2, 15, 17, 37 and 52**

Government procurement.

**William F. Clark,**

*Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 15, 17, 37, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 15, 17, 37, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

### PART 2—DEFINITIONS OF WORDS AND TERMS

#### 2.101 [Amended]

■ 2. Amend section 2.101, in paragraph (b), in the definition ''*Ineligible*'' by removing from paragraph (4) ''$15,000'' and adding ''$10,000'' in its place.

### PART 15—CONTRACTING BY NEGOTIATION

■ 3. Amend section 15.209 by adding paragraph (e) to read as follows:

#### 15.209 Solicitation provisions and contract clauses.

* * * * *

(e) The contracting officer shall insert the provision at 52.215–5, Facsimile Proposals, in solicitations if facsimile proposals are authorized (see 15.203(d)).

* * * * *

### PART 17—SPECIAL CONTRACTING METHODS

#### 17.502 1 [Amended]

■ 4. Amend section 17.502–1 by—

■ a. Removing from the sixth sentence of paragraph (a)(1)(i) ''Policy'' and ''__acq/iac____'' adding ''Policy (OFPP)'' and ''__acq/iac__'' in their place; respectively; and

■ b. Removing from paragraph (b) introductory text ''Office of Federal Procurement Policy (OFPP)'' and adding ''OFPP'' in its place.

### PART 37—SERVICE CONTRACTING

#### 37.103 [Amended]

■ 5. Amend section 37.103 in paragraph (d) by removing ''42 U.S.C. 13041, as amended,'' and adding ''34 U.S.C. 20351'' in its place.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.212–3 by—

■ a. Revising the date of the provision; and

■ b. Revising paragraph (f)(2);

■ c. Revising the table in paragraph (g)(1)(ii), and the undesignated tables in (g)(1)(iii), (g)(2), and (g)(3);

■ d. Revising the tables in (g)(4) and (g)(5)(ii); and

■ e. Revising the paragraph (i)(1).

The revisions read as follows:

#### 52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

**Offeror Representations and Certifications—Commercial Items (Feb 2021)**

* * * * *

(f) * * *

(2) Foreign End Products:

| Line item No. | Country of origin |
|---|---|
| | |
| | |
| | |

[List as necessary]

* * * * *

(g)(1) * * *

(ii) * * *

| Line item No. | Country of origin |
| --- | --- |
| | |
| | |
| | |

[List as necessary]

(iii) * * *

Other Foreign End Products:

| Line item No. | Country of origin |
| --- | --- |
| | |
| | |
| | |

[List as necessary]

* * * * *

(2) * * *

Canadian End Products:

| Line item No. |
| --- |
| |
| |
| |

[List as necessary]

(3) * * *

Canadian or Israeli End Products:

| Line item No. | Country of origin |
| --- | --- |
| | |
| | |
| | |

[List as necessary]

(g)(4) * * *

* * * * *

| Line item No. | Country of origin |
| --- | --- |
| | |
| | |
| | |

[List as necessary]

(5) * * *

(ii) * * *

Other End Products:

| Line item No. | Country of origin |
| --- | --- |
| | |
| | |
| | |

[List as necessary]

* * * * *

(i) * * *

(1) *Listed end products.*

| Listed end product | Listed countries of origin |
| --- | --- |
| | |
| | |
| | |

* * * * *

■ 7. Amend section 52.212–5 in Alternate II by—

■ a. Revising the date of the Alternate; and

■ b. Revising paragraphs (e)(1)(ii)(R)(*1*) and (*2*) to read as follows:

**52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.**

* * * * *

*Alternate II* (Feb 2021). * * *

(e)(1) * * *

(ii) * * *

(R)____(*1*) 52.224–3, Privacy Training (Jan 2017) (5 U.S.C. 552a).

___(*2*) Alternate I (Jan 2017) of 52.224–3.

* * * * *

■ 8. Amend section 52.213–4 by—

■ a. Revising the date of the clause; and

■ b. Adding paragraph (a)(2)(ix).

The revision and addition read as follows:

**52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).**

* * * * *

**Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Feb 2021)**

* * * * *

(a) * * *

(2) * * *

(ix) 52.253–1, Computer Generated Forms (Jan 1991).

* * * * *

■ 9. Amend section 52.222–18 by revising the date of the provision and the undesignated table in paragraph (b) to read as follows:

**52.222–18 Certification Regarding Knowledge of Child Labor for Listed End Products.**

* * * * *

**Certification Regarding Knowledge of Child Labor for Listed End Products (Feb 2021)**

* * * * *

(b) * * *

| Listed end product | Listed countries of origin |
| --- | --- |
| | |
| | |
| | |

* * * * *

■ 10. Amend section 52.223–3 by revising the date of the clause and the undesignated table in paragraph (b) to read as follows:

**52.223–3 Hazardous Material Identification and Material Safety Data.**

* * * * *

**Hazardous Material Identification and Material Safety Data (Feb 2021)**

* * * * *

(b) * * *

| Material (if none, insert *None*) | Identification No. |
| --- | --- |
| | |
| | |
| | |

* * * * *

■ 11. Amend section 52.225–2 by revising the date of the provision and paragraph (b) to read as follows:

**52.225–2 Buy American Certificate.**

* * * * *

**Buy American Certificate (Feb 2021)**

* * * * *

(b) Foreign End Products:

| Line item No. | Country of origin |
| --- | --- |
| | |
| | |
| | |

[List as necessary]

* * * * *

■ 12. Amend section 52.225–4 by—

■ a. Revising the section heading and the date of the provision;

■ b. Revising the table in paragraphs (b) and (c);

■ c. Revising the date of Alternate II and the undesignated table in paragraph (b) of Alternate II; and

■ d. Revising the date of Alternate III and the table in paragraph (b) of Alternate III.

The revisions read as follows:

**52.225–4 Buy American—Free Trade Agreements—Israeli Trade Act Certificate.**

* * * * *

**Buy American—Free Trade Agreements—Israeli Trade Act Certificate (Feb 2021)**

* * * * *

(b) * * *

Free Trade Agreement Country End Products (Other than Bahrainian, Moroccan, Omani, Panamanian, or Peruvian End Products) or Israeli End Products:

| Line item No. | Country of origin |
|---|---|
| | |
| | |
| | |

[List as necessary]

(c) * * *

Other Foreign End Products:

| Line item No. | Country of origin |
|---|---|
| | |
| | |
| | |

[List as necessary]

* * * * *

*Alternate II* (Feb 2021). * * *

(b) * * *

Canadian or Israeli End Products:

| Line item No. | Country of origin |
|---|---|
| | |
| | |
| | |

[List as necessary]

*Alternate III* (Feb 2021). * * *

(b) * * *

Free Trade Agreement Country End Products (Other than Bahrainian, Korean, Moroccan, Omani, Panamanian, or Peruvian End Products) or Israeli End Products:

| Line item No. | Country of origin |
|---|---|
| | |
| | |
| | |

[List as necessary]

■ 13. Amend section 52.225–6 by revising the date of the provision and the undesignated table in paragraph (b) to read as follows:

**52.225–6 Trade Agreements Certificate.**

* * * * *

**Trade Agreements Certificate (Feb 2021)**

* * * * *

(b) * * *

Other End Products:

| Line item No. | Country of origin |
|---|---|
| | |
| | |
| | |

[List as necessary]

* * * * *

■ 14. Amend section 52.225–9 by revising the date of the clause and paragraph (b)(2) to read as follows:

**52.225–9 Buy American—Construction Materials.**

* * * * *

**Buy American—Construction Materials (Feb 2021)**

* * * * *

(b) * * *

(2) This requirement does not apply to information technology that is a commercial item or to the construction materials or components listed by the Government as follows:

________ *[Contracting Officer to list applicable excepted materials or indicate ''none'']*

* * * * *

■ 15. Amend section 52.225–13 by—

■ a. Revising the date of clause; and

■ b. Removing from paragraph (b) ''*http://www.treas.gov/offices/enforcement/ofac/sdn*'' and ''*http://www.treas.gov/offices/enforcement/ofac*'' and adding ''*https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists*'' and ''*https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information*'' in their places, respectively.

The revision reads as follows:

**52.225–13 Restrictions on Certain Foreign Purchases.**

* * * * *

**Restrictions on Certain Foreign Purchases (Feb 2021)**

* * * * *

■ 16. Amend section 52.229–12 by—

■ a. Revising the date of clause; and

■ b. Removing from paragraph (d) ''3ontractor must identify'' and adding ''the Contractor must identify'' in its place.

The revision reads as follows:

**52.229–12 Tax on Certain Foreign Procurements.**

* * * * *

**Tax on Certain Foreign Procurements (Feb 2021)**

* * * * *

[FR Doc. 2020–29089 Filed 1–13–21; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Chapter 1

**[Docket No. FAR–2020–0051, Sequence No. 8]**

## Federal Acquisition Regulation; Federal Acquisition Circular 2021–03; Small Entity Compliance Guide

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2021–03, which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2021–03, which precedes this document.

**DATES:** January 14, 2021.

**ADDRESSES:** The FAC, including the SECG, is available via the internet at *https://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2021–03 and the FAR Case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

RULES LISTED IN FAC 2021–03

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| * I | Violations of Arms Control Treaties or Agreements with the United States | 2017–018 | Jackson. |
| * II | Lowest Price Technically Acceptable Source Selection Process | 2018–016 | Jackson. |
| * III | Individual Sureties | 2017–003 | Delgado. |
| IV | Technical Amendments. | | |

**SUPPLEMENTARY INFORMATION:**
Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2021–03 amends the FAR as follows:

## Item I—Violations of Arms Control Treaties or Agreements With the United States (FAR Case 2017–018)

This final rule adopts as final with changes, an interim rule published on June 15, 2018. The interim rule amended the FAR to implement 22 U.S.C. 2593e, as added by section 1290 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). The final rule makes technical edits clarifying the suspension and debarment remedies for determination of a false certification pursuant to 22 U.S.C. 2593e, and other minor edits.

## Item II—Lowest Price Technically Acceptable Source Selection Process (FAR Case 2018–016)

This final rule amends the FAR to implement section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. Specifically, this rule amends: (1) FAR part 15 to specify the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation, and require solicitations predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable; and (2) FAR parts 12, 13, 16, and 37 to point to the text in FAR part 15, as applicable.

## Item III—Individual Sureties (FAR Case 2017–003)

This final rule changes the kind of assets that an individual surety must pledge as security for an individual surety bond. A pledge of assets must consist only of eligible obligations, *i.e.,* public debt obligations of the United States Government. The rule implements section 874 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), codified at 31 U.S.C. 9310, Individual Sureties.

This final rule will not have a significant economic impact on a substantial number of small entities.

## Item IV—Technical Amendments

Editorial changes are made at FAR 2.101, 15.209, 17.502–1, 37.103, 52.212–3, 52.212–5, 52.213–4, 52.222–18, 52.223–3, 52.225–2, 52.225–4, 52.225–6, 52,225–9, 52.225–13, and 52.229–12.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

[FR Doc. 2020–29090 Filed 1–13–21; 8:45 am]

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Part VI

## Small Business Administration

Department of the Treasury

13 CFR Parts 113, 120, et al.

Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act; Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans; Final Rule

**SMALL BUSINESS ADMINISTRATION**

**13 CFR Parts 113, 120, and 121**

**[Docket No. SBA–2021–0001]**

**RIN 3245–AH62**

**DEPARTMENT OF THE TREASURY**

**RIN 1505–AC74**

# Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act

**AGENCY:** U.S. Small Business Administration; Department of the Treasury.

**ACTION:** Interim final rule.

**SUMMARY:** On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Section 1102 of the CARES Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan Program. Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). Subsequently, SBA published twenty-three interim final rules providing additional guidance on the PPP (some of which were jointly issued with the Department of the Treasury) and Treasury published one interim final rule. On December 27, 2020, the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act) became law. The Economic Aid Act extends the authority to make PPP loans through March 31, 2021 and revises certain PPP requirements. This interim final rule incorporates the Economic Aid Act amendments required to be implemented by regulation within 10 days of enactment. For ease of borrower and lender reference, this interim final rule also consolidates the interim final rules (and important guidance) issued to date governing borrower eligibility, lender eligibility, and PPP application and origination requirements for new PPP loans, as well as provides general rules relating to loan increases and loan forgiveness. This rule is not intended to substantively alter or affect PPP rules that were not amended by the Economic Aid Act. Additional rules related to second draw PPP loans will be published separately, and SBA intends to issue a consolidated rule governing all aspects of loan forgiveness and the loan review process as well. This interim final rule is intended to govern new PPP loans made under the Economic Aid Act, as well as applications for loan forgiveness on existing PPP loans where the loan forgiveness payment has not been remitted, and should not be construed to alter or affect the requirements applicable to PPP loans closed prior to its enactment, unless the provisions apply retroactively consistent with specific applicability provisions of the Economic Aid Act as identified in this rule. In addition, in this interim final rule, Treasury exercises its authority under section 1109 of the CARES Act to allow borrowers of first draw PPP loans to use 2019 or 2020 to calculate their maximum loan amount.

**DATES:**

*Effective date:* Unless otherwise specified in this interim final rule, the provisions of this interim final rule are effective January 12, 2021.

*Applicability date:* This interim final rule applies to loan applications, including requests for increases, and applications for loan forgiveness submitted under the Paycheck Protection Program following enactment of the Economic Aid Act. This interim final rule also applies to loan forgiveness applications submitted under the Paycheck Protection Program before enactment of the Economic Aid Act where SBA has not remitted the forgiveness payment.

*Comment date:* Comments must be received on or before February 16, 2021.

**ADDRESSES:** You may submit comments, identified by number SBA–2021–0001 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* All other comments must be submitted through the Federal eRulemaking Portal described above. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

**FOR FURTHER INFORMATION CONTACT:** Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

**SUPPLEMENTARY INFORMATION:**

## I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide continue to experience economic hardship as a direct result of the Federal, State, and local public health measures that continue to be taken to minimize the public's exposure to the virus. In addition, based on the advice of public health officials, other voluntary measures continue to be observed, resulting in a decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency.

Section 1102 of the CARES Act temporarily permitted SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program,'' pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)). Section 1106 of the CARES Act provided for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III.

On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the PPP. On June 5, 2020, the President signed the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) (Pub. L. 116–142), which changed key provisions of the Paycheck Protection Program, including provisions relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans. Section 3(d) of the Flexibility Act provided that the amendments relating to PPP loan forgiveness and extension of the deferral period for PPP loans were effective as if included in the CARES Act, which meant that they were retroactive to March 27, 2020. Section 2 of the Flexibility Act provided that the amendment relating to the extension of the maturity date for PPP loans became effective on the date of enactment (June 5, 2020). Under the Flexibility Act, the extension of the maturity date for PPP loans was applicable to PPP loans made on or after that date, and lenders and borrowers were able to mutually agree to modify PPP loans made before such date to reflect the longer maturity. On July 4, 2020, Public Law 116–147 extended the authority for SBA to guarantee PPP loans to August 8, 2020. On December 27, 2020, the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act) (Pub. L. 116–260) was enacted, which reauthorizes lending under the PPP through March 31, 2021, and among other things, modifies provisions related to making PPP loans and forgiveness of PPP loans, and authorizes second draw PPP loans under new section 7(a)(37) of the Small Business Act for PPP borrowers that previously received a PPP loan (rules for second draw loans will be published separately). The Economic Aid Act also redesignates section 1106 of the CARES Act as section 7A and transfers that section to the Small Business Act, to appear after section 7 of the Small Business Act.[1]

In addition to incorporating the changes to PPP requirements made by the Economic Aid Act, this interim final rule consolidates and restates the following interim final rules: 85 FR 20811 (posted on April 2, 2020 and published in the **Federal Register** on April 15, 2020); 85 FR 20817 (posted on April 3, 2020 and published on April 15, 2020); 85 FR 21747 (posted on April 14, 2020 and published on April 20, 2020); 85 FR 23450 (posted on April 24, 2020 and published on April 28, 2020); 85 FR 23917 (posted on April 27, 2020 and published on April 30, 2020); 85 FR 26321 (posted on April 28, 2020 and published on May 4, 2020); 85 FR 26324 (posted on April 30, 2020 and published on May 4, 2020); 85 FR 27827 (posted on May 5, 2020 and published on May 8, 2020); 85 FR 29845 (posted on May 8, 2020 and published on May 19, 2020); 85 FR 29842 (posted on May 13, 2020 and published on May 19, 2020); 85 FR 29847 (posted on May 14, 2020 and published on May 19, 2020); 85 FR 30835 (posted on May 18, 2020 and published on May 21, 2020); 85 FR 31357 (posted on May 20, 2020 and published on May 26, 2020); 85 FR 35550 (posted on June 5, 2020 and published on June 11, 2020); 85 FR 36308 (posted on June 11, 2020 and published on June 16, 2020); 85 FR 36717 (posted on June 12, 2020 and published on June 18, 2020); 85 FR 36997 (posted on June 17, 2020 and published on June 19, 2020); 85 FR 38301 (posted on June 24, 2020 and published on June 26, 2020); and 85 FR 39066 (posted on June 25, 2020 and published on June 30, 2020). This rule should be interpreted consistently with the sets of Frequently Asked Questions (FAQs) regarding the PPP that are posted on SBA's and Treasury's websites and the interim final rules posted separately providing guidance on second draw PPP loans and the consolidated guidance on loan forgiveness and the loan review process; however, the Economic Aid Act overrides any conflicting guidance in the FAQs, and SBA will be revising the FAQs to fully conform to the Economic Aid Act as quickly as feasible.

Most of this document restates existing regulatory provisions to provide lenders and new PPP borrowers a single regulation to consult on borrower eligibility, lender eligibility, and loan application and origination requirements, as well as general rules on increases and loan forgiveness for PPP loans. To enhance the readability of this document, SBA has not reproduced the policy and legal justifications for existing regulatory provisions restated here, except to the extent that those justifications may be helpful to the borrower or lender. However, those justifications from the original interim final rules are incorporated by reference here.

In addition, section 1109(b) of the CARES Act authorizes Treasury to establish criteria for certain other lenders to participate in the PPP. The SBA is required to administer the program that Treasury establishes under section 1109 of the Act, with guidance from Treasury. The CARES Act authorizes Treasury to issue regulations and guidance to implement section 1109, including regulations that establish ''terms and conditions'' for PPP loans. *See* section 1109(d)(2). The terms and conditions established by Treasury under section 1109 are not required to be identical to those provided elsewhere. Rather, the CARES Act allows Treasury to set terms and conditions pertaining to certain criteria—the maximum interest rate, maximum loan amount, and other specified terms—that are ''consistent,'' to ''the maximum extent practicable,'' with comparable terms in paragraph 36 of section 7(a) of the Small Business Act (15 U.S.C. 636(a)). *See* section 1109(d)(2).

In this rulemaking, Treasury is addressing the needs of new PPP borrowers by allowing all new borrowers to use 2019 or 2020 for purposes of calculating their maximum loan amount. Section 1102 of the CARES Act states that borrowers are to calculate their maximum loan amount by using ''payroll costs incurred during the 1-year period before the date on which the loan is made . . . .'' For PPP loans made in 2020, most borrowers used 2019. The Economic Aid Act did not change this language for borrowers that are not farmers and ranchers and would require most new PPP borrowers who obtain a loan in 2021 to use 2020 as their base period. Using authority granted by section 1109 of the CARES Act, this rulemaking allows new borrowers to choose 2019 or 2020 as the base period, thereby ensuring that they are able to obtain funding on terms commensurate with existing PPP borrowers. Separately, section 313 of the Economic Aid Act states that farmers and ranchers are to calculate their maximum loan amount using 2019 as their base period. This rulemaking allows farmers and ranchers to elect either 2019 or 2020 as their base period, in order to ensure that they can obtain funding on terms commensurate with those available to other new PPP borrowers.

As required by section 1109(d)(2)(B) of the CARES Act, Treasury has determined that providing new PPP borrowers with flexibility in choosing a base period is consistent, to the ''maximum extent practicable,'' with the terms applicable to existing PPP borrowers. This enhanced flexibility will help ensure that new PPP borrowers are treated even-handedly and do not see their permissible loan amounts reduced due to financial distress experienced in 2020. Other than these adjustments, the terms and requirements applicable to PPP loans under this rule are identical to the terms and requirements applicable to all other PPP loans. As a result, a PPP borrower that elects to use the flexibility in selecting a base period under this interim final rule may follow the same processes and procedures applicable to other PPP loans.

[1] Because section 1106 of the CARES Act is now codified as section 7A of the Small Business Act, any reference to section 1106 of the CARES Act in the rules that are being restated herein will refer to section 7A.

## II. Comments and Immediate Effective Date

This interim final rule is being issued without advance notice and public comment because section 303 of the Economic Aid Act authorizes SBA to issue regulations to implement the Economic Aid Act without regard to notice requirements. In addition, this rule is being issued to allow for immediate implementation of this program. The intent of both the CARES Act and the Economic Aid Act is that SBA provides relief to America's small businesses expeditiously. Congress reauthorized PPP because of the current economic conditions affecting small businesses and intended for the loans to be made quickly. The last day to apply for and receive a PPP loan is March 31, 2021. Given the short duration of this program, and the urgent need to issue loans quickly, the Administrator in consultation with the Secretary has determined that it is impractical and not in the public interest to provide a 30-day delayed effective date. An immediate effective date will give small businesses the maximum amount of time to apply for loans and lenders the maximum amount of time to process applications before the program ends. This good cause justification also supports waiver of the 60-day delayed effective date for major rules under the Congressional Review Act at 5 U.S.C. 808(2). Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III. These comments must be submitted on or before February 16, 2021. The SBA will consider these comments and the need for making any revisions as a result of these comments.

## III. Paycheck Protection Program as Amended by Economic Aid Act

*Overview*

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the ''Paycheck Protection Program.'' Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. The Economic Aid Act reauthorizes lending under the PPP through March 31, 2021, and revises certain PPP requirements. The following outlines the key provisions of the PPP related to eligibility of applicants for PPP loans, which lenders are authorized to make PPP loans, the process for making PPP loans, loan increases, and loan forgiveness, as revised by the Economic Aid Act. Additional rules related to second draw PPP loans will be published separately. While this interim final rule fully implements the Economic Aid Act's changes to loan forgiveness, SBA also intends to issue a consolidated rule governing all aspects of loan forgiveness and loan review as well to provide a single reference point for lenders and borrowers.

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## A. General

SBA is authorized to guarantee loans under the PPP through March 31, 2021. Congress has authorized a total program level of $806,450,000,000 to provide guaranteed loans under this temporary 7(a) program under sections 7(a)(36) (PPP loans or First Draw PPP Loans) and 7(a)(37) (Second Draw PPP Loans) of the Small Business Act, a portion of which is available for new First Draw and Second Draw PPP Loans. Lenders have delegated authority to make PPP loans. SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness. Lenders must comply with the applicable lender obligations set forth in this interim final rule, but will be held harmless for borrowers' failure to comply with program criteria and will not be subject to any enforcement action or penalty relating to loan origination or forgiveness of the PPP loan if the lender acts in good faith relating to the origination or forgiveness of the PPP loan and satisfies all other applicable Federal, State, local, and other statutory or regulatory requirements (as provided in section 7A(h) of the Small Business Act, as amended). Remedies for violations of PPP requirements or fraud are separately addressed in this interim final rule. The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10).

**B. What do borrowers need to know and do?**

*1. What businesses, organizations, and individuals are eligible?*

*a. Am I eligible?* [2] [3]

You are eligible for a PPP loan if:

i. You, together with any affiliates (if applicable),[4] are:

• A small business concern under the applicable revenue-based size standard established by SBA in 13 CFR 121.201 for your industry or under the SBA alternative size standard; [5]

• an independent contractor, eligible self-employed individual, or sole proprietor;

• a business concern, a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, and you employ no more than the greater of 500 employees or, if applicable, the size standard in number of employees established by SBA in 13 CFR 121.201;

• a housing cooperative, an eligible section 501(c)(6) organization, or an eligible destination marketing organization,[6] that employs no more than 300 employees;

• a news organization that is majority owned or controlled by a NAICS code 511110 or 5151 business or a nonprofit public broadcasting entity with a trade or business under NAICS 511110 or 5151, that employs no more than 500 employees (or, if applicable, the size standard in number of employees established by SBA in 13 CFR 121.201 for your industry) per location; or

• another type of entity specifically provided for by PPP rules (as described below); and

ii. you were in operation on February 15, 2020, and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099–MISC or you were an eligible self-employed individual, independent contractor, or sole proprietorship with no employees.

You must submit documentation sufficient to establish eligibility and to demonstrate the qualifying payroll amount, which may include, as applicable, payroll records, payroll tax filings, Form 1099–MISC, Schedule C or F, income and expenses from a sole proprietorship, or bank records.

*b. Are employees of foreign affiliates included for purposes of determining whether a PPP borrower has more than 500 employees (or 300 employees, if applicable)?* [7]

Yes. SBA's affiliation regulations provide that to determine a concern's size, employees of the concern "and all of its domestic and foreign affiliates" are included. 13 CFR 121.301(f). Therefore, to calculate the number of employees of an entity for purposes of determining eligibility for the PPP, an entity must include all employees of its domestic and foreign affiliates, except in those limited circumstances where the affiliation rules expressly do not apply to the entity.[8] Any entity that, together with its domestic and foreign affiliates, does not meet the 500-employee, 300-employee,[9] or other applicable PPP size standard is therefore ineligible for a PPP loan. Under no circumstances may PPP funds be used to support non-U.S. workers or operations.

*c. I have income from self-employment and file a Form 1040, Schedule C. Am I eligible for a PPP Loan?* [10]

You are eligible for a PPP loan if: (i) You were in operation on February 15, 2020; (ii) you are an individual with self-employment income (such as an independent contractor or a sole proprietor); (iii) your principal place of residence is in the United States; and (iv) you filed or will file a Form 1040 Schedule C for 2019 or meet the requirements below. However, if you are a partner in a partnership, you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred on a PPP loan application filed by or on behalf of the partnership. Partnerships are eligible for PPP loans under the CARES Act, as amended by the Economic Aid Act, and the Administrator has determined, in consultation with the Secretary of the

[2] *See* interim final rule on Second Draw PPP Loans for eligibility criteria for Second Draw PPP Loans, which is being published separately.

[3] This subsection was originally published at 85 FR 20811, subsection III.2.a. (April 15, 2020), as amended by 85 FR 36308 (June 16, 2020), 85 FR 36717 (June 18, 2020), and 85 FR 38301 (June 26, 2020), and has been modified to reflect subsequent rules or guidance and the Economic Aid Act.

[4] See section 3 regarding the applicability of affiliation rules at 13 CFR 121.103 and 121.301 to PPP loans.

[5] Under SBA's alternative size standard, a business concern may qualify as a small business concern if it, together with any affiliates: (1) Has a maximum tangible net worth of not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) for the two full fiscal years before the date of application is not more than $5 million.

[6] *See* subsections 1.j., 1.k., and 1.m. for additional information on the eligibility of housing cooperatives, section 501(c)(6) organizations, and destination marketing organizations. The applicable size standard for these entities is not more than 300 employees.

[7] This subsection was originally published at 85 FR 30835, section III.1. (May 21, 2020) and has been modified for readability. Housing cooperatives, section 501(c)(6) organizations, and destination marketing organizations, added by the Economic Aid Act, must have no more than 300 employees to be eligible for PPP loans.

[8] Paragraph 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv)), as added by the CARES Act and amended by the Economic Aid Act, waives SBA's affiliation rules for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681); and (4)(a) any business concern (including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 *et seq.*) without regard for whether such a station is a concern as defined in section 121.105 of title 13, Code of Federal Regulations, or any successor thereto) that employs not more than 500 employees, or the size standard established by the Administrator for the North American Industry Classification System code applicable to the business concern, per physical location of such business concern and is majority owned or controlled by a business concern that is assigned a North American Industry Classification System code beginning with 511110 or 5151; or (b) any nonprofit organization that is assigned a North American Industry Classification System code beginning with 5151. SBA also applies affiliation exceptions to certain categories of entities. 13 CFR 121.103(b).

[9] For housing cooperatives, section 501(c)(6) organizations, and destination marketing organizations, the applicable size standard is not more than 300 employees. *See* subsections 1.j. and 1.m. For the applicable size standard for entities eligible to apply for Second Draw PPP Loans, see the interim final rule on Second Draw PPP Loans that is being published separately.

[10] This subsection was originally published at 85 FR 21747, subsection III.1.a. (April 20, 2020) and has been modified to reflect subsequent interim final rules or guidance and the Economic Aid Act.

Treasury (Secretary), that limiting a partnership and its partners (and an LLC filing taxes as a partnership) to one PPP loan is necessary to help ensure that as many eligible borrowers as possible obtain PPP loans before the statutory deadline of March 31, 2021. This limitation will allow lenders to more quickly process applications and lower the burdens of applying for partnerships/partners. The Administrator has further determined that permitting partners to apply as self-employed individuals would create unnecessary confusion regarding which entity, the partner or the partnership, applies for partner and LLC member income, and would generate loan proceeds use coordination and allocation issues. Rent, mortgage interest, utilities, other debt service, operations expenditures, property damage costs, supplier costs, and worker protection expenditures are generally incurred at the partnership level, not partner level, so it is most natural to provide the funds for these expenses to the partnership, not individual partners. In addition, you should be aware that participation in the PPP may affect your eligibility for state-administered unemployment compensation or unemployment assistance programs, including the programs authorized by Title II, Subtitle A of the CARES Act, or CARES Act Employee Retention Credits. On June 26, 2020, SBA issued additional guidance for those individuals with self-employment income who: (i) Were not in operation in 2019 but who were in operation on February 15, 2020, and (ii) filed a Form 1040 Schedule C for 2020. See ''How To Calculate Maximum Loan Amounts—By Business Type,'' Question 10 posted on SBA's website.[11]

*d. Are eligible businesses owned by directors or shareholders of a PPP lender permitted to apply for a PPP loan through the lender with which they are associated?*[12]

SBA regulations (including 13 CFR 120.110 and 120.140) shall not apply to prohibit an otherwise eligible business owned (in whole or part) by an outside director or holder of a less than 30 percent equity interest in a PPP lender from obtaining a PPP loan from the PPP lender on whose board the director serves or in which the equity owner holds an interest, provided that the eligible business owned by the director or equity holder follows the same process as any similarly situated customer or account holder of the lender. Favoritism by the lender in processing time or prioritization of the director's or equity holder's PPP application is prohibited. Lenders should comply with all other applicable state and federal regulations concerning loans to associates of the lender. Lenders should also consult their own internal policies concerning lending to individuals or entities associated with the lender.

The foregoing paragraph does not apply to a director or owner who is also an officer or key employee of the PPP Lender. Officers and key employees of a PPP Lender may obtain a PPP Loan from a different lender, but not from the PPP Lender with which they are associated. SBA also reminds Lenders that the ''Authorized Lender Official'' for each PPP Loan is subject to the limitations described in the PPP Lender Application Form (SBA Form 2484), which states in relevant part: ''Neither the undersigned Authorized Lender Official, nor such individual's spouse or children, has a financial interest in the Applicant [Borrower].''

*e. If a seasonal business was dormant or not fully operating as of February 15, 2020, is it still eligible?*[13]

Yes, in evaluating eligibility, a seasonal business will be considered to have been in operation as of February 15, 2020, if the business was in operation for any 12-week period between February 15, 2019 and February 15, 2020. This approach aligns the eligibility criteria for seasonal businesses being in operation with the time period for calculation of a seasonal employer's maximum loan amount from section 336 of the Economic Aid Act and makes PPP loans available to seasonal businesses that operate outside of the original, more limited time frame.

*f. How does the 500 employee limit apply to news organizations with more than one physical location?*[14]

A business concern, or any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 *et seq.*), with more than one physical location that employs not more than 500 employees (or the size standard established by the Administrator for the NAICS code applicable to the business concern) per physical location, is eligible for a PPP loan if it: (1) Is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 or 5151 or, with respect to a public broadcasting entity (as defined in section 397(11) of the Communications Act of 1934 (47 U.S.C. 397(11))), has a trade or business that falls under such a code; and (2) makes a good faith certification that proceeds of the loan will be used to support expenses at the component of the organization that produces or distributes locally focused or emergency information. See section 3 for the applicability of SBA's affiliation rules to news organizations.

*g. Industry-Specific Eligibility Issues*

*i. Is a hospital owned by governmental entities eligible for a PPP loan?*[15]

Notwithstanding 13 CFR 120.110(j), a hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

*ii. Are businesses that receive revenue from legal gaming eligible for a PPP Loan?*[16]

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible.

*iii. Are electric cooperatives that are exempt from Federal income taxation under section 501(c)(12) of the Internal Revenue Code eligible for a PPP loan?*[17]

Yes. An electric cooperative that is exempt from Federal income taxation under section 501(c)(12) of the Internal Revenue Code will be considered to be ''a business entity organized for profit'' for purposes of 13 CFR 121.105(a)(1). As a result, such entities are eligible PPP borrowers, as long as other eligibility requirements are met. To be eligible, an electric cooperative must satisfy the employee-based size standard established in the CARES Act, SBA's employee-based size standard

[11] *https://www.sba.gov/sites/default/files/2020-12/How-to-Calculate-Loan-Amounts-508_6-26-20.pdf* (April 20, 2020).

[12] This subsection was originally published at 85 FR 21747, subsection III.2.a. (April 20, 2020) and has been modified for readability.

[13] This subsection was originally published at 85 FR 23917, subsection III.4. (April 30, 2020) and has been modified to reflect the Economic Aid Act.

[14] This subsection has been added to conform to section 317 of the Economic Aid Act.

[15] This subsection was originally published at 85 FR 23450, subsection III.2.c. (April 28, 2020) and has been modified for readability.

[16] This subsection was originally published at 85 FR 23450, subsection III.2.d. (April 28, 2020) and has been modified for readability.

[17] This subsection was originally published at 85 FR 29847, subsection III.1. (May 19, 2020) and has been modified for readability.

corresponding to its primary industry, if higher, or both tests in SBA's ''alternative size standard.'' [18]

*iv. Are telephone cooperatives that are exempt from federal income taxation under section 501(c)(12) of the Internal Revenue Code eligible for a PPP loan?* [19]

Yes. A telephone cooperative that is exempt from federal income taxation under section 501(c)(12) of the Internal Revenue Code will be considered to be ''a business entity organized for profit'' for purposes of 13 CFR 121.105(a)(1). As a result, such entities are eligible PPP borrowers, as long as other eligibility requirements are met. To be eligible, a telephone cooperative must satisfy the employee-based size standard established in the CARES Act, SBA's employee-based size standard corresponding to its primary industry, if higher, or both tests in SBA's ''alternative size standard.'' [20]

*v. Are housing cooperatives as defined in section 216(b) of the Internal Revenue Code eligible for PPP loans?* [21]

Yes. Housing cooperatives (as defined in section 216(b) of the Internal Revenue Code of 1986) that employ not more than 300 employees are eligible to apply for PPP loans as long as other eligibility requirements are met. In addition, the provisions applicable to affiliation, described in section 3, apply to housing cooperatives in the same manner as with respect to a small business concern.

*vi. Are nonprofit and tax-exempt news organizations eligible for PPP loans?* [22]

Yes. A public broadcasting entity (as defined in section 397(11) of the Communications Act of 1934 (47 U.S.C. 397(11)) that is a nonprofit organization or any organization otherwise subject to section 511(a)(2)(B) of the Internal Revenue Code of 1986, and employs no more than 500 employees (or, if applicable, the size standard in number of employees established by SBA in 13 CFR 121.201 for the entity's industry) per location is eligible for a PPP loan if the organization has a trade or business that is assigned a NAICS code beginning with 511110 or 5151, and makes a good faith certification that proceeds of the loan will be used to support expenses at the component of the organization that produces or distributes locally focused or emergency information.[23] See subsection B.1.f. for information on how the 500 employee limit applies to news organizations with more than one physical location. See section 3 for the applicability of SBA's affiliation rules to news organizations.

*vii. Are destination marketing organizations eligible for PPP loans?* [24]

Yes. Under the Economic Aid Act, any destination marketing organization [25] is eligible to receive a PPP loan as long as other eligibility requirements are met and if: (1) The destination marketing organization does not receive more than 15 percent of its receipts from lobbying activities; (2) the lobbying activities of the destination marketing organization do not comprise more than 15 percent of the total activities of the organization; (3) the cost of the lobbying activities of the destination marketing organization did not exceed $1,000,000 during the most recent tax year of the destination marketing organization that ended prior to February 15, 2020; (4) the destination marketing organization employs not more than 300 employees; and (5) the destination marketing organization: (a) Is described in section 501(c) of the Internal Revenue Code and is exempt from taxation under section 501(a) of such Code; or (b) is a quasi-governmental entity or is a political subdivision of a State or local government, including any instrumentality of those entities.[26]

*viii. Are 501(c)(6) organizations eligible for PPP loans?* [27]

Yes. Any organization that is described in section 501(c)(6) of the Internal Revenue Code and that is exempt from taxation under section 501(a) of such Code (excluding professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity) shall be eligible to receive a PPP loan as long as other eligibility requirements are met and if: (1) The organization does not receive more than 15 percent of its receipts from lobbying activities; (2) the lobbying activities of the organization do not comprise more than 15 percent of the total activities of the organization; (3) the cost of the lobbying activities of the organization did not exceed $1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and (4) the organization employs not more than 300 employees.

*2. What businesses, organizations, and individuals are ineligible?*

*a. Could I be ineligible even if I meet the eligibility requirements in section 1?* [28]

[18] Under the alternative size standard, a business concern, including an electric cooperative, can qualify for the PPP as a small business concern if, as of March 27, 2020: (1) The maximum tangible net worth of the business was not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. For an electric cooperative that does not have net income, the cooperative's savings distributed to its owner-members will be considered its net income.

[19] This subsection was originally published at 85 FR 35550, subsection III.1. (June 11, 2020) and has been modified for readability.

[20] Under the alternative size standard, a business concern, including a telephone cooperative, can qualify for the PPP as a small business concern if, as of March 27, 2020: (1) The maximum tangible net worth of the business was not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. For a telephone cooperative that does not have net income, the telephone cooperative's capital credits distributed to its owner-members will be considered its net income.

[21] This subsection has been added to conform to section 316 of the Economic Aid Act.

[22] This subsection has been added to conform to section 317 of the Economic Aid Act.

[23] This subsection provides that an eligible nonprofit news organization under section 317 of the Economic Aid Act must have no more than 500 employees. (For those nonprofit news organizations with more than one physical location, they must have no more than 500 employees per location.) This will make PPP loans available to nonprofit news organizations, regardless of whether the organization would be a business concern under SBA regulations, if the nonprofit news organization satisfies the same general size standard applicable under the PPP rules to other borrowers that are nonprofit or tax-exempt organizations. The Administrator, in consultation with the Secretary, has determined this requirement appropriately implements section 317 of the Economic Aid Act by making PPP loans available to nonprofit news organizations on the same terms as other nonprofit organizations that have been made eligible for PPP loans.

[24] This subsection has been added to conform to section 318 of the Economic Aid Act.

[25] Section 318 of the Economic Aid Act added the following definition to paragraph 7(a)(36)(A) of the Small Business Act (15 U.S.C. 636(a)(36)(A)): ''(xv) the term 'destination marketing organization' means a nonprofit entity that is—(I) an organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; or (II) a State, or a political subdivision of a State (including any instrumentality of such entities)—(aa) engaged in marketing and promoting communities and facilities to businesses and leisure travelers through a range of activities, including—(AA) assisting with the location of meeting and convention sites; (BB) providing travel information on area attractions, lodging accommodations, and restaurants; (CC) providing maps; and (DD) organizing group tours of local historical, recreational, and cultural attractions; or (bb) that is engaged in, and derives the majority of the operating budget of the entity from revenue attributable to, providing live events.

[26] A destination marketing organization that is a quasi-governmental entity or is a political subdivision of a State or local government, including any instrumentality of those entities, is eligible for a PPP loan notwithstanding the SBA regulation at 13 CFR 120.110(j), which states that government-owned entities (except for businesses owned or controlled by a Native American tribe) are not eligible for SBA financial assistance.

[27] This subsection has been added to conform to section 318 of the Economic Aid Act.

[28] This subsection was originally published at 85 FR 20811, subsection III.2.a. (April 15, 2020), as

Continued

You are ineligible for a PPP loan if, for example:

i. You are engaged in any activity that is illegal under Federal, state, or local law;

ii. You are a household employer (individuals who employ household employees such as nannies or housekeepers);

iii. An owner of 20 percent or more of the equity of the applicant is presently incarcerated or, for any felony, presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of, pleaded guilty or nolo contendere to, or commenced any form of parole or probation (including probation before judgment) for, a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year;

iv. You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government;

v. Your business or organization was not in operation on February 15, 2020;[29]

vi. You or your business received or will receive a grant under the Shuttered Venue Operator Grant program under section 324 of the Economic Aid Act;[30]

vii. The President, the Vice President, the head of an Executive Department, or a Member of Congress, or the spouse of such person as determined under applicable common law, directly or indirectly holds a controlling interest in your business;[31]

viii. Your business is an issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f)[32] (SBA will not consider whether a news organization that is eligible under the conditions described in subsection 1.f. and 1.g.vi. is affiliated with an entity, which includes any entity that owns or controls such news organization, that is an issuer[33]); or

ix. Your business has permanently closed.[34]

*b. Are businesses that are generally ineligible for 7(a) loans under 13 CFR 120.110 eligible for a PPP loan?*[35]

Paragraphs (a), (g), and (k), of 13 CFR 120.110 do not apply to PPP loans. For PPP loans, the ineligibility restriction in 13 CFR 120.110(n) is superseded by subsection B.2.a.iii. of this interim final rule. Otherwise, a business is not eligible for a PPP loan if it is a type of business concern (or would be, if the entity were a business concern) described in 13 CFR 120.110, except as permitted by subsections B.1.d and B.1.g of this rule or otherwise permitted by PPP rules. Businesses that are not generally eligible for a 7(a) loan under 13 CFR 120.110 are described further in SBA's Standard Operating Procedure (SOP) 50 10 6, Part 2, Section A, Chapter 3.[36]

*c. Will I be approved for a PPP loan if my business is in bankruptcy?*[37]

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.

The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

*d. Is a hedge fund or private equity firm eligible for a PPP loan?*[38]

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan.

### *3. Affiliation Rules Generally*

*a. Are affiliates considered together for purposes of determining eligibility?*[39]

In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP.[40] Under SBA rules, entities

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amended by 85 FR 36308 (June 16, 2020), 85 FR 36717 (June 18, 2020), and 85 FR 38301 (June 26, 2020), and has been modified to conform to subsequent interim final rules or guidance and the Economic Aid Act and for readability.

[29] Added to conform to section 310 of the Economic Aid Act. This provision is effective as if included in the CARES Act and applies to any loan made pursuant to section 7(a)(36) of the Small Business Act before, on, or after December 27, 2020, including forgiveness of such a loan.

[30] Added to conform to section 310 of the Economic Aid Act. This provision applies to PPP loans made on or after December 27, 2020.

[31] Added to conform to section 322 of the Economic Aid Act. This provision applies to any loan made on or after December 27, 2020. For any loan made under section 7(a)(36) to a covered entity before December 27, 2020, *see* subsection B.16 of this interim final rule.

[32] Added to conform to section 342 of the Economic Aid Act, which also added the following definitions to paragraph 7(a)(36)(A) of the Small Business Act (15 U.S.C. 636(a)(36)(A)): ''(xvi) the terms 'exchange', 'issuer', and 'security' have the meanings given those terms in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).'' This provision applies to loans made on or after December 27, 2020.

[33] *See* section 317 of the Economic Aid Act.

[34] This provision prohibits an entity that has gone out of business and has no intention of reopening from receiving a PPP loan. The Administrator, in consultation with the Secretary, has determined this provision is necessary to maintain program integrity, prevent abuse, and prevent PPP loans being made to businesses that have permanently closed. Preserving funds for businesses in operation is necessary because only businesses that are still in operation will retain employees, which is a primary purposes of the PPP. PPP was not intended to support businesses that have permanently closed. A borrower that has temporarily closed or temporarily suspended its business but intends to reopen remains eligible for a PPP loan.

[35] This subsection replaces the subsection originally published at 85 FR 20811, subsection III.2.c. (''*How do I determine if I am ineligible*'') (April 15, 2020) and modified to conform to the Economic Aid Act.

[36] SOP 50 10 6 can be found at *https://www.sba.gov/document/sop-50-10-lender-development-company-loan-programs-0.* For PPP loans approved before December 27, 2020, see SOP 50 10 5(K), Subpart B, Chapter 2 for ineligible types of businesses. SOP 50 10 5(K) can be found at *https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs.*

[37] This subsection was originally published at 85 FR 23450, subsection III.4. (April 28, 2020) and has been modified for readability.

[38] This subsection was originally published at 85 FR 23450, subsection III.2.a. (April 28, 2020) and has been modified for readability.

[39] The text of this subsection was originally published at 85 FR 20817 (April 15, 2020).

[40] Paragraph 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv), as added by the CARES Act and amended by the Economic Aid Act, waives the affiliation rules contained in § 121.103 for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681); and (4)(a) any business concern (including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 *et seq.*) without regard for whether such a station is a concern as defined in section 121.105 of title 13, Code of Federal Regulations, or any successor thereto) that employs not more than 500 employees, or the size standard established by the Administrator for the North American Industry Classification System code applicable to the business concern, per physical location of such business concern and is majority owned or controlled by a business concern that is assigned a

may be considered affiliates based on factors including but not limited to stock ownership, overlapping management,[41] and identity of interest. See 13 CFR 121.301(f).

*b. How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?*[42]

An entity generally is eligible for the PPP if it, combined with its affiliates, (i) is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), (ii)(1) has 500 or fewer employees[43] or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, if higher, and (2) is a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a housing cooperative, a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, a section 501(c)(6) organization, a destination marketing organization, or any other business concern, or (iii) has 500 or fewer employees per location (or an applicable SBA employee-based size standard for that industry, if higher) and is either majority owned or controlled by a NAICS code 511110 or 5151 business or is a nonprofit public broadcasting entity with a trade or business under NAICS code 511110 or 5151. Prior to the CARES Act, the nonprofit organizations listed above were not eligible for SBA Business Loan Programs under section 7(a) of the Small Business Act; only for-profit small business concerns were eligible. The CARES Act made such nonprofit organizations not only eligible for the PPP, but also subjected them to SBA's affiliation rules. As amended, section 7(a) of the Small Business Act (15 U.S.C. 636(a)) now provides that the provisions applicable to affiliations under 13 CFR 121.103 apply with respect to nonprofit organizations, housing cooperatives, and veterans organizations in the same manner as with respect to small business concerns. However, the detailed affiliation standards contained in § 121.103 currently do not apply to PPP borrowers, because § 121.103(a)(8) provides that applicants in SBA's Business Loan Programs (which include the PPP) are subject to the affiliation rules contained in 13 CFR 121.301.

*c. Faith-Based Organizations*[44]

This rule exempts otherwise qualified faith-based organizations from the SBA's affiliation rules, including those set forth in 13 CFR part 121, where the application of the affiliation rules would substantially burden those organizations' religious exercise. For the reasons described in 85 FR 20817, the SBA's affiliation rules, including those set forth in 13 CFR part 121, do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion. This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization's determination.

*d. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?*[45]

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.[46] However, in addition to applying any applicable affiliation rules, all borrowers should carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that ''[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.''

*e. Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?*[47]

No. For purposes of the PPP, a business's participation in an ESOP (as defined in 15 U.S.C. 632(q)(6)) does not result in an affiliation between the business and the ESOP.

### *4. I Have Determined That I Am Eligible. How much can I borrow?*[48]

Under the PPP, the maximum loan amount for First Draw PPP Loans is the lesser of $10 million or an amount that you will calculate using a payroll-based formula authorized by the Act, as explained below.[49] PPP loans approved in 2020 used 2019 or the 1-year before the date on which the loan is made to calculate payroll costs for purposes of calculating the maximum loan amount. Borrowers who apply for PPP loans 2021 and who are not self-employed (including sole proprietorships and independent contractors) are also permitted to use the precise 1-year period before the date on which the loan is made to calculate payroll costs if they choose not to use 2019 or 2020. Since most borrowers will use 2019 or 2020 the rule text refers only to 2019 or 2020 for simplicity and readability.

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North American Industry Classification System code beginning with 511110 or 5151; or (b) any nonprofit organization that is assigned a North American Industry Classification System code beginning with 5151. This interim final rule has no effect on these statutory waivers, which remain in full force and effect. As a result, the affiliation rules contained in section 121.301 also do not apply to these types of entities. In addition, paragraph 7(a)(36)(D) of the Small Business Act (15 U.S.C. 636(a)(36)(D)), as amended by section 342 of the Economic Aid Act states that, with respect to a business concern made eligible under paragraph 7(a)(36)(D)(iii)(II) or (iv)(IV) (certain news organizations), the Administrator shall not consider whether any affiliated entity, which for purposes of this subclause shall include any entity that owns or controls such business concern, is an issuer.

[41] In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, released on April 2, 2020, requires applicants to list other businesses with which they have common management (including under a management agreement). The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

[42] The text of this subsection was originally published at 85 FR 20817 (April 15, 2020) and has been modified to conform to the Economic Aid Act.

[43] For housing cooperatives, section 501(c)(6) organizations, and destination marketing organizations, the applicable size standard is not more than 300 employees.

[44] The text of this subsection was originally published at 85 FR 20817 (April 15, 2020) and has been modified for readability.

[45] This subsection was originally published at 85 FR 23450, subsection III.2.b. (April 28, 2020).

[46] However, the CARES Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

[47] This subsection was originally published at 85 FR 23450, section III.3. (April 28, 2020) and has been modified for readability.

[48] This subsection was originally published at 85 FR 20811, subsection III.2.d. (April 15, 2020) and has been modified to conform to additional interim final rules or guidance and the Economic Aid Act.

[49] *See* subsection 4.d. for maximum loan amount applicable to certain farmers and ranchers. For the maximum loan amount for Second Draw PPP Loans, *see* the the interim final rule on Second Draw PPP Loans that is being published separately.

*a. How do I calculate the maximum amount I can borrow?* [50]

The following methodology, which is one of the methodologies authorized by the Act, will be most useful for many applicants.

i. *Step 1:* Aggregate payroll costs (defined in detail below in subsections 4.g. and 4.h.) from 2019 or 2020 for employees whose principal place of residence is the United States.

ii. *Step 2:* Subtract any compensation paid to an employee in excess of $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred.[51]

iii. *Step 3:* Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

iv. *Step 4:* Multiply the average monthly payroll costs from Step 3 by 2.5.

v. *Step 5:* Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance. Do not include the amount of any ''advance'' under an EIDL COVID–19 loan (because it does not have to be repaid).

The examples below illustrate this methodology.

i. Example 1—No employees make more than $100,000
Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Maximum loan amount is $25,000

ii. Example 2—Some employees make more than $100,000
Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Maximum loan amount is $250,000

iii. Example 3—No employees make more than $100,000, outstanding EIDL loan of $10,000.
Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Add EIDL loan of $10,000 = $35,000
Maximum loan amount is $35,000

iv. Example 4—Some employees make more than $100,000, outstanding EIDL loan of $10,000
Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Add EIDL loan of $10,000 = $260,000
Maximum loan amount is $260,000

You must provide your Form 941 (or other tax forms containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever you used to calculate loan amount), or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation on February 15, 2020.[52]

b. I have income from self-employment and file a Form 1040, Schedule C, how do I calculate the maximum amount I can borrow and what documentation is required?[53]

How you calculate your maximum loan amount depends upon whether or not you employ other individuals. If you have no employees, the following methodology should be used to calculate your maximum loan amount:

i. *Step 1:* Find your 2019 or 2020 IRS Form 1040 Schedule C line 31 net profit amount (if you are using 2020 to calculate payroll costs and have not yet filed a 2020 return, fill it out and compute the value). If this amount is over $100,000, reduce it to $100,000. If this amount is zero or less, you are not eligible for a PPP loan.

ii. *Step 2:* Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).

iii. *Step 3:* Multiply the average monthly net profit amount from Step 2 by 2.5.

iv. *Step 4:* Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance. Do not include the amount of any advance under an EIDL COVID–19 loan (because it does not have to be repaid).

You must provide the 2019 or 2020 (whichever you used to calculate loan amount) Form 1040 Schedule C with your PPP loan application to substantiate the applied-for PPP loan amount and a 2019 or 2020 (whichever you used to calculate loan amount) IRS Form 1099–MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes you are self-employed. If using 2020 to calculate loan amount, this is required regardless of whether you have filed a 2020 tax return with the IRS. You must provide a 2020 invoice, bank statement, or book of record to establish you were in operation on or around February 15, 2020.

If you have employees, the following methodology should be used to calculate your maximum loan amount:

i. *Step 1:* Compute 2019 or 2020 payroll (using the same year for all items) by adding the following:

a. Your 2019 or 2020 Form 1040 Schedule C line 31 net profit amount (if you are using 2020 and have not yet filed a 2020 return, fill it out and compute the value), up to $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, if this amount is over $100,000, reduce it to $100,000, if this amount is less than zero, set this amount at zero;

b. 2019 or 2020 gross wages and tips paid to your employees whose principal place of residence is in the United States computed using 2019 or 2020 IRS Form 941 Taxable Medicare wages & tips (line 5c—column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips; subtract any amounts paid to any individual employee in excess of $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred and any amounts paid to any employee whose principal place of residence is outside the United States; and

c. 2019 or 2020 employer contributions to employee group health, life, disability, vision and dental insurance (portion of IRS Form 1040 Schedule C line 14 attributable to those contributions); retirement contributions (Form 1040 Schedule C line 19), and state and local taxes assessed on employee compensation (primarily under state laws commonly referred to as the State Unemployment Tax Act or SUTA from state quarterly wage reporting forms).

ii. *Step 2:* Calculate the average monthly amount (divide the amount from Step 1 by 12).

[50] This subsection was originally published at 85 FR 20811, subsection III.2.d. (April 15, 2020) and has been modified to conform to additional rules or guidance and the Economic Aid Act.

[51] *See* subsection 4.j for treatment of amounts paid to independent contractors.

[52] This subsection clarifies the documentation that must be submitted with an applicant's loan application to substantiate the borrower's payroll costs. This requirement applies to loans made after December 27, 2020. For documentation requirements for PPP loans made before December 27, 2020, *see* 85 FR 20811, subsection III.1.e. (April 15, 2020).

[53] This subsection was originally published at 85 FR 21747, subsection III.1.b. (April 20, 2020) and has been modified to conform to additional rules or guidance and the Economic Aid Act.

iii. *Step 3:* Multiply the average monthly amount from Step 2 by 2.5.

iv. *Step 4:* Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance. Do not include the amount of any advance under an EIDL COVID–19 loan (because it does not have to be repaid).

You must supply your 2019 or 2020 (whichever you used to calculate loan amount) Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever you used to calculate loan amount) or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions, if applicable. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation on February 15, 2020.

*c. How does a seasonal employer calculate the maximum PPP loan amount?* [54]

As defined by section 315 of the Economic Aid Act, a borrower is a seasonal employer if it does not operate for more than 7 months in any calendar year or, during the preceding calendar year, it had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts for the other 6 months of that year. Under section 336 of the Economic Aid Act, a seasonal employer must determine its maximum loan amount for purposes of the PPP by using the employer's average total monthly payments for payroll for any 12-week period selected by the seasonal employer beginning February 15, 2019, and ending February 15, 2020.

*d. How do farmers and ranchers calculate the maximum PPP loan amount?* [55]

How you calculate your maximum loan amount depends upon whether you employ other individuals. If you have no employees, the following methodology should be used to calculate your maximum loan amount:

i. *Step 1:* Find your 2019 or 2020 IRS Form 1040 Schedule F line 9 gross income (if you are using 2020 and you have not yet filed a 2020 return, fill it out and compute the value). If this amount is over $100,000, reduce it to $100,000. If this amount is zero or less, you are not eligible for a PPP loan.

ii. *Step 2:* Divide the amount from Step 1 by 12.

iii. *Step 3:* Multiply the average monthly gross income amount from Step 2 by 2.5.

iv. *Step 4:* Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and ending on April 3, 2020 that you seek to refinance. Do not include the amount of any advance under an EIDL COVID–19 loan (because it does not have to be repaid).

You must provide the 2019 or 2020 (whichever you used to calculate loan amount) Form 1040 Schedule F with your PPP loan application to substantiate the applied-for PPP loan amount and a 2019 or 2020 (whichever you used to calculate loan amount) IRS Form 1099–MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes you are self-employed. You must provide a 2020 invoice, bank statement, or book of record to establish you were in operation on or around February 15, 2020.

If you have employees, the following methodology should be used to calculate your maximum loan amount:

i. *Step 1:* Compute 2019 or 2020 payroll (using the same year for all items) by adding the following:

a. The difference between your 2019 or 2020 Form 1040 Schedule F line 9 gross income amount (if you are using 2020 and you have not yet filed a 2020 return, fill it out and compute the value), and the sum of Schedule F lines 15, 22 and 23, up to $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, if this amount is over $100,000, reduce it to $100,000, if this amount is less than zero, set this amount at zero; [56]

b. 2019 or 2020 gross wages and tips paid to your employees whose principal place of residence is in the United States computed using 2019 or 2020 IRS Form 941 Taxable Medicare wages & tips (line 5c—column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips; subtract any amounts paid to any individual employee in excess of $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred and any amounts paid to any employee whose principal place of residence is outside the United States; and

c. 2019 or 2020 employer contributions for employee group health, life, disability, vision and dental insurance (portion of IRS Form 1040 Schedule F line 15 attributable to those contributions), employer contributions for employee retirement contributions (Form 1040 Schedule F line 23, and state and local taxes assessed on employers for employee compensation (primarily under state laws commonly referred to as the State Unemployment Tax Act or SUTA from state quarterly wage reporting forms).

ii. *Step 2:* Calculate the average monthly amount (divide the amount from Step 1 by 12).

iii. *Step 3:* Multiply the average monthly amount from Step 2 by 2.5.

iv. *Step 4:* Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance. Do not include the amount of any advance under an EIDL COVID–19 loan (because it does not have to be repaid).

You must supply your 2019 or 2020 (whichever you used to calculate loan amount) Form 1040 Schedule F, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever you used to calculate loan amount) or equivalent

[54] This subsection has been added to conform to section 336 of the Economic Aid Act. Except for loans made pursuant to section 7(a)(36) of the Small Business Act for which SBA has remitted a loan forgiveness payment to the lender before December 27, 2020, it is effective as if included in the CARES Act and applies to any loan made before, on, or after December 27, 2020, including forgiveness of such a loan. Previous guidance issued for seasonal employers stated as follows: ''Under section 1102 of the CARES Act, a seasonal employer may determine its maximum loan amount for purposes of the PPP by reference to the employer' average total monthly payments for payroll 'the 12-week period beginning February 15, 2019, or at the election of the eligible [borrower], March 1, 2019, and ending June 30, 2019.' Under this interim final rule issued pursuant to section 1109 of the Act, a seasonal employer may alternatively elect to determine its maximum loan amount as the average total monthly payments for payroll during any consecutive 12-week period between May 1, 2019 and September 15, 2019.'' 85 FR 23917 (April 30, 2020).

[55] This subsection has been added to conform to section 313 of the Economic Aid Act. This provision applies to a farmer or rancher who (1) operates as a sole proprietorship, an independent contractor, or is an eligible self-employed individual; (2) reports farm income or expenses on a Schedule F (or any equivalent successor schedule); and (3) was in business as of February 15, 2020. This provision is effective as if included in the CARES Act and applies to any loan made before, on, or after December 27, 2020, unless SBA has remitted a loan forgiveness payment to the lender on the PPP loan.

[56] Any employee payroll costs should be subtracted from the farmer's or rancher's gross income to avoid double-counting amounts that represent pay to the employees of the farmer or rancher.

payroll processor records, along with evidence of any retirement and health insurance contributions, if applicable. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation on February 15, 2020.

A farmer or rancher who received a PPP loan before December 27, 2020 may request a recalculation of the maximum loan amount based on the formula described above regarding gross income, if doing so would result in a larger covered loan amount and may receive an increase in its PPP loan based on the recalculation.

*e. How do partnerships calculate the maximum loan amount?*

The following methodology should be used to calculate the maximum amount that partnerships can borrow:

(i) *Step 1:* Compute 2019 or 2020 payroll (using the same year for all items) by adding (1) net earnings from self-employment of individual general partners in 2019 or 2020, as reported on IRS Form 1065 K–1, reduced by section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties, multiplied by 0.9235,[57] that is not more than $100,000 per partner; (2) 2019 or 2020 gross wages and tips paid to your employees whose principal place of residence is in the United States, if any, which can be computed using 2019 or 2020 IRS Form 941 Taxable Medicare wages and tips (line 5c—column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages and tips, subtracting any amounts paid to any individual employee in excess of $100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.; (3) 2019 or 2020 employer contributions for employee group health, life, disability, vision and dental insurance, if any (portion of IRS Form 1065 line 19 attributable to those contributions); (4) 2019 or 2020 employer contributions to employee retirement plans, if any (IRS Form 1065 line 18); and (5) 2019 or 2020 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms), if any.

(ii) *Step 2:* Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).

(iii) *Step 3:* Multiply the average monthly payroll costs from Step 2 by 2.5.

(iv) *Step 4:* Add any outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance. Do not include the amount of any advance under an EIDL COVID–19 loan (because it does not have to be repaid).

You must supply 2019 or 2020 (whichever you used to calculate loan amount) IRS Form 1065 (including K–1s) and other relevant supporting documentation if the partnership has employees, including the 2019 or 2020 (whichever you used to calculate loan amount) IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements) along with records of any retirement or health insurance contributions. If the partnership has employees, a payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish the partnership was in operation and had employees on that date. If the partnership has no employees, an invoice, bank statement, or book of record establishing the partnership was in operation on February 15, 2020 must instead be provided.

*f. Can a single corporate group receive unlimited PPP loans?* [58]

No. To preserve the limited resources available to the PPP program, and in light of the previous lapse of PPP appropriations and the high demand for PPP loans, businesses that are part of a single corporate group shall in no event receive more than $20,000,000 of PPP loans in the aggregate.[59] For purposes of this limit, businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent.

It is the responsibility of an applicant for a PPP loan to notify the lender if the applicant has applied for or received PPP loans in excess of the amount permitted by this interim final rule and withdraw or request cancellation of any pending PPP loan application or approved PPP loan not in compliance with the limitation set forth in this rule. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes, and the loan will not be eligible for forgiveness. A lender may rely on an applicant's representation concerning the applicant's compliance with this limitation.

The Administrator, in consultation with the Secretary, determined that limiting the amount of PPP loans that a single corporate group may receive will promote the availability of PPP loans to the largest possible number of borrowers, consistent with the CARES Act. The Administrator has concluded that a limitation of $20,000,000 strikes an appropriate balance between broad availability of PPP loans and program resource constraints.

SBA's affiliation rules, which relate to an applicant's eligibility for PPP loans, and any waiver of those rules under the CARES Act, continue to apply independent of this limitation. Businesses are subject to this limitation even if the businesses are eligible for the waiver-of-affiliation provision under the CARES Act or are otherwise not considered to be affiliates under SBA's affiliation rules.[60]

This rule has no effect on lender obligations required to obtain an SBA guarantee for PPP loans.

*g. What qualifies as ''payroll costs?''* [61]

Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care or group life, disability, vision, or dental

[57] This treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the ''employer'' share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.

[58] This subsection was originally published at 85 FR 26324, subsection III.1. (May 4, 2020).

[59] The Administrator has authority to issue ''such rules and regulations as [the Administrator] deems necessary to carry out the authority vested in [her] by or pursuant to'' 15 U.S.C. Chapter 14A, including authorities established under section 1102 of the CARES Act. Section 1102 provides that the Administrator ''may'' guarantee loans under the terms and conditions set forth in section 7(a) of the Small Business Act, and those conditions specify a ''maximum''—but not a minimum—loan amount. *See* 15 U.S.C. 636(a)(36)(B), (E); *see also* CARES Act section 1106(k) (authorizing SBA to issue regulations to govern loan forgiveness). To preserve finite appropriations for PPP loans and ensure broad access for eligible borrowers, the Administrator, in consultation with the Secretary, has determined that an aggregate limitation on loans to a single corporate group is necessary and appropriate.

[60] *See* Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv), as added by the CARES Act; 13 CFR 121.103(b).

[61] This subsection was originally published at 85 FR 20811, subsection III.2.f. (April 15, 2020) and has been modified to conform to the Economic Aid Act.

insurance,[62] including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation.

*h. Is there anything that is expressly excluded from the definition of payroll costs?* [63]

Yes. The Act expressly excludes the following:

i. Any compensation of an employee whose principal place of residence is outside of the United States;

ii. The compensation of an individual employee in excess of $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred;

iii. Federal employment taxes imposed or withheld during the applicable period, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and

iv. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Pub. L. 116–127).

*i. May fishing boat owners include payroll costs in their PPP loan applications that are attributable to crewmembers described in section 3121(b)(20) of the Internal Revenue Code?* [64]

Yes. A fishing boat owner may include compensation reported on Box 5 of IRS Form 1099–MISC and paid to a crewmember described in section 3121(b)(20) of the Code, up to $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, as a payroll cost in its PPP loan application.

*j. Do independent contractors count as employees for purposes of PPP loan calculations?* [65]

No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan calculation.[66]

*k. Do student workers count when determining the number of employees for PPP loan eligibility?* [67]

Yes. Student workers generally count as employees, unless (a) the applicant is an institution of higher education, as defined in the Department of Education's Federal Work-Study regulations, 34 CFR 675.2, and (b) the student worker's services are performed as part of a Federal Work-Study Program (as defined in those regulations [68]) or a substantially similar program of a State or political subdivision thereof. Institutions of higher education must exclude work study students when determining the number of employees for PPP loan eligibility, and must also exclude payroll costs for work study students from the calculation of payroll costs used to determine their PPP loan amount.

*5. What is the interest rate on a PPP loan?* [69]

The interest rate will be 100 basis points or one percent, calculated on a non-compounding, non-adjustable basis.[70]

*6. What will be the maturity date on a PPP loan?* [71]

The maturity is five years.

*7. Can I apply for more than one First Draw PPP Loan?* [72]

No. Except as set forth in subsection D.8, the Administrator, in consultation with the Secretary, determined that no eligible borrower may receive more than one First Draw PPP Loan. This means that if you apply for a PPP loan you should consider applying for the maximum amount. Any borrower who received a PPP loan in 2020 received a First Draw PPP Loan and is not eligible to receive another First Draw PPP Loan, but may be eligible for a second draw PPP loan.[73]

*8. Can I use e-signatures or e-consents if a borrower has multiple owners?* [74]

Yes, e-signature or e-consents can be used regardless of the number of owners.

*9. When will I have to begin paying principal and interest on my PPP loan?* [75]

If you submit to your lender a loan forgiveness application within 10 months after the end of your loan forgiveness covered period, you will not have to make any payments of principal or interest on your loan before the date on which SBA remits the loan forgiveness amount on your loan to your lender (or notifies your lender that no loan forgiveness is allowed).

Your ''loan forgiveness covered period'' is the period beginning on the date the lender disburses the PPP loan and ending on any date selected by the borrower that occurs during the period (i) beginning on the date that is 8 weeks after the date of disbursement and (ii) ending on the date that is 24 weeks after the date of disbursement. Your lender must notify you of remittance by SBA of the loan forgiveness amount (or notify you that SBA determined that no loan forgiveness is allowed) and the date your first payment is due. Interest continues to accrue during the deferment period.

If you do not submit to your lender a loan forgiveness application within 10

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[62] This provision has been modified to conform to section 308 of the Economic Aid Act. This revision is effective as if included in the CARES Act and applies to any loan made before, on, or after December 27, 2020, including forgiveness of such a loan.

[63] This subsection was originally published at 85 FR 20811, subsection III.2.g. (April 15, 2020) and has been modified to conform to section 344 the Economic Aid Act.

[64] This subsection was originally published at 85 FR 39066, subsection III.1. (June 30, 2020) and has been modified to conform to section 344 the Economic Aid Act and for readability.

[65] This subsection was originally published at 85 FR 20811, subsection III.2.h. (April 15, 2020).

[66] *See* subsection 4.i. regarding fishing boat owners including payroll costs for their crewmembers in the calculation of the PPP loan amount.

[67] This subsection was originally published at 85 FR 27287, section III.2. (May 8, 2020) and has been modified for readability.

[68] The Department of Education's Federal Work-Study Programs described at 34 CFR part 675 are (1) the Federal Work-Study Program, (2) the Job Location and Development Program, and (3) Work Colleges Program.

[69] This subsection was originally published at 85 FR 20811, subsection III.2.i. (April 15, 2020) and has been modified to conform to additional interim final rules or guidance and the Economic Aid Act.

[70] Revised to conform to section 339 of the Economic Aid Act. The revision applies to PPP loans made on or after December 27, 2020, but may apply with respect to a PPP loan made before that date upon the mutual agreement of the lender and the borrower. A one percent interest rate provides low cost funds to borrowers to meet eligible payroll costs and other eligible expenses during this temporary period of economic dislocation caused by the coronavirus. Second, for lenders, the 100 basis points offers an attractive interest rate relative to the cost of funding for comparable maturities.

[71] This subsection was originally published at 85 FR 36308, subsection III.1.b. (June 16, 2020) and has been modified for readability.

[72] This subsection was originally published at 85 FR 20811, subsection III.2.i. (''*Can I apply for more than one PPP loan?*'') (April 15, 2020) and has been modified to conform to the Economic Aid Act and for readability. PPP borrowers may be eligible for a loan under section 7(a)(37) of the Small Business Act, ''Paycheck Protection Program Second Draw Loans,'' *see* interim final rule on Second Draw PPP Loans that is being published separately.

[73] *See* interim final rule on Second Draw PPP Loans for eligibility criteria for Second Draw PPP Loans, which is being published separately.

[74] This subsection was originally published at 85 FR 20811, subsection III.2.l. (April 15, 2020).

[75] This subsection was originally published at 85 FR 20811, subsection III.2.n. (April 15, 2020), as amended by 85 FR 36038 (June 16, 2020), and has been modified to conform to the Economic Aid Act.

months after the end of your loan forgiveness covered period, you must begin paying principal and interest after that period. For example, if a borrower's PPP loan is disbursed on January 25, 2021, the 24-week period ends on July 12, 2021. If the borrower does not submit a loan forgiveness application to its lender by May 12, 2022, the borrower must begin making payments on or after May 12, 2022.

*10. What forms do I need and how do I submit an application for a PPP loan?* [76]

The applicant must submit Paycheck Protection Program Borrower Application Form (SBA Form 2483), or lender's equivalent form, and payroll documentation, as described above. The lender must submit SBA Form 2484, Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty, electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

*11. How can PPP loans be used?* [77]

a. The proceeds of a PPP loan are to be used for:

i. Payroll costs (as defined in the CARES Act, Economic Aid Act and this interim final rule);

ii. costs related to the continuation of group health care, life, disability, vision, or dental benefits during periods of paid sick, medical, or family leave, and group health care, life, disability, vision, or dental insurance premiums;

iii. mortgage interest payments (but not mortgage prepayments or principal payments);

iv. rent payments;

v. utility payments;

vi. interest payments on any other debt obligations that were incurred before February 15, 2020;

vii. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020; [78]

viii. covered operations expenditures (payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses); [79]

ix. covered property damage costs (costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation);

x. covered supplier costs (expenditures made by a borrower to a supplier of goods for the supply of goods that—(A) are essential to the operations of the borrower at the time at which the expenditure is made; and (B) is made pursuant to a contract, order, or purchase order—(i) in effect at any time before the covered period with respect to the applicable covered loan; or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan); and

xi. covered worker protection expenditures ((A) operating or a capital expenditures to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency with respect to the COVID–19 expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19; (B) such expenditures may include—(i) the purchase, maintenance, or renovation of assets that create or expand—(I) a drive-through window facility; (II) an indoor, outdoor, or combined air or air pressure ventilation or filtration system; (III) a physical barrier such as a sneeze guard; (IV) an expansion of additional indoor, outdoor, or combined business space; (V) an onsite or offsite health screening capability; or (VI) other assets relating to the compliance with the requirements or guidance described in subparagraph (A), as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and (ii) the purchase of—(I) covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation; (II) particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or (III) other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and (C) such expenditures do not include residential real property or intangible property).

At least 60 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness. While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs, consistent with Congress' overarching goal of keeping workers paid and employed. This percentage is consistent with the limitation on the forgiveness amount set forth in the Flexibility Act. This limitation on use of the loan funds will help to ensure that the finite appropriations available for these loans are directed toward payroll protection, as each loan that is issued depletes the appropriation, regardless of whether portions of the loan are later forgiven.

*b. How can PPP loans be used by individuals with income from self-employment who file a Form 1040, Schedule C?* [80]

The proceeds of a PPP loan are to be used for the following.

i. Owner compensation replacement, calculated based on 2019 or 2020 (using the same year that was used to calculate the loan amount) net profit as described in subsection 4.b.

ii. Employee payroll costs (as defined in this interim final rule) for employees whose principal place of residence is in

[76] This subsection was originally published at 85 FR 20811, subsection III.2.q. (April 15, 2020).

[77] This subsection was originally published at 85 FR 20811, subsection III.2.r. (April 15, 2020), as amended by 85 FR 36308 (June 16, 2020) and has been modified to conform to the Economic Aid Act.

[78] Under paragraph 7(a)(36)(Q) of the Small Business Act, as amended by section 341 of the Economic Aid Act, an EIDL loan used for purposes other than paying payroll costs and other eligible PPP expenditures is not considered a duplication of the assistance available under the PPP.

[79] Items viii. through xi. were added to conform to section 304 of the Economic Aid Act. These provisions are effective as if included in the CARES Act and apply to any loan made before, on, or after December 27, 2020, including forgiveness of such loan, unless SBA has remitted a loan forgiveness payment to the lender on the PPP loan. Section 1106 of the CARES Act (15 U.S.C. 9005) was redesignated as section 7A, transferred to the Small Business Act (15 U.S.C. 631 *et seq.*), and inserted so as to appear after section 7 of the Small Business Act (15 U.S.C. 636) in section 304(b) of the Economic Aid Act.

[80] This subsection was originally published at 85 FR 21747, subsection III.1.d. (April 20, 2020) and has been modified to conform to the Economic Aid Act.

the United States, if you have employees.

iii. Mortgage interest payments (but not mortgage prepayments or principal payments) on any business mortgage obligation on real or personal property (*e.g.,* the interest on your mortgage for the warehouse you purchased to store business equipment or the interest on an auto loan for a vehicle you use to perform your business), business rent payments (*e.g.,* the warehouse where you store business equipment or the vehicle you use to perform your business), and business utility payments (*e.g.,* the cost of electricity in the warehouse you rent or gas you use driving your business vehicle). You must have claimed or be entitled to claim a deduction for such expenses on your 2019 or 2020 (whichever you used to calculate loan amount) Form 1040 Schedule C for them to be a permissible use. For example, if you did not claim or are not entitled to claim utilities expenses on your 2019 or 2020 Form 1040 Schedule C, you cannot use the proceeds for utilities.

iv. Interest payments on any other debt obligations that were incurred before February 15, 2020 (such amounts are not eligible for PPP loan forgiveness).

v. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020 (maturity will be reset to PPP's maturity of two years for PPP loans made before June 5, 2020 unless the borrower and lender mutually agree to extend the maturity of such loans to five years, or PPP's maturity of five years for PPP loans made on or after June 5).[81]

vi. Covered operations expenditures, as defined in section 7A(a) of the Small Business Act, to the extent they is deductible on Form 1040 Schedule C.

vii. Covered property damage costs, as defined in section 7A(a) of the Small Business Act, to the extent they is deductible on Form 1040 Schedule C.

viii. Covered supplier costs, as defined in section 7A(a) of the Small Business Act, to the extent they is deductible on Form 1040 Schedule C.

ix. Covered worker protection expenditures, as defined in section 7A(a) of the Small Business Act, to the extent they is deductible on Form 1040 Schedule C.[82]

The Administrator, in consultation with the Secretary, determined that it is appropriate to limit self-employed individuals' (who file a Form 1040 Schedule C) use of loan proceeds to those types of allowable uses for which the borrower made expenditures in 2019 or 2020 or that were used on covered property damage, as defined in section 7A(a). The Administrator has determined that this limitation on self-employed individuals who file a Form 1040 Schedule C is consistent with the borrower certification required by the Act; specifically, that the PPP loan is necessary ''to support the ongoing operations'' of the borrower. The Administrator and the Secretary thus believe that this limitation is consistent with the structure of the Act to maintain existing operations and payroll and not for business expansion. This limitation on the use of PPP loan proceeds will also help to ensure that the finite appropriations available for these loans are directed toward maintaining existing operations and payroll, as each loan that is made depletes the appropriation.

*c. Can PPP proceeds be used for lobbying activities or expenditures?*[83]

No. None of the proceeds of a PPP loan may be used for (1) lobbying activities, as defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602); (2) lobbying expenditures related to a State or local election; or (3) expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before Congress or any State government, State legislature, or local legislature or legislative body.

*d. What happens if PPP loan funds are misused?*[84]

If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

*12. What certifications need to be made?*[85]

On the PPP borrower application, an authorized representative of the applicant must certify in good faith to all of the below:[86]

i. The Applicant was in operation on February 15, 2020, has not permanently closed, and was either an eligible self-employed individual, independent contractor, or sole proprietorship with no employees, or had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099–MISC.

ii. Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.

iii. The funds will be used to retain workers and maintain payroll; or make payments for mortgage interest, rent, utilities, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures as specified under the Paycheck Protection Program Rules; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable such as for charges of fraud. (As explained above, not more than 40 percent of loan proceeds may be used for nonpayroll costs.)

iv. I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, covered utilities, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures, and not more than 40% of the forgiven amount may be for non-payroll costs. If required, the Applicant will provide to the Lender and/or SBA documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of eligible expenses for the covered period following this loan.

v. The Applicant has not and will not receive another loan under the Paycheck Protection Program, section 7(a)(36) of the Small Business Act (15 U.S.C.

[81] Under section 7(a)(36)(Q) of the Small Business Act, as amended by section 341 of the Economic Aid Act, an EIDL loan used for purposes other than paying payroll costs and other eligible PPP expenditures is not considered a duplication of the assistance available under the PPP.

[82] Items vi. through ix. were added to conform to section 304 of the Economic Aid Act. These provisions are effective as if included in the CARES Act and apply to any loan made before, on, or after December 27, 2020, including forgiveness of such loan, unless SBA has remitted a loan forgiveness payment to the lender on the PPP loan.

[83] This subsection has been added to conform to section 319 of the Economic Aid Act.

[84] This subsection was originally published at 85 FR 20811, subsection III.2.s. (April 15, 2020).

[85] This subsection was originally published at 85 FR 20811, subsection III.2.s. (April 15, 2020), as amended by 85 FR 36308 (June 16, 2020) and has been modified to conform to the Economic Aid Act and the revised PPP Borrower Application Form (SBA Form 2483).

[86] A representative of the applicant can certify for the business as a whole if the representative is legally authorized to do so. The certifications have been revised to conform to the Economic Aid Act and the revised PPP Borrower Application Form (SBA Form 2483).

636(a)(36)) (this does not include Paycheck Protection Program second draw loans, section 7(a)(37) of the Small Business Act (15 U.S.C. 636(a)(37)).

vi. The Applicant has not and will not receive a Shuttered Venue Operator grant from SBA.

vii. The President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person as determined under applicable common law, does not directly or indirectly hold a controlling interest in the Applicant, with such terms having the meanings provided in section 322 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act.

viii. The Applicant is not an issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).

ix. I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000.

x. I acknowledge that the Lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

*13. Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request* [87]

The CARES Act requires each applicant applying for a PPP loan to certify in good faith ''that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing obligations'' of the applicant. SBA, in consultation with the Department of the Treasury, issued additional guidance on May 13, 2020 concerning how SBA will review the required good-faith certification. *See* FAQ 46 (posted May 13, 2020). This guidance included a safe harbor providing that any PPP borrower, together with its affiliates, that received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

*14. Can my PPP loan be forgiven in whole or in part?* [88]

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. An eligible borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes and employee and compensation levels are maintained or, if not, an applicable safe harbor or exemption applies. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs (including employer contributions for group health, life, disability, vision and dental insurance), payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, utility payments for service that began before February 15, 2020, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures over the loan forgiveness covered period.[89] Payroll costs that are qualified wages taken into account in determining the Employer Retention Credit are not eligible for loan forgiveness. The ''loan forgiveness covered period'' is the period beginning on the date the lender disburses the PPP loan and ending on any date selected by the borrower that occurs during the period (i) beginning on the date that is 8 weeks after the date of disbursement and (ii) ending on the date that is 24 weeks after the date of disbursement.

To receive full loan forgiveness, a borrower must use at least 60 percent of the PPP loan for payroll costs, and not more than 40 percent of the loan forgiveness amount may be attributable to nonpayroll costs. For example, if a borrower uses 59 percent of its PPP loan for payroll costs, it will not receive the full amount of loan forgiveness it might otherwise be eligible to receive. Instead, the borrower will receive partial loan forgiveness, based on the requirement that 60 percent of the forgiveness amount must be attributable to payroll costs. For example, if a borrower receives a $100,000 PPP loan, and during the covered period the borrower spends $54,000 (or 54 percent) of its loan on payroll costs, then because the borrower used less than 60 percent of its loan on payroll costs, the maximum amount of loan forgiveness the borrower may receive is $90,000 (with $54,000 in payroll costs constituting 60 percent of the forgiveness amount and $36,000 in nonpayroll costs constituting 40 percent of the forgiveness amount). Because the Economic Aid Act changed the loan forgiveness covered period from either an 8- or 24-week period to a covered period between 8 and 24 weeks at the election of the borrower, SBA is eliminating the ''alternative covered period'' as defined in the interim final rule published at 85 FR 33004, 33006 (June 1, 2020), as amended.

Additionally, an eligible borrower that received a loan of $150,000 or less shall not, at the time of its application for loan forgiveness, be required to submit any application or documentation in addition to the certification and information required by paragraph 7A(l)(1)(A) of the Small Business Act. Such borrowers must retain records relevant to the form that prove compliance with the PPP requirements—with respect to employment records, for the 4-year period following submission of the loan forgiveness application, and with respect to other records, for the 3-year period following submission of the loan forgiveness application. All other borrowers must follow the existing requirements for loan forgiveness applications and records retention. SBA may review and audit PPP loans of $150,000 or less and access any records the borrower is required to retain. All borrowers with loans of any size must provide documentation independently to a lender to satisfy relevant Federal, State, local or other statutory or regulatory requirements or in connection with an SBA loan review.

The Economic Aid Act repealed the CARES Act provision requiring SBA to deduct EIDL Advance Amounts received by borrowers from the forgiveness payment amounts remitted

[87] This subsection has been added to codify the safe harbor contained in FAQ 46 (posted May 13, 2020).

[88] This subsection replaces the rule originally published at 85 FR 20811, subsection III.2.o (April 15, 2020), as amended by 85 FR 36308 (June 16, 2020) and has been modified to conform to the Economic Aid Act.

[89] Covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures were added as eligible expenses in section 304 of the Economic Aid Act. Except for loans made pursuant to section 7(a)(36) of the Small Business Act for which SBA has remitted a loan forgiveness payment to the lender before December 27, 2020, these eligible expenses apply to any loan made before, on, or after December 27, 2020, including forgiveness of such a loan.

by SBA to the lender. The EIDL Advance Amount received by the borrower will not reduce the amount of forgiveness to which the borrower is entitled and will not be deducted from the forgiveness payment amount that SBA remits to the lender. Any EIDL Advance Amounts previously deducted from a borrower's forgiveness amount will be remitted to the lender, together with interest to the remittance date.

*15. Do independent contractors count as employees for purposes of PPP loan forgiveness?* [90]

No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan forgiveness.

*16. For loans made prior to December 27, 2020, what additional documentation must a borrower submit when the President of the United States, Vice President of the United States, the head of an Executive department, or a Member of Congress, or the spouse of any of the preceding, directly or indirectly holds a controlling interest in the borrower?*

For PPP loans made before December 27, 2020, if the President of the United States, Vice President of the United States, the head of an Executive department, or a Member of Congress, or the spouse of such person as determined under applicable common law, directly or indirectly holds a controlling interest in the borrower, the principal executive officer, or individual performing a similar function, of the borrower must disclose that information to SBA. Such disclosure must be made not later than January 26, 2021, if the borrower submitted an application for forgiveness before December 27, 2020, or not later than 30 days after submitting an application for forgiveness.

**C. What do lenders need to know and do?**

*1. Who is eligible to make PPP loans?* [91]

a. All SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis.

b. The Act provides that the authority to make PPP loans can be extended to additional lenders determined by the Administrator and the Secretary to have the necessary qualifications to process, close, disburse, and service loans made with the SBA guarantee. Since SBA is authorized to make PPP loans (and loans under section 7(a)(37) of the Small Business Act) up to $806.45 billion by March 31, 2021, the Adminstrator and the Secretary have jointly determined that authorizing additional lenders is necessary to achieve the purpose of allowing as many eligible borrowers as possible to receive loans by the March 31, 2021 deadline.

c. The following types of lenders have been determined to meet the criteria and are eligible to make PPP loans unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action with their primary Federal regulator that addresses unsafe or unsound lending practices:

i. Any federally insured depository institution or any federally insured credit union;

ii. Any Farm Credit System institution [92] (other than the Federal Agricultural Mortgage Corporation) as defined in 12 U.S.C. 2002(a) that applies the requirements under the Bank Secrecy Act and its implementing regulations (collectively, BSA) as a federally regulated financial institution, or functionally equivalent requirements that are not altered by this rule; and

iii. Any depository or non-depository financing provider that originates, maintains, and services business loans or other commercial financial receivables and participation interests; has a formalized compliance program; applies the requirements under the BSA as a federally regulated financial institution, or the BSA requirements of an equivalent federally regulated financial institution; has been operating since at least February 15, 2019, and has originated, maintained, or serviced more than $50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution's lending activities in accordance with 12 U.S.C. 1867(c) and is in good standing with the appropriate Federal banking agency.[93]

d. Qualified institutions described in 1.c.i. and ii. will be automatically qualified under delegated authority by the SBA upon transmission of CARES Act Section 1102 Lender Agreement (SBA Form 3506) unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action by their primary Federal regulator that addresses unsafe or unsound lending practices.

e. A non-bank lender may be approved to make PPP loans if it has originated, maintained, or serviced more than $10 million in business loans or other commercial financial receivables during a 12-month period in the past 36 months, if the non-bank lender is (1) a community development financial institution (other than a federally insured bank or federally insured credit union) or (2) a majority minority-, women-, or veteran/military-owned lender.[94]

*2. Do lenders have to register in SAM.gov to make PPP loans?* [95]

Yes. Given the exigent circumstances in which small businesses and lenders currently find themselves due to the COVID–19 pandemic, PPP lenders will have thirty (30) days from the date of the first PPP loan disbursement made by them after December 27, 2020 to complete SAM registration and provide SBA with the lender's unique entity identifier.

*3. What do lenders have to do in terms of loan underwriting?* [96]

Each lender shall:

a. Confirm receipt of borrower certifications contained in Paycheck Protection Program Borrower Application Form (SBA Form 2483) issued by the Administration or lender's equivalent form;

b. Confirm receipt of information demonstrating that a borrower was either an eligible self-employed individual, independent contractor, or

[90] This subsection was originally published at 85 FR 20811, subsection III.2.p. (April 15, 2020).

[91] This subsection was originally published at 85 FR 20811, subsection III.3.a. (April 15, 2020) and has been modified to conform to additional interim final rules or guidance and sections 323 and 343 of the Economic Aid Act.

[92] Section 314 of the Economic Aid Act contains the following information related to Farm Credit System Institutions: ''(1) APPLICABLE RULES.—Solely with respect to loans under paragraphs (36) and (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), Farm Credit Administration regulations and guidance issued as of July 14, 2020, and compliance with such regulations and guidance, shall be deemed functionally equivalent to requirements referenced in section 3(a)(iii)(II) of the interim final rule of the Administration entitled 'Business Loan Program Temporary Changes; Paycheck Protection Program' (85 FR 20811 (April 15, 2020)) or any similar requirement referenced in that interim final rule in implementing such paragraph (37).''

[93] This subsection c.iii. was modified to implement the rule originally published at 85 FR 26324, subsection III.2.a. (May 4, 2020).

[94] Lenders described in this subsection (e.) should follow the special instructions in footnote 1 of the 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lenders (SBA Form 3507). This subsection (e.) was adapted from the rule originally published at 85 FR 26324, subsection III.2.b. (May 4, 2020).

[95] This subsection adds a new requirement that all PPP lenders must register in *SAM.gov. See* 2 CFR 25.110(c)(2)(iii).

[96] This subsection was originally published at 85 FR 20811, subsection III.3.b. (April 15, 2020) and has been modified to conform to additional rules or guidance and the Economic Aid Act.

sole proprietorship with no employees or had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;

c. Confirm the dollar amount of average monthly payroll costs for 2019 or 2020 by reviewing the payroll documentation submitted with the borrower's application;[97] and

d. Follow applicable BSA requirements:

i. Federally insured depository institutions and federally insured credit unions should continue to follow their existing BSA protocols when making PPP loans to either new or existing customers who are eligible borrowers under the PPP. PPP loans for existing customers will not require re-verification under applicable BSA requirements, unless otherwise indicated by the institution's risk-based approach to BSA compliance.

ii. Entities that are not presently subject to the requirements of the BSA, should, prior to engaging in PPP lending activities, including making PPP loans to either new or existing customers who are eligible borrowers under the PPP, establish an anti-money laundering (AML) compliance program equivalent to that of a comparable federally regulated institution. Depending upon the comparable federally regulated institution, such a program may include a customer identification program (CIP), which includes identifying and verifying their PPP borrowers' identities (including *e.g.,* date of birth, address, and taxpayer identification number), and, if that PPP borrower is a company, following any applicable beneficial ownership information collection requirements. Alternatively, if available, entities may rely on the CIP of a federally insured depository institution or federally insured credit union with an established CIP as part of its AML program. In either instance, entities should also understand the nature and purpose of their PPP customer relationships to develop customer risk profiles. Such entities will also generally have to identify and report certain suspicious activity to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). If such entities have questions with regard to meeting these requirements, they should contact the FinCEN Regulatory Support Section at *FRC@fincen.gov.* In addition, FinCEN has created a COVID–19-specific contact channel, via a specific drop-down category, for entities to communicate to FinCEN COVID–19-related concerns while adhering to their BSA obligations. Entities that wish to communicate such COVID–19-related concerns to FinCEN should go to *www.FinCEN.gov,* click on ''Need Assistance,'' and select ''COVID19'' in the subject drop-down list.

Each lender's underwriting obligation under the PPP is limited to the items above and reviewing the ''Paycheck Protection Borrower Application Form.'' Borrowers must submit such documentation as is necessary to establish eligibility such as payroll records, payroll tax filings, or Form 1099–MISC, Schedule C or F, income and expenses from a sole proprietorship, or bank records. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

A lender may rely on any certification or documentation submitted by an applicant for a PPP loan or an eligible recipient or eligible entity that (A) is submitted pursuant to all applicable statutory requirements, regulations, and guidance related to a PPP loan, including under paragraph 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)); and (B) attests that the applicant, eligible recipient, or eligible entity, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations, and guidance related to PPP loans. With respect to a lender that relies on such a certification or documentation related to a PPP loan, an enforcement action may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the PPP loan, if—(A) the lender acts in good faith relating to loan origination or forgiveness of the PPP loan based on that reliance; and (B) all other relevant Federal, State, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the PPP loan.[98]

*4. Can lenders rely on borrower documentation for loan forgiveness?*[99]

Yes. The lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs.

*5. What fees will lenders be paid?*[100]

For PPP loans made on or after December 27, 2020, SBA will pay lenders fees, based on the balance of the financing outstanding at the time of disbursement of the loan, for processing PPP loans in the following amounts:

i. For loans of not more than $50,000, an amount equal to the lesser of fifty (50) percent or $2,500;

ii. Five (5) percent for loans of more than $50,000 and not more than $350,000;

iii. Three (3) percent for loans of more than $350,000 and less than $2,000,000; and

iv. One (1) percent for loans of at least $2,000,000.

SBA will pay the fee not later than 5 days after the reported disbursement of the PPP loan and, as required by the Economic Aid Act, may not require the fee to be repaid by the lender unless the lender is found guilty of an act of fraud in connection with the PPP loan.

*6. Can PPP loans be sold into the secondary market?*[101]

Yes. A PPP loan may be sold on the secondary market after the loan is fully disbursed. A PPP loan may be sold on the secondary market at a premium or a discount to par value.

*7. Do the requirements for loan pledges under 13 CFR 120.434 apply to PPP loans pledged for borrowings from a Federal Reserve Bank (FRB) or advances by a Federal Home Loan Bank (FHLB)?*[102]

No. Pursuant to SBA regulations at 13 CFR 120.435(d) and (e), a pledge of 7(a) loans to a FRB or FHLB does not require SBA's prior written consent or notice to SBA. SBA, in consultation with Treasury, has determined that for purposes of loans made under the PPP, the additional requirements set forth in 120.434 shall also not apply. This would mean, for example, that SBA would not have to approve loan

[97] *See* PPP FAQ 1 (April 3, 2020) for further information on this step.

[98] This paragraph was added to conform to section 305 of the Economic Aid Act. This shall be effective as if included in the CARES Act and shall apply to any loan made before, on, or after December 27, 2020, including forgiveness of such a loan.

[99] This subsection was originally published at 85 FR 20811, subsection III.3.c. (April 15, 2020) and has been modified for readability. SBA also intends to issue a consolidated interim final rule governing all aspects of loan forgiveness and the loan review process.

[100] This subsection was originally published at 85 FR 20811, subsection III.3.d. (April 15, 2020) and has been modified to conform to section 340 of the Economic Aid Act.

[101] This subsection was originally published at 85 FR 20811, subsection III.4.d (April 15, 2020) and modified to reflect that advance purchases are not available.

[102] This subsection was originally published at 85 FR 21747, subsection III.3. (April 20, 2020).

documents or require a multi-party agreement among SBA, the lender, and others.

*8. Are lenders required to use a promissory note provided by SBA or may they use their own?* [103]

Lenders may use their own promissory note or an SBA form of promissory note.

*9. Are lenders required to use a separate SBA Authorization document to issue PPP loans?* [104]

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 (the Lender Application Form—Paycheck Protection Program Loan Guaranty) [105] to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with section 1102 of the CARES Act and section 7A of the Small Business Act, the PPP Interim Final Rules and guidance, and SBA Form 2484. *See* FAQ 21 (posted April 13, 2020). The decision not to require a separate SBA Authorization in order to ensure that critical PPP loans are disbursed as efficiently as practicable.

*10. By when must a lender electronically submit an SBA Form 1502 indicating that PPP loan funds have been disbursed?* [106]

SBA has made available a specific SBA Form 1502 reporting process through which PPP lenders report on PPP loans and collect the processing fee on fully disbursed loans to which they are entitled. Lenders must electronically upload SBA Form 1502 information within 20 calendar days after a PPP loan is approved. The lender must report on SBA Form 1502 whether it has fully disbursed PPP loan proceeds. A lender will not receive a processing fee: (1) Prior to full disbursement of the PPP loan; (2) if the PPP loan is cancelled before disbursement; or (3) if the PPP loan is cancelled or voluntarily terminated and repaid after disbursement (including if a borrower repays the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request). If the lender has received a processing fee on a loan that was cancelled or voluntarily terminated and repaid after disbursement (including if a borrower repaid the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request), SBA will not require the lender to repay the processing fee unless the lender is found guilty of an act of fraud in connection with the PPP loan. In addition to providing ACH credit information to direct payment of the requested processing fee, lenders will be required to confirm that all PPP loans for which the lender is requesting a processing fee have been fully disbursed on the disbursement dates and in the loan amounts reported. A lender must report through either E-Tran Servicing or the SBA Form 1502 report any PPP loans that have been cancelled before disbursement or that have been cancelled or voluntarily terminated and repaid after disbursement.

*11. How do lenders report disbursements on PPP loans that are approved for loan increases due to the Economic Aid Act?* [107]

Lenders must submit the SBA Form 1502 information within 20 calendar days after a PPP loan increase is approved following the SBA Form 1502 reporting process. See subsection C.10. for more information.

**D. What do both borrowers and lenders need to know and do?**

*1. What are the loan terms and conditions?* [108]

Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans, with certain changes including but not limited to:

a. The guarantee percentage is 100 percent.

b. No collateral will be required.

c. No personal guarantees will be required.

d. The interest rate will be 100 basis points or one percent, calculated on a non-compounding, non-adjustable basis.[109]

e. All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds.

*2. Do lenders have to apply the ''credit elsewhere test''?* [110]

No. When evaluating an applicant's eligibility lenders will not be required to apply the ''credit elsewhere test'' (as set forth in section 7(a)(1)(A) of the Small Business Act (15 U.S.C. 636) and SBA regulations at 13 CFR 120.101).

*3. Are there any fee waivers?* [111]

a. There will be no up-front guarantee fee payable to SBA by the borrower;

b. There will be no lender's annual service fee (''on-going guaranty fee'') payable to SBA;

c. There will be no subsidy recoupment fee; and

d. There will be no fee payable to SBA for any guarantee sold into the secondary market.

*4. Who pays the fee to an agent who provides assistance in connection with a PPP loan?* [112]

Agent fees may not be paid out of the proceeds of a PPP loan. If a borrower has knowingly retained an agent, such fees will be paid by the borrower. A lender is only responsible for paying fees to an agent for services for which the lender directly contracts with the agent. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:

a. One (1) percent for loans of not more than $350,000;

b. 0.50 percent for loans of more than $350,000 and less than $2 million; and

c. 0.25 percent for loans of at least $2 million.

The Act authorizes the Administrator to establish limits on agent fees. The Administrator, in consultation with the Secretary, determined that the agent fee limits set forth above are reasonable based upon the application

[103] This subsection was originally published at 85 FR 23450, subsection III.1.a. (April 28, 2020).

[104] This subsection was originally published at 85 FR 23450, subsection III.1.b. (April 28, 2020) and has been modified to conform to the Economic Aid Act.

[105] This requirement is satisfied by a lender when the lender completes the process of submitting a loan through the E-Tran system; no transmission or retention of a physical copy of Form 2484 is required.

[106] This subsection was originally published at 85 FR 26321, subsection III.1.b. (May 4, 2020) and has been modified to conform to the Economic Aid Act and for readability.

[107] This subsection was added to conform to the Economic Aid Act.

[108] This subsection was originally published at 85 FR 20811, subsection III.4.a. (April 15, 2020) and modified to conform to the Economic Aid Act.

[109] This subsection (d) was revised to conform to section 339 of the Economic Aid Act. The revision applies to PPP loans made on or after December 27, 2020, but may apply with respect to a PPP loan made before that date upon the mutual agreement of the lender and the borrower.

[110] This subsection was originally published at 85 FR 20811, subsection III.3.e. (April 15, 2020).

[111] This subsection was originally published at 85 FR 20811, subsection III.4.a. (April 15, 2020).

[112] This subsection was originally published at 85 FR 20811, subsection III.4.c. (April 15, 2020) and modified to conform to section 340 of the Economic Aid Act. This revision is effective as if included in the CARES Act and applies to PPP loans made before, on, or after December 27, 2020, including forgiveness of such a loan.

requirements and the fees that lenders receive for making PPP loans.

*5. Can a borrower take multiple draws from a PPP loan and thereby delay the start of the covered period?* [113]

No. The lender must make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval; for the purposes of this rule, a loan is considered approved when the loan is assigned a loan number by SBA.[114]

Notwithstanding this limitation, lenders are not responsible for delays in disbursement attributable to a borrower's failure to timely provide required loan documentation, including a signed promissory note. Loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender. When disbursing loans, lenders must send any amount of loan proceeds designated for the refinance of an EIDL loan directly to SBA and not to the borrower.

*6. If a partnership received a PPP loan that did not include any compensation for its partners, can the loan amount be increased to include partner compensation?* [115]

Yes. If a partnership received a PPP loan that only included amounts necessary for payroll costs of the partnership's employees and other eligible operating expenses, but did not include any amount for partner compensation,[116] the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount to include appropriate partner compensation, even if the loan has been fully disbursed and even if the lender's first SBA Form 1502 report to SBA on the PPP loan has already been submitted. In no event can the increased loan amount exceed the maximum loan amount allowed under the PPP Program, which is $10 million for an individual borrower or $20 million for a corporate group. Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase. Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds.

As described in subsection B.1.c., partnerships, rather than individual partners, are eligible for a PPP loan. As described in subsection B.4.e., self-employment income of general active partners could be reported as a payroll cost, up to $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, on a PPP loan application filed by or on behalf of the partnership. For guidance describing how to calculate partnership PPP loan amounts and defining the self-employment income of partners, *see* How to Calculate Maximum Loan Amounts, Question 4 at *https://www.sba.gov/sites/default/files/2020-04/How-to-Calculate-Loan-Amounts.pdf* (April 20, 2020).

*7. If a seasonal employer received a PPP loan before December 27, 2020, can the loan amount be increased based on a revised calculation of the maximum loan amount?* [117]

Yes. If a seasonal employer received a PPP loan before December 27, 2020, and such employer would be eligible for a higher maximum loan amount under section 336 of the Economic Aid Act, as described in subsection B.4.c., the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount, even if the loan has been fully disbursed and even if the lender's first SBA Form 1502 report to SBA on the PPP loan has already been submitted. In no event can the increased loan amount exceed the maximum PPP loan amount ($10 million for an individual borrower or $20 million for a corporate group). Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase. Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds.

*8. Which other PPP borrowers can reapply or request an increase in their PPP loan amount?* [118]

The following borrowers can reapply or request an increase in their PPP loan amount:

a. If a borrower returned all of a PPP loan, the borrower may reapply for a PPP loan in an amount the borrower is eligible for under current PPP rules.

b. If a borrower returned part of a PPP loan, the borrower may reapply for an amount equal to the difference between the amount retained and the amount previously approved.

c. If a borrower did not accept the full amount of a PPP loan for which it was approved, the borrower may request an increase in the amount of the PPP loan up to the amount previously approved.

Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds. SBA will issue additional guidance on the process to reapply or request a loan increase under subsections D.6, D.7, and D.8.

*9. If a borrower's PPP loan has already been fully disbursed, can the lender make an additional disbursement for the increased loan proceeds?* [119]

Yes. Notwithstanding the requirement set forth in paragraph 1.a. of the interim final rule on disbursements posted on April 28, 2020, *i.e.,* that lenders make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval, if a PPP loan is increased under subsections D.6., D.7., or D.8., the lender may make a single additional disbursement of the increased loan proceeds.

*10. Are recipients of PPP loans entitled to exemptions on the grounds provided in Federal nondiscrimination laws for sex-specific admissions practices, sex-specific domestic violence shelters, coreligionist housing, or Indian tribal preferences in connection with adoption or foster care practices?* [120]

Yes. With respect to any loan or loan forgiveness under the PPP, the nondiscrimination provisions in the applicable SBA regulations incorporate the limitations and exemptions provided in corresponding Federal statutory or regulatory

[113] This subsection was originally published at 85 FR 26321, subsection III.1.a. (May 4, 2020), as amended by 85 FR 26321 (June 19, 2020), and has been modified for readability.

[114] If the tenth calendar day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next business day.

[115] This subsection was originally published at 85 FR 29842, subsection III.1.a. (May 19, 2020) and has been revised to conform to sections 312 and 344 of the Economic Aid Act.

[116] A partner in a partnership may not submit a separate PPP loan application as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, on a PPP loan application filed by or on behalf of the partnership.

[117] This subsection was originally published at 85 FR 29842, subsection III.1.b. (May 19, 2020) and has been revised to conform to sections 312 and 336 of the Economic Aid Act.

[118] This subsection was added to conform to section 312 of the Economic Aid Act. *See also* recalculation available under subsection B.4.d. above for farmers and ranchers.

[119] This subsection was originally published at 85 FR 29842, subsection III.2.a. (May 19, 2020) and revised to conform to section 312 of the Economic Aid Act.

[120] This subsection was originally published at 85 FR 27287, section III.1. (May 8, 2020).

nondiscrimination provisions for sex-specific admissions practices at preschools, non-vocational elementary or secondary schools, and private undergraduate higher education institutions under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), for sex-specific emergency shelters and coreligionist housing under the Fair Housing Act of 1968 (42 U.S.C. 3601 *et seq.*), and for adoption or foster care practices giving child placement preferences to Indian tribes under the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 *et seq.*).

In addition, for purposes of the PPP, SBA regulations do not bar a religious nonprofit entity from making decisions with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such nonprofit of its activities.

**E. Additional Information**

All loans guaranteed by the SBA pursuant to the CARES Act and the Economic Aid Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–1 and bb–3, and SBA regulation at 13 CFR 113.3–1h, which provides that nothing in SBA nondiscrimination regulations shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at *www.sba.gov.*

Questions on the Paycheck Protection Program 7(a) Loans may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

**Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)**

*Executive Orders 12866, 13563, and 13771*

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) has determined that this is a major rule under the Congressional Review Act (5 U.S.C. 804(2)). SBA, however, is proceeding under the emergency provision at Executive Order 12866 section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement the Economic Aid Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

The Administrator of OIRA has determined that this is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 *et seq.*) (CRA). Under section 801(3) of the CRA, a major rule takes effect 60 days after the rule is published in the **Federal Register**.

Notwithstanding this requirement, section 808(2) of the CRA allows agencies to dispense with the requirements of section 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 section 808(2) of the CRA, SBA finds, for good cause, that a 60-day delay in the effective date is unnecessary and contrary to the public interest.

As discussed elsewhere in this interim final rule, the last day to apply for and receive a PPP loan is March 31, 2021. Given the short duration of this program, and the urgent need to issue loans quickly, the Administrator in consultation with the Secretary has determined that it is impractical and not in the public interest to provide a delayed effective date. An immediate effective date will give small businesses the maximum amount of time to apply for loans and lenders the maximum amount of time to process applications before the program ends.

*Executive Order 12988*

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive effect but does have some retroactive effect consistent with specific applicability provisions of the Economic Aid Act (such provisions are identified in the footnotes).

*Executive Order 13132*

SBA has determined that this rule 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

*Paperwork Reduction Act, 44 U.S.C. Chapter 35*

SBA has determined that this rule requires revisions to existing recordkeeping or reporting requirements of the Paycheck Protection Program (PPP) information collection (OMB Control Number 3245–0407) as a result of amendments made to the PPP by the Economic Aid Act and implemented in this interim final rule. The revisions will affect the PPP Borrower Application Form (SBA Form 2483), the PPP Lender Application Form (SBA Form 2484), the Lender Application Form for Federally Insured Depository Institutions, Federally Insured Credit Unions, and Farm Credit System Institutions (SBA Form 3506), and the Lender Application Form for Non-Bank and Non-Insured Depository Institution Lenders (SBA Form 3507).

SBA Form 2483 has been revised to add housing cooperatives, section 501(c)(6) organizations, destination marketing organizations, and certain news organizations to the categories of eligible entities; to collect the NAICS code of the applicant; to add additional eligible use of proceeds; and to add or revise the certifications to incorporate the Economic Aid Act amendments. Changes were made to SBA Form 2484 to conform to the changes made to SBA Form 2483. SBA Forms 3506 and 3507 were revised to extend the term through March 31, 2021; restate the way interest rate is calculated; and make clarifying changes for consistency with program requirements.

SBA is developing a process to collect the information necessary for eligible borrowers to reapply or request an increase in their PPP loan amount as described in this interim final rule.

SBA has requested emergency approval of the revisions to this PPP information collection to enable the Agency to resume the reauthorized PPP as quickly as possible. Without such emergency approval, the authority for the program would expire before the procedural steps, including the comment periods generally required by the Paperwork Reduction Act, could be completed.

*Regulatory Flexibility Act (RFA)*

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for small government jurisdictions with a population of less than 50,000, neither State nor local governments are ''small entities.''

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9.* Since this rule is exempt from notice and comment, SBA is not required to conduct a regulatory flexibility analysis.

**Authority:** 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, section 1114 and Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Pub. L. 116–260), section 303.

**Jovita Carranza, Michael Faulkender,**

*Assistant Secretary for Economic Policy.*

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## SMALL BUSINESS ADMINISTRATION

## 13 CFR Parts 120 and 121

**[Docket No. SBA–2021–0002]**

**RIN 3245–AH63**

## Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule announces the implementation of section 311 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the Economic Aid Act). The Economic Aid Act authorizes the U.S. Small Business Administration to guarantee additional loans under the temporary Paycheck Protection Program, which was originally established under the Coronavirus Aid, Relief, and Economic Security Act to provide economic relief to small businesses nationwide adversely impacted under the Coronavirus Disease 2019 (COVID–19) Emergency Declaration (COVID–19 Emergency Declaration) issued by President Trump on March 13, 2020. Section 311 of the Economic Aid Act adds a second temporary program to SBA's 7(a) Loan Program titled, ''Paycheck Protection Program Second Draw Loans.'' This interim final rule implements the key provisions of section 311 of the Economic Aid Act and requests public comment.

**DATES:**

*Effective Date:* This interim final rule is effective January 12, 2021.

*Applicability Date:* This interim final rule applies to loan applications and applications for loan forgiveness submitted for Paycheck Protection Program Second Draw Loans.

*Comment Date:* Comments must be received on or before February 16, 2021.

**ADDRESSES:** You may submit comments, identified by number SBA–2021–0002 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please send an email to *ppp-ifr@sba.gov.* All other comments must be submitted through the Federal eRulemaking Portal described above. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

**FOR FURTHER INFORMATION CONTACT:** Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

**SUPPLEMENTARY INFORMATION:**

### I. Background Information

On December 27, 2020, President Trump signed the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the Economic Aid Act) (Pub. L. 116–260) into law to provide continued assistance to individuals and businesses that have been financially impacted by the ongoing coronavirus pandemic. Section 311 of the Economic Aid Act added a new temporary section 7(a)(37) to the Small Business Act (15 U.S.C. 636(a)(37)). This new section authorizes the U.S. Small Business Administration (SBA or the Administration) to guarantee Paycheck Protection Program Second Draw Loans (PPP Second Draw Program), under generally the same terms and conditions available under the Paycheck Protection Program (PPP) established under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)). Under section 311, SBA may guarantee loans under the PPP Second Draw Program through March 31, 2021 (''Second Draw PPP Loans'') to borrowers that previously received a PPP loan under section 7(a)(36) of the Small Business Act (''First Draw PPP Loans'') and have used or will use the full amount of the initial PPP loan for authorized purposes on or before the expected date of disbursement of the Second Draw PPP Loan.

Like First Draw PPP Loans, Second Draw PPP Loans are intended to provide expeditious relief to America's small businesses. Second Draw PPP Loans generally are guaranteed by SBA under the same terms, conditions, and processes as First Draw PPP Loans. SBA guarantees 100 percent of Second Draw PPP Loans and SBA may forgive up to the full principal loan amount. Second Draw PPP Loans are subject to SBA's and the Department of the Treasury's (Treasury's) consolidated interim final rules implementing updates to the Paycheck Protection Program for First Draw PPP Loans (''Consolidated First Draw PPP IFR'') issued concurrently with this interim final rule (IFR) [1] and all PPP loan program requirements, except as specified in this IFR. The key differences between First Draw PPP Loans and Second Draw PPP Loans are described in this IFR, which explains the loan terms, eligibility requirements, and application process for Second Draw PPP Loans.

## II. Comments and Immediate Effective Date

This interim final rule is being issued without advance notice and public comment because section 303 of the Economic Aid Act authorizes SBA to issue regulations to implement the Economic Aid Act without regard to notice requirements. In addition, this rule is being issued to allow for immediate implementation of this program. The intent of the Economic Aid Act is that SBA provide relief to America's small businesses expeditiously. The last day to apply for and receive a PPP loan is March 31, 2021. Given the short duration of this program, and the urgent need to issue loans quickly, the Administrator in consultation with the Secretary has determined that it is impractical and not in the public interest to provide a 30-day delayed effective date. An immediate effective date will give small businesses the maximum amount of time to apply for loans and lenders the maximum amount of time to process applications before the program ends. This good cause justification also supports waiver of the 60-day delayed effective date for major rules under the Congressional Review Act at 5 U.S.C. 808(2). Although this IFR is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be submitted on or before February 16, 2021. SBA will consider these comments and the need for making any revisions as a result of these comments.

## III. Summary of Key Terms of PPP Second Draw Loans

The rules applicable to Second Draw PPP Loans are published in section IV of this IFR. This summary provides additional information and explains the key terms in the IFR. All references to subsections refer to section IV.

Second Draw PPP Loans are generally subject to the same terms, conditions and requirements as First Draw PPP Loans. These include, but are not limited to the following terms:

- The guarantee percentage is 100 percent.
- No collateral will be required.
- No personal guarantees will be required.
- The interest rate will be 100 basis points or one percent, calculated on a non-compounding, non-adjustable basis.[2]
- The maturity is five years.
- All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower to determine the borrower's eligibility and use of loan proceeds.

Subsection (b) of this IFR confirms that these terms apply to Second Draw PPP Loans. Subsection (b) also confirms that SBA's Consolidated First Draw PPP IFR, Frequently Asked Questions (FAQs), and other guidance about PPP loans under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) apply to Second Draw PPP Loans, except as specified in this IFR.[3]

The Economic Aid Act includes terms and conditions, including but not limited to terms relating to eligibility and a borrower's maximum loan amount, that apply only to Second Draw PPP Loans and do not apply to First Draw PPP Loans, regardless of when the First Draw PPP Loan is made. These terms and conditions specific to Second Draw PPP Loans are summarized below.

### *A. Eligibility Requirements*

#### 1. General Eligibility Requirements

In general, the Economic Aid Act made the eligibility requirements for Second Draw PPP Loans narrower than the eligibility requirements for First Draw PPP Loans. The Economic Aid Act generally provides that a borrower is eligible for a Second Draw PPP Loan only if it has 300 or fewer employees and experienced a revenue reduction in 2020 relative to 2019 (described further below).[4] In addition, the Economic Aid Act provides that a Second Draw PPP Loan may only be made to an eligible borrower that (i) has received a First Draw PPP Loan, and (ii) has used, or will use, the full amount of the First Draw PPP Loan on or before the expected date on which the Second Draw PPP Loan is disbursed to the borrower.[5] Accordingly, subsections (c)(1)(i) through (c)(1)(iv) of this IFR implement these criteria. Subsection (c)(1)(ii) of the IFR clarifies that ''the full amount'' of the borrower's First Draw PPP Loan includes the amount of any increase on such First Draw PPP Loan made pursuant to the Economic Aid Act. In addition, subsection (c)(1)(ii) of the IFR clarifies that the borrower must have spent the full amount of its First Draw PPP Loan on eligible expenses under the PPP rules to be eligible for a Second Draw PPP Loan. This clarification will help ensure program integrity by preventing a borrower from receiving a Second Draw PPP Loan if the borrower has not complied with PPP loan program requirements.[6]

#### 2. Revenue Reduction Requirement

The Economic Aid Act provides that, to be eligible for a Second Draw PPP Loan, the borrower must have experienced a revenue reduction of 25% or greater in 2020 relative to 2019.[7] A borrower must calculate this revenue reduction by comparing the borrower's quarterly gross receipts for one quarter in 2020 with the borrower's gross receipts for the corresponding quarter of 2019. For example, a borrower with gross receipts of $50,000 in the second quarter of 2019 and gross receipts of $30,000 in the second quarter of 2020 has experienced a revenue reduction of 40 percent between the quarters, and is therefore eligible for a Second Draw PPP loan (assuming all other eligibility criteria are met). Subsection (c)(1)(iv)(A) of the IFR reflects this methodology. Subsection (c)(1)(iv)(B) of the IFR provides that a borrower that was in operation in all four quarters of 2019 is deemed to have experienced the required revenue reduction if it

[1] The Consolidated First Draw PPP IFR titled ''Business Loan Program Temporary Changes: Extension of and Changes to Paycheck Protection Program'' restates existing regulatory provisions to provide lenders and new PPP borrowers a single regulation to consult on borrower eligibility, lender eligibility, and loan application and origination requirements issues for new First Draw PPP loans, as well as general rules relating to First Draw PPP Loan increases and loan forgiveness.

[2] Section 339 of the Economic Aid Act added ''calculated on a non-compounding, non-adjustable basis'' to the maximum interest rate for a PPP loan.

[3] SBA will be revising the FAQs to conform to the Economic Aid Act as quickly as feasible.

[4] See paragraph 7(a)(37)(A)(iv) of the Small Business Act.

[5] See paragraph 7(a)(37)(O) of the Small Business Act.

[6] Subsection (B)(11) of the Consolidated First Draw PPP IFR specifies that the proceeds of a PPP loan may be spent only on certain eligible expenses.

[7] See paragraph 7(a)(37)(A)(iv) of the Small Business Act.

experienced a reduction in annual receipts of 25 percent or greater in 2020 compared to 2019 and the borrower submits copies of its annual tax forms substantiating the revenue decline. This provision will allow a borrower to provide annual tax return forms to substantiate its revenue reduction. The Administrator, in consultation with the Secretary of the Treasury (Secretary), has determined that this is necessary to improve administrability of Second Draw PPP Loans by providing borrowers an additional verifiable method for substantiating their revenue reduction. This method will be particularly important for small borrowers that may not have quarterly revenue information readily available. Moreover, this approach is appropriate because, if annual filings show a 25 percent revenue reduction, then at least one quarter in 2020 would have had at least a 25 percent revenue reduction. A borrower that did not experience a 25 percent annual decline in revenues, or that was not in operation in all four quarters of 2019, may still meet the revenue reduction requirement under one of the quarterly measurements described above.

The Economic Aid Act does not include a general definition of gross receipts for purposes of determining a borrower's revenue reduction.[8] Subsection (c)(2) of the IFR defines gross receipts consistent with the definition of receipts in 13 CFR 121.104 of SBA's size regulations because this definition appropriately captures the type of income that is typically included in a small business's gross receipts.[9] Moreover, this definition will enhance the administrability of Second Draw PPP Loans because it is a definition already used by the Administration and many small businesses.

The IFR specifies that any forgiveness amount of a First Draw PPP Loan that a borrower received in calendar year 2020 is excluded from a borrower's gross receipts. Excluding the forgiveness amount from a borrower's gross receipts is consistent with section 7A(i) of the Small Business Act, which expressly excludes PPP forgiveness amounts from being taxed as income.[10] This clarification ensures the effectiveness of the second draw loan program by ensuring that a borrower is not disqualified from receiving a Second Draw PPP Loan because it received forgiveness on a First Draw PPP Loan. This furthers the purpose of the second draw loan provisions, which is to deliver additional aid to small businesses that previously received a First Draw PPP Loan.

3. Business Concerns With More Than One Physical Location

Under the CARES Act, any single business entity that is assigned a NAICS code beginning with 72 (including hotels and restaurants) and employs not more than 500 employees per physical location is eligible to receive a First Draw PPP Loan.[11] In addition, as discussed below, under the Consolidated First Draw PPP IFR, SBA's affiliation rules (13 CFR 121.301) do not apply to any business entity that is assigned a NAICS code beginning with 72 and that employs not more than a total of 500 employees.[12] As a result, if each hotel or restaurant location owned by a parent business is a separate legal business entity and employs not more than 500 employees, each hotel or restaurant location is permitted to apply for a separate PPP loan provided it uses its unique EIN.

Section 317 of the Economic Aid Act modified this provision for Second Draw PPP Loans by reducing the limit on employees per physical location to 300. Accordingly, a single business entity that is assigned a NAICS code beginning with 72 is eligible to receive a Second Draw PPP Loan if it employs no more than 300 employees per physical location and meets the revenue reduction requirements and otherwise satisfies the eligibility criteria described in this IFR.[13] Under section 317 of the Economic Aid Act, the same standard applies to certain news organizations.[14] Subsections (c)(3) and (c)(4) of the IFR implement these statutory provisions. Borrowers may consult PPP Frequently Asked Question (FAQ) 24 [15] for guidance on these standards for business concerns with more than one physical location, except that, for Second Draw PPP Loans, the number of employees per physical location is limited to 300 rather than 500.

*B. Affiliation Rules*

The same affiliation rules that apply to First Draw PPP Loans apply to Second Draw PPP Loans, except as provided in this IFR. As with First Draw PPP Loans, in most cases, a borrower is considered together with its affiliates to determine eligibility for the PPP.[16] However, the CARES Act waived the affiliation rules for certain categories of borrowers.[17] Paragraph 7(a)(37)(E) of the Small Business Act, as amended by the Economic Aid Act, applies the same

[8] For an eligible nonprofit organization, a veterans organization, an eligible nonprofit news organization, eligible 501(c) organization, or eligible destination marketing organization, gross receipts has the meaning in section 6033 of the Internal Revenue Code of 1986. See paragraph 7(a)(37)(I)(ii) of the Small Business Act. Subsection (c)(2) of the IFR clarifies that this definition, which generally relates to eligible nonprofit organizations, applies only to eligible nonprofit news organizations rather than to all eligible news organizations.

[9] Subsection (c)(2) of the IFR generally defines gross receipts to include all revenue in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered ''total income'' (or in the case of a sole proprietorship, independent contractor, or self-employed individual ''gross income'') plus ''cost of goods sold,'' and excludes net capital gains or losses as these terms are defined and reported on IRS tax return forms. Gross receipts do not include the following: Taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts. Subsection (c)(2) also adapts the methodology for calculating affiliate receipts from 13 CFR 121.104.

[10] Section 1106 of the CARES Act (15 U.S.C. 9005) was redesignated as section 7A, transferred to the Small Business Act (15 U.S.C. 631 *et seq.*), and inserted so as to appear after section 7 of the Small Business Act (15 U.S.C. 636) in section 304(b) of the Economic Aid Act.

[11] Paragraph 7(a)(36)(D)(iii)(I) of the Small Business Act.

[12] Paragraph 7(a)(36)(D)(iv) of the Small Business Act.

[13] Paragraph 7(a)(37)(D) of the Small Business Act.

[14] Paragraph 7(a)(36)(D)(iii)(II) of the Small Business Act.

[15] *See* PPP FAQ #24 (posted April 13, 2020), available at *https://www.sba.gov/sites/default/files/2020-12/Final%20PPP%20FAQs%20%28December%209%202020%29-508.pdf.*

[16] Paragraph 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv), as added by the CARES Act and amended by the Economic Aid Act, waived the affiliation rules contained in § 121.103 for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a NAICS code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by SBA; (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681); and (4)(a) any business concern (including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 *et seq.*) without regard for whether such a station is a concern as defined in 13 CFR 121.105, or any successor thereto) that employs not more than 500 employees, or the size standard established by the Administrator for the NAICS code applicable to the business concern, per physical location of such business concern and is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 or 5151; or (b) any nonprofit organization that is assigned a NAICS code beginning with 5151.

[17] Paragraph 7(a)(36)(D)(iv) of the Small Business Act.

waivers to Second Draw PPP Loans, adds a waiver for certain eligible news organizations, and makes adjustments to reflect the reduced size requirement for Second Draw PPP Loans. Specifically, business concerns with a NAICS code beginning with 72 qualify for the affiliation waiver for Second Draw PPP Loans if they employ 300 or fewer employees. Eligible news organizations with a NAICS code beginning with 511110 or 5151 (or majority-owned or controlled by a business concern with those NAICS codes) may qualify for the affiliation waiver for Second Draw PPP Loans only if they employ 300 or fewer employees per physical location.[18] Subsection (d)(2) implements these revised affiliation waivers. SBA also adopted a religious exemption to the affiliation rules by regulation,[19] which applies to Second Draw PPP loans.

*C. Excluded Entities*

An entity that is ineligible to receive a First Draw PPP Loan under the CARES Act or Consolidated First Draw PPP IFR is also ineligible for a Second Draw PPP Loan.[20] Subsection (e)(1) of the IFR implements this restriction. Subsection (e)(1) ensures that a borrower that received a First Draw PPP Loan despite being ineligible to receive the loan is not eligible to receive a Second Draw PPP Loan.

The Economic Aid Act also prohibits several additional categories of borrowers from receiving a Second Draw PPP Loan under section 7(a)(37) of the Small Business Act. These categories of prohibited borrowers are listed in subsection (e) of the IFR:

- A business concern or entity primarily engaged in political activities or lobbying activities, including any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or that describes itself as a think tank in any public documents;[21]
- certain entities organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or with other specified ties to the People's Republic of China or the Special Administrative Region of Hong Kong;[22]
- any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612);[23]
- a person or entity that receives a grant for shuttered venue operators under section 324 of the Economic Aid Act;[24]
- entities in which the President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person owns, controls, or holds at least 20 percent of any class of equity;[25] or
- a publicly traded company, defined as an issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).[26]

In addition, subsection (e)(9) of this IFR provides that an entity that has previously received a Second Draw PPP Loan may not receive another Second Draw PPP Loan, as required by the Economic Aid Act.[27] Subsection (e)(9) also prohibits an entity that has permanently closed from receiving a Second Draw PPP Loan because paragraph 7(a)(37)(A)(iv) of the Small Business Act is best understood to describe existing businesses. The Administrator, in consultation with the Secretary, has determined this provision is also necessary to maintain program integrity, prevent abuse, and preserve the availability of Second Draw PPP Loan funds for businesses still in operation. Preserving funds for such businesses is necessary because only businesses that are still in operation will retain employees, which is a primary purpose of the PPP. A borrower that has temporarily closed or temporarily suspended its business remains eligible for a Second Draw PPP Loan.

*D. Payroll Cost Calculation*

In general, section 307 of the Economic Aid Act provides that the maximum loan amount for a Second Draw PPP Loan is equal to the lesser of two and half months of the borrower's average monthly payroll costs or $2 million. Relative to First Draw PPP loans, the Economic Aid Act adjusted the methodology for calculating a borrower's payroll costs. Unlike First Draw PPP Loans, the Economic Aid Act provides that the relevant time period for calculating a borrower's payroll costs for a Second Draw PPP Loan is either the twelve-month period prior to when the loan is made or calendar year 2019. The Act also provided tailored methodologies for certain categories of borrowers. These calculations are reflected in subsection (f) of this IFR. Subsection (f) of the IFR uses "calendar year 2020" to refer to "the twelve-month period prior to when the loan is made." Calculating payroll costs based on calendar year 2020 rather than the twelve months preceding the date the loan is made will simplify the calculations and documentation requirements for borrowers because payroll records are more commonly created and retained on a calendar-year basis. Allowing borrowers to calculate payroll costs based on calendar year 2020 is also not expected to result in a significant difference in payroll costs compared to the twelve months preceding the date the loan is made because all Second Draw PPP Loans will be made in the first quarter of 2021. However, the rule notes that Second Draw PPP Loan borrowers who are not self-employed (including sole proprietorships and independent contractors) are also permitted to use the precise 1-year period before the date on which the loan is made to calculate payroll costs if they choose not to use 2019 or 2020 to calculate payroll costs.

Consistent with the Economic Aid Act, subsections (f)(3) and (f)(4) of the IFR include tailored calculation methodologies for seasonal businesses, new entities that did not exist for the full twelve-month period preceding the Second Draw PPP Loan, and borrowers assigned a NAICS code beginning with 72 at the time of disbursement. For borrowers assigned a NAICS code beginning with 72 at the time of disbursement, the Economic Aid Act provides that the maximum loan amount is equal to three-and-a-half (3.5) months of payroll costs rather than two-and-a-half (2.5) months.[28] These subsections also provide that, for a borrower with a NAICS code beginning with 72 that would fall into more than one category listed in subsection (f) (for example, a business with a NAICS code beginning with 72 that is also a seasonal business or is also a new entity without 12 months of payroll costs), the borrower may calculate its average monthly payroll costs based on the methodology that applies to the entity but may use the 3.5 multiplier

[18] Paragraph 7(a)(37)(E) of the Small Business Act.

[19] *See* section (B)(3)(c) of the Consolidated First Draw PPP IFR.

[20] Paragraph 7(a)(37)(O) of the Small Business Act provides that a Second Draw PPP Loan may be made only to a borrower that received a First Draw PPP Loan under paragraph 7(a)(36). In addition, section 7(a)(37)(B) provides that the Administrator may guarantee covered loans to eligible entities under the same terms, conditions, and processes as First Draw PPP Loans.

[21] Paragraph 7(a)(37)(A)(iv)(III)(bb) of the Small Business Act.

[22] Paragraph 7(a)(37)(A)(iv)(III)(cc) of the Small Business Act.

[23] Paragraph 7(a)(37)(A)(iv)(III)(dd) of the Small Business Act.

[24] Paragraph 7(a)(37)(A)(iv)(III)(ee) of the Small Business Act.

[25] Section 322 of the Economic Aid Act.

[26] Section 342 of the Economic Aid Act.

[27] Paragraph 7(a)(37)(F) of the Small Business Act.

[28] Paragraph 7(a)(37)(C)(iv) of the Small Business Act.

applicable to businesses with a NAICS code beginning with 72. The Administrator, in consultation with the Secretary, has determined that this methodology is necessary to provide small businesses in the accommodation and food services sector the full amount of relief provided in the Economic Aid Act while allowing these borrowers to calculate their average monthly payroll costs accurately.

The Economic Aid Act included a new payroll cost calculation for farmers and ranchers receiving First Draw PPP Loans. However, it did not specify how payroll costs should be calculated for Second Draw PPP Loans to farmers and ranchers. This IFR clarifies that the same general calculation for farmers and ranchers applicable to First Draw PPP Loans applies to Second Draw PPP Loans, with adjustments that (i) eliminate the provision for refinancing of an Economic Injury Disaster Loan (EIDL), which does not apply to Second Draw PPP Loans, and (ii) apply the choice of time period for calculating a farmer's or rancher's payroll costs for Second Draw PPP Loans, consistent with other Second Draw PPP Loans. This IFR also specifies that, in calculating a farmer's or rancher's maximum loan amount, any employee payroll costs should be subtracted from the farmer's or rancher's gross income to avoid double-counting amounts that represent pay to the employees of the farmer or rancher.

Subsections (f)(7) and (f)(8) of the IFR include tailored calculation methodologies for self-employed individuals and partnerships. These methodologies are based on the corresponding methodologies for self-employed individuals and partnerships that are used for First Draw PPP Loans.[29] These methodologies have been adjusted to eliminate the provision for refinancing of an EIDL loan, which does not apply to Second Draw PPP loans and to apply the choice of time period for calculating payroll costs, consistent with other Second Draw PPP loans.

Finally, subsection (f)(9) provides that businesses that are part of a single corporate group shall in no event receive more than $4,000,000 of Second Draw PPP Loans in the aggregate. The Administrator, in consultation with the Secretary, determined that limiting the amount of Second Draw PPP Loans that a single corporate group may receive will promote the availability of PPP loans to the largest possible number of borrowers, consistent with the CARES and Economic Aid Act. The Administrator has concluded that a limitation of $4,000,000 is appropriate because it is proportional to the $20,000,000 maximum amount for corporate groups that is provided under the Consolidated First Draw PPP IFR when the maximum loan amount for a single PPP loan is $10,000,000.

### *E. Second Draw PPP Loan Application and Documentation Requirements*

Subsection (g) of this IFR includes the application and documentation requirements for Second Draw PPP Loans. The documentation required to substantiate an applicant's payroll cost calculations is generally the same as documentation required for First Draw PPP Loans. However, no additional documentation to substantiate payroll costs will be required if the applicant (i) used calendar year 2019 figures to determine its First Draw PPP Loan amount, (ii) used calendar year 2019 figures to determine its Second Draw PPP Loan amount (instead of calendar year 2020), and (iii) the lender for the applicant's Second Draw PPP Loan is the same as the lender that made the applicant's First Draw PPP Loan. In such cases, additional documentation is not required because the lender already has the relevant documentation supporting the borrower's payroll costs. The lender may request additional documentation, however, if on further review the lender concludes that it would be useful in conducting the lender's good-faith review of the borrower's loan amount calculation.

For loans with a principal amount greater than $150,000, the applicant must also submit documentation adequate to establish that the applicant experienced a revenue reduction of 25% or greater in 2020 relative to 2019. (The revenue reduction requirement is addressed in subsection (c)(1)(iv) of this IFR.) Such documentation may include relevant tax forms, including annual tax forms, or, if relevant tax forms are not available, quarterly financial statements or bank statements. For loans with a principal amount of $150,000 or less, such documentation is not required at the time the borrower submits its application for a loan, but must be submitted on or before the date the borrower applies for loan forgiveness, as required under the Economic Aid Act.[30] If a borrower does not submit an application for loan forgiveness, such documentation must be provided upon SBA's request.

### *F. Lender Requirements*

Subsection (g) of this IFR contains the provisions specific to lenders for Second Draw PPP Loans. Paragraph 7(a)(37)(K) of the Small Business Act, added by the Economic Aid Act, states that a lender approved to make First Draw PPP loans may make Second Draw PPP Loans under the same terms and conditions as new First Draw PPP Loans. Subsection (g)(2) of this IFR provides that lenders are subject to the same requirements when making Second Draw PPP Loans as when they are making First Draw PPP Loans. These provisions allow a lender approved to make Second Draw PPP Loans to use existing program guidance and standard operating procedures to the maximum extent practicable.[31] The requirements applicable to PPP lenders are in sections (C) and (D) of the Consolidated First Draw PPP IFR. If a borrower has not submitted new payroll documentation with its Second Draw PPP Loan application because it previously submitted 2019 payroll information to the same lender when it applied for its First Draw PPP Loan, then the lender must confirm the borrower's average monthly payroll costs based on that prior documentation.

In addition, for a Second Draw PPP Loan greater than $150,000, the lender must confirm the dollar amount and percentage of the borrower's revenue reduction by performing a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning the borrower's revenue reduction. If the lender identifies errors in the borrower's calculation or a material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue.

### *G. Loans to Borrowers With Unresolved First Draw PPP Loans*

As described in SBA's interim final rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, SBA may review any PPP loan, as the Administrator deems appropriate.[32] Subsection (i) of the IFR establishes procedures relating to the handling of a Second Draw PPP Loan application by a borrower whose First Draw PPP Loan is under review by SBA (''unresolved borrower''). If a borrower's First Draw PPP loan is under review by SBA and/or information in SBA's possession indicates that the borrower may have been ineligible for the First

[29] See subsections (B)(4)(b) and (B)(4)(e) of the Consolidated First Draw PPP IFR.

[30] See paragraph 7(a)(37)(I)(i) of the Small Business Act.

[31] Paragraph 7(a)(37)(N) of the Small Business Act.

[32] 85 FR 33010, 33012.

Draw PPP Loan it received or for the loan amount it received, the lender will receive notification from SBA when the lender submits an application for a guaranty of a Second Draw PPP Loan and will not receive an SBA loan number until the issue related to the unresolved borrower's First Draw PPP Loan is resolved. SBA will resolve issues related to unresolved borrowers expeditiously. These procedures are designed to promote compliance with the eligibility requirements for Second Draw PPP Loans by preventing additional loans from being made to borrowers that were not eligible for a First Draw PPP Loan or received an impermissible loan amount. At the same time, these procedures do not disqualify an eligible unresolved borrower from receiving a Second Draw PPP Loan, in recognition that many flags will be resolved in the borrower's favor. The Administrator, in consultation with the Secretary, has determined that these procedures strike an appropriate balance between promoting program integrity and preventing abuse, while making Second Draw PPP Loans available to all eligible borrowers as expeditiously as possible. SBA will set aside available appropriations to fund Second Draw PPP Loans applied for by unresolved borrowers in the event they are approved.

*H. Loan Forgiveness*

Loan forgiveness of Second Draw PPP Loans and the loan review process for Second Draw PPP Loans are generally subject to the interim final rules regarding Loan Forgiveness and SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, as modified to conform to the Economic Aid Act by the Consolidated First Draw PPP IFR, which is being published concurrently with this IFR. Subsection (j) contains forgiveness provisions specific to Second Draw PPP loans.

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## IV. Paycheck Protection Program Second Draw Loans

*(a) Second Draw PPP Loan Program*

Under section 7(a)(37) of the Small Business Act (15 U.S.C. 636(a)(37)), SBA is authorized to guarantee Paycheck Protection Program Second Draw Loans (''Second Draw PPP Loans'').

*(b) What requirements apply to Second Draw PPP Loans?*

(1) Second Draw PPP Loans are subject to SBA's and the Department of the Treasury's (''Treasury's'') consolidated interim final rule implementing the Paycheck Protection Program (''Consolidated First Draw PPP IFR'') and all PPP loan program requirements, except as otherwise provided in this section, including but not limited to the following terms:

(i) The guarantee percentage is 100 percent.

(ii) No collateral will be required.

(iii) No personal guarantees will be required.

(iv) The interest rate will be 100 basis points or one percent, calculated on a non-compounding, non-adjustable basis.

(v) The maturity is five years.

(vi) All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds.

(2) Frequently Asked Questions and other guidance issued by SBA or by SBA in consultation with the Department of the Treasury with respect to PPP loans under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) (''First Draw PPP Loans'') apply to Second Draw PPP Loans, except as otherwise provided in this section.

*(c) Who is eligible for a Second Draw PPP Loan?*

Subject to subsection (e) of this section, below, the following applicants are eligible for Second Draw PPP Loans:

(1) An applicant is eligible for a Second Draw PPP Loan if it is a business concern, independent contractor, eligible self-employed individual, sole proprietor, nonprofit organization eligible for a First Draw PPP Loan, veterans organization, Tribal business concern, housing cooperative, small agricultural cooperative, eligible 501(c)(6) organization or destination marketing organization, or an eligible nonprofit news organization [33] that:

(i) Previously received a First Draw PPP loan in accordance with the eligibility criteria in the Consolidated First Draw PPP IFR;

(ii) has used, or will use, the full amount of its First Draw PPP Loan (including *the amount of* any increase on such First Draw PPP Loan) on authorized uses under subsection (B)(11) of the Consolidated First Draw PPP IFR on or before the expected date on which the Second Draw PPP Loan will be disbursed; [34]

(iii) employs not more than 300 employees, unless it satisfies the alternative criteria for businesses with a North American Industry Classification System (''NAICS'') code beginning with 72 and eligible news organizations with more than one physical location described in subsection (c)(3) or (c)(4) of this section; and

(iv) (A) experienced a reduction in revenue in calendar year 2020, measured as follows:

(*1*) the applicant had gross receipts during the first, second, third, or fourth quarter in 2020 that demonstrate at least a 25 percent reduction from the applicant's gross receipts during the same quarter in 2019 (for example, an applicant that had gross receipts of $50,000 in the second quarter of 2019 and had gross receipts of $30,000 in the second quarter of 2020 experienced a 40 percent revenue reduction between these two quarters);

(*2*) if the applicant was not in business during the first or second quarter of 2019, but was in business during the third and fourth quarters of 2019, the applicant had gross receipts during the first, second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the applicant's gross receipts during the third or fourth quarter of 2019 (for example, an applicant that had gross receipts of $50,000 in the third quarter of 2019 and had gross receipts of $30,000 in the third quarter of 2020– demonstrating a reduction of 40 percent from the applicant's gross receipts during the third quarter in 2019);

(*3*) if the applicant was not in business during the first, second, or third quarter of 2019, but was in business during the fourth quarter of 2019, the applicant had gross receipts

[33] All terms in this subsection have the same definitions as in sections 7(a)(36) and (37) of the Small Business Act and the Consolidated First Draw PPP IFR, as applicable.

[34] A lender must make disbursement of the loan within ten calendar days of loan approval. *See* subsection (D)(7) of the Consolidated First Draw PPP IFR.

during the first, second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the fourth quarter of 2019 (for example, an applicant that had gross receipts of $50,000 in the fourth quarter of 2019 and had gross receipts of $30,000 in the fourth quarter of 2020–demonstrating a reduction of 40 percent from the applicant's gross receipts during the fourth quarter in 2019); or

(*4*) if the applicant was not in business during 2019, but was in operation on February 15, 2020, the applicant had gross receipts during the second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the gross receipts of the entity during the first quarter of 2020 (for example, an applicant that had gross receipts of $50,000 in the first quarter of 2020 and had gross receipts of $30,000 in the fourth quarter of 2020—demonstrating a reduction of 40 percent from the applicant's gross receipts during the first quarter in 2020).

(B) An applicant that was in operation in all four quarters of 2019 is deemed to have experienced the revenue reduction in subsection (c)(1)(iv)(A)(*1*) if it experienced a reduction in annual receipts of 25 percent or greater in 2020 compared to 2019 and the borrower submits copies of its annual tax forms substantiating the revenue decline.

(2)(i) Gross receipts includes all revenue in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered ''total income'' (or in the case of a sole proprietorship, independent contractor, or self-employed individual ''gross income'') plus ''cost of goods sold,'' and excludes net capital gains or losses as these terms are defined and reported on IRS tax return forms. Gross receipts do not include the following: Taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts.

(ii) Gross receipts of affiliates are calculated as follows:

(A) Gross receipts of a borrower with affiliates is calculated by adding the gross receipts of the business concern with the gross receipts of each affiliate.

(B) If a borrower has acquired an affiliate or been acquired as an affiliate during 2020, gross receipts includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a concern acquired a segregable division of another business concern during 2020, gross receipts do not include the receipts of the acquired division prior to the acquisition.

(C) The gross receipts of a former affiliate are not included. This exclusion of gross receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a borrower sold a segregable division during 2020, the gross receipts will continue to include the receipts of the division that was sold.

(D) All terms in this subsection shall have the meaning attributed to them by the IRS.

(iii) For an eligible nonprofit organization, a veterans organization, an eligible nonprofit news organization, an eligible 501(c)(6) organization, or eligible destination marketing organization, gross receipts means gross receipts within the meaning of section 6033 of the Internal Revenue Code of 1986.

(iv) The amount of any forgiven First Draw PPP Loan shall not be included toward any borrower's gross receipts.

(3) Any business concern that has more than one physical location and that employs not more than 300 employees per physical location is eligible to receive a Second Draw PPP Loan if it is assigned a NAICS code beginning with 72 at the time of loan disbursement and otherwise meets the eligibility criteria in subsection (c)(1).

(4) Any business concern, or any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 *et seq.*), that has more than one physical location and that employs not more than 300 employees per physical location is eligible to receive a Second Draw PPP Loan if it meets the eligibility criteria in subsection (c)(1) and: (1) Is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 or 5151 or, with respect to a public broadcasting entity (as defined in section 397(11) of the Communications Act of 1934 (47 U.S.C. 397(11))), has a trade or business that falls under such a code; and (2) makes a good faith certification that proceeds of the loan will be used to support expenses at the component of the organization that produces or distributes locally focused or emergency information.

*(d) How do SBA's affiliation rules affect an applicant's eligibility for a Second Draw PPP Loan?*

(1) Eligibility for Second Draw PPP Loans is governed by the same affiliations rules (and waivers) as First Draw PPP Loans, except as described in subsection (d)(2).

(2) The affiliation rules under 13 CFR 121.301(f) are waived with respect to eligibility for a Second Draw PPP Loan for:

(i) Any business concern with not more than 300 employees that, as of the date on which the covered loan is disbursed, is assigned a NAICS code beginning with 72; and

(ii) (A) any business concern (including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 *et seq.*) without regard for whether such a station is a concern as defined in 13 CFR 121.105, or any successor thereto) that employs not more than 300 employees, per physical location of such business concern and is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 or 5151; or

(B) any nonprofit organization that is assigned a NAICS code beginning with 5151.

*(e) Who is not eligible for a Second Draw PPP Loan?*

An applicant is not eligible for a Second Draw PPP Loan, even if it meets the eligibility requirements of subsection (c) of this section, if the applicant is:

(1) Excluded from eligibility under the Consolidated First Draw PPP IFR;[35]

(2) a business concern or entity primarily engaged in political activities or lobbying activities, as defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602), including any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or

[35] *See generally* section (B)(2) of the Consolidated First Draw PPP IFR.

otherwise describes itself as a think tank in any public documents;

(3) any business concern or entity:

(i) For which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or

(ii) that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China;

(4) any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612);

(5) any person or entity that receives a grant for shuttered venue operators under section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act;

(6) any entity in which the President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person as determined under applicable common law, directly or indirectly holds a controlling interest in the entity, where:

(i) ''controlling interest'' means owning, controlling, or holding not less than 20 percent, by vote or value, of the outstanding amount of any class of equity interest in an entity;

(ii) ''equity interest'' means:

(A) A share in an entity, without regard to whether the share is transferable or classified as stock or anything similar;

(B) a capital or profit interest in a limited liability company or partnership; or

(C) a warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share or interest described in (A) or (B), respectively;

(iii) ''Executive department'' has the meaning given the term in section 101 of title 5, United States Code;

(iv) ''Member of Congress'' means a Member of the Senate or House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico; and

(v) For the purpose of determining whether a person has a controlling interest in the entity, the securities owned, controlled, or held by the President, the Vice President, the head of an Executive department, or a Member of Congress, shall be aggregated with the securities held by his or her spouse as determined under applicable common law;

(7) any issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), where the terms ''exchange,'' ''issuer,'' and ''security'' have the meanings given those terms in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) (except SBA will not consider whether a news organization that is eligible under subsection (c)(4) is affiliated with an entity, which includes any entity that owns or controls such news organization, that is an issuer);

(8) an entity that has previously received a Second Draw PPP Loan; or

(9) an entity that has permanently closed.

*(f) What is the maximum loan amount for a Second Draw PPP Loan?*

(1) In general, the maximum loan amount for a Second Draw PPP Loan is equal to the lesser of two and half months of the borrower's average monthly payroll costs or $2 million, except as otherwise specified in this subsection (e). A borrower's average monthly payroll costs may be based on calendar year 2020, calendar year 2019,[36] or as otherwise specified in subsections (f)(2) through (f)(9) of this section. ''Payroll costs'' has the same meaning as in subsections (B)(4)(g) and (B)(4)(h) of the Consolidated First Draw PPP IFR and is calculated in the same manner. In calculating a borrower's payroll costs, the borrower must subtract any compensation paid to an employee in excess of $100,000 on an annualized basis, as prorated for the time period during which the payments are made or the obligation to make the payments is incurred.

(2) Except as otherwise provided in subsection (f)(3) through (f)(7), the maximum amount of a Second Draw PPP Loan is calculated as the lesser of:

(i) The product obtained by multiplying:

(A) The average total monthly payment for payroll costs incurred or paid by the borrower during 2019 or 2020 (at the election of the borrower); by

(B) 2.5; or

(ii) $2,000,000.

[36] Second Draw PPP Loan borrowers who are not self-employed, sole proprietorships, or independent contractors are also permitted to use the precise 1-year period before the date on which the loan is made to calculate payroll costs if they choose not to use 2019 or 2020. Since most borrowers will use 2019 or 2020 the rule text refers only to 2019 or 2020 for simplicity and readability.

(3) The maximum amount of a Second Draw PPP Loan to a borrower that is a seasonal employer (meaning an employer that does not operate for more than 7 months in any calendar year or that during the preceding calendar year, had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts of the employer for the other 6 months of that year) is calculated as the lesser of:

(i) The product obtained by multiplying:

(A) At the election of the borrower, the average total monthly payments for payroll costs incurred or paid by the borrower for any 12-week period between February 15, 2019 and February 15, 2020; by

(B) 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 at the time of disbursement as defined in subsection (f)(10), 3.5); or

(ii) $2,000,000.

(4) The maximum amount of a Second Draw PPP Loan to a borrower that did not exist during the 1-year period preceding February 15, 2020, but was in operation on February 15, 2020 (''new entity''), is calculated as the lesser of:

(i) The product obtained by multiplying:

(A) The quotient obtained by dividing:

(*1*) The sum of the total monthly payments by the borrower for payroll costs paid or incurred by the borrower as of the date on which the borrower applies for the Second Draw PPP Loan; by

(*2*) the number of months in which those payroll costs were paid or incurred; by

(B) 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 at the time of disbursement as defined in subsection (f)(10), 3.5); or

(ii) $2,000,000.

(5) The maximum amount of a Second Draw PPP Loan made to a borrower assigned a NAICS code beginning with 72 at the time of disbursement as defined in subsection (f)(10) (that is not a seasonal employer or new entity addressed in subsection (f)(3) or (f)(4) or a borrower with self-employment income or a partnership addressed in subsection (f)(7) or (f)(8) of this section) is calculated as the lesser of:

(i) The product obtained by multiplying:

(A) The average total monthly payment for payroll costs incurred or paid by the borrower during either 2019 or 2020 (at the borrower's election) by

(B) 3.5; or

(ii) $2,000,000.

(6) (i) The maximum amount of a Second Draw PPP Loan to a farmer or rancher that:

(A) Operates as a sole proprietorship or as an independent contractor, or is an eligible self-employed individual;

(B) reports farm income or expenses on a Schedule F (IRS Form 1040); and

(C) was in business as of February 15, 2020; is calculated according to (ii) or (iii) of this subsection(e)(6), depending on whether the borrower has employees.

(ii) If a borrower meeting the criteria in subsection (6)(i) of this section does not have any employees, the maximum loan amount is the product obtained by multiplying:

(A) The gross income of the borrower in 2019 or 2020, as reported on a Schedule F (IRS Form 1040), that is not more than $100,000, divided by 12; and

(B) 2.5.

(iii) If a borrower meeting the criteria in subsection (6)(i) of this section has employees, the maximum loan amount is calculated as the lesser of:

(A) The product obtained by multiplying:

(*1*) The sum of (*i*) the difference between gross income and employee payroll costs of the borrower in 2019 or 2020 (at the election of the borrower), as reported on a Schedule F (IRS Form 1040), that is not more than $100,000, divided by 12, and (*ii*) the average total monthly payment for employee payroll costs incurred or paid by the borrower during the same year elected by the borrower; by

(*2*) 2.5; or

(B) $2,000,000.

(7) The maximum amount of a Second Draw PPP Loan to a borrower that has income from self-employment and files a Form 1040, Schedule C, is calculated as follows, depending on whether the borrower has employees:

(i) For a borrower that has income from self-employment and does not have any employees, the maximum loan amount is the lesser of:

(A) The product obtained by multiplying:

(*1*) The net profit of the borrower in 2019 or 2020, as reported on IRS Form 1040 Schedule C, that is not more than $100,000, divided by 12; and

(*2*) 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 as defined in subsection (f)(10) at the time of disbursement, 3.5).

(ii) For a borrower that has income from self-employment and has employees, the maximum loan amount is the lesser of:

(A) The product obtained by multiplying:

(*1*) The sum of (*i*) the net profit of the borrower in 2019 or 2020 (at the election of the borrower), as reported on IRS Form 1040 Schedule C, that is not more than $100,000, divided by 12; (*ii*) the average total monthly payment for employee payroll costs incurred or paid by the borrower during the same year elected by the borrower; by

(*2*) 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 at the time of disbursement as defined in subsection (f)(10), 3.5); or

(B) $2,000,000.

(8) The maximum amount of a Second Draw PPP Loan to a borrower that files taxes as a partnership is calculated as the lesser of:

(i) The product obtained by multiplying:

(A) The sum of (*1*) net earnings from self-employment of individual general partners in 2019 or 2020 (at the election of the borrower), as reported on IRS Form 1065 K–1, reduced by section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties, multiplied by 0.9235,[37] that is not more than $100,000, divided by 12; (*2*) the average total monthly payment for employee payroll costs incurred or paid by the borrower during the same year elected by the borrower; by

(B) 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 as defined in subsection (f)(10) at the time of disbursal, 3.5); or

(ii) $2,000,000.

(9) Businesses that are part of a single corporate group shall in no event receive more than $4,000,000 of Second Draw PPP Loans in the aggregate. Corporate group has the same meaning as in subsection (B)(4)(f) of the Consolidated First Draw PPP IFR.

(10) For purposes of calculating a borrower's maximum payroll costs, a borrower may multiply its average monthly payroll costs by 3.5 only if the borrower is in the Accommodation and Food Services sector and has reported a NAICS code beginning with 72 as its business activity code on its most recent IRS income tax return.

*(g) How do I submit an application for a Second Draw PPP Loan and what documentation must I provide to demonstrate eligibility?*

(1) The applicant must submit to the lender SBA Form 2483–SD (Paycheck Protection Program Second Draw Borrower Application Form) or the lender's equivalent form including the required certifications and the documentation in subsection (g)(2).

(2) At the time an applicant submits its loan application form, it must submit the following unless the documentation was submitted to the lender for the First Draw PPP Loan (*i.e.,* the applicant used calendar year 2019 figures to determine both its First Draw PPP Loan amount and its Second Draw PPP Loan amount, and the lender for the applicant's Second Draw PPP Loan is the same as the lender that made the applicant's First Draw PPP Loan):

(i) If the applicant is not self-employed, the applicant's Form 941 (or other tax forms containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever was used to calculate payroll), as applicable, or equivalent payroll processor records, along with evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions, must be provided. A partnership must also include its IRS Form 1065 K–1s.

(ii) If the applicant is self-employed and has employees, the applicant's 2019 or 2020 (whichever was used to calculate loan amount) IRS Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever was used to calculate loan amount), as applicable, or equivalent payroll processor records, along with evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions, if applicable, must be provided. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish the applicant was in operation on February 15, 2020.

(iii) If the applicant is self-employed and does not have employees, the applicant must provide (a) its 2019 or 2020 (whichever was used to calculate loan amount) Form 1040 Schedule C, (b) a 2019 or 2020 (whichever was used to calculate loan amount) IRS Form 1099–MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes that the applicant is self-employed; and (c) a 2020 invoice, bank statement, or book of record to establish that the applicant was in operation on or around February 15, 2020.

(iv) For loans with a principal amount greater than $150,000, documentation sufficient to establish that the applicant experienced a reduction in revenue, as provided in subsection(c)(1)(iv), must be

[37] This treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the ''employer'' share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.

provided at the time of application, which may include relevant tax forms, including annual tax forms, or, if relevant tax forms are not available, a copy of the applicant's quarterly income statements or bank statements.

(v) For loans with a principal amount of $150,000 or less, the applicant must submit documentation sufficient to establish that the applicant experienced a reduction in revenue as provided in subsection (c)(1)(i) of this section at the time of application, on or before the date the borrower submits an application for loan forgiveness, or, if the borrower does not apply for loan forgiveness, at SBA's request. Such documentation may include relevant tax forms, including annual tax forms, or, if relevant tax forms are not available, a copy of the applicant's quarterly income statements or bank statements.

(3) On the Second Draw PPP Loan borrower application, an authorized representative of the applicant [38] must make the certifications listed in subsection (B)(12) of the Consolidated First Draw PPP IFR, except:

(i) Instead of the certification in subsection (B)(12)(v) of the Consolidated First Draw PPP IFR, the applicant must certify that the applicant has not and will not receive another Second Draw Paycheck Protection Program Loan; and

(ii) an authorized representative of the applicant must also certify:

(A) The Applicant has realized a reduction in gross receipts in excess of 25% relative to the relevant comparison time period. For loans greater than $150,000, Applicant has provided documentation to the lender substantiating the decline in gross receipts. For loans of $150,000 or less, Applicant will provide documentation substantiating the decline in gross receipts upon or before seeking loan forgiveness for the Second Draw Paycheck Protection Program Loan or upon SBA request.

(B) The Applicant received a First Draw Paycheck Protection Program Loan and, before the Second Draw Paycheck Protection Program Loan is disbursed, will have used the full loan amount (including any increase) of the First Draw Paycheck Protection Program Loan only for eligible expenses.

(C) The Applicant is not a business concern or entity (a) for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or (b) that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China.

(D) The Applicant is not required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612).

(E) The Applicant is not a business concern or entity primarily engaged in political or lobbying activities, including any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents.

(4) A lender must submit SBA Form 2484–SD (Paycheck Protection Program Lender's Application—Second Draw Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

*(h) What do lenders need to know and do?*

(1) A lender approved to make First Draw PPP Loans may make Second Draw PPP Loans under the same terms and conditions applicable to First Draw PPP Loans, including all requirements under sections (C) and (D) of the Consolidated First Draw PPP IFR, except as otherwise provided in this section.

(2) What do lenders have to do in terms of loan underwriting?

(i) Each lender shall:

(A) Confirm receipt of borrower certifications contained in Paycheck Protection Program Second Draw Borrower Application Form (SBA Form 2483–SD) or lender's equivalent;

(B) Confirm receipt of information demonstrating that a borrower was either an eligible self-employed individual, independent contractor, or sole proprietorship with no employees or had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;

(C) Confirm the dollar amount of average monthly payroll costs for 2019 or 2020 (whichever was used to calculate loan amount) by reviewing the payroll documentation submitted with the borrower's application;

(D) For a Second Draw PPP Loan greater than $150,000 or a loan of $150,000 or less where the borrower provides documentation of revenue reduction, confirm the dollar amount and percentage of the borrower's revenue reduction by performing a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning the borrower's revenue reduction. For a loan of $150,000 or less where the borrower does not provide documentation of revenue reduction with its application, the lender shall perform this review when the borrower provides such documentation. If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue.

(E) Follow applicable BSA requirements (listed in subsection (C)(3)(d) of the Consolidated First Draw PPP IFR); and

(ii) Each lender's underwriting obligation under the Second Draw PPP is limited to the items above and reviewing the ''Paycheck Protection Program Second Draw Borrower Application Form'' (SBA Form 2483–SD) or lender's equivalent form.

(iii) A lender may rely on any certification or documentation submitted by an applicant for a PPP loan or an eligible recipient or eligible entity that (A) is submitted pursuant to all applicable statutory requirements, regulations, and guidance related to a PPP loan, including under sections 7(a)(36) or (37) of the Small Business Act (15 U.S.C. 636(a)(36) and (37)); and (B) attests that the applicant, eligible recipient, or eligible entity, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations, and guidance related to PPP loans. With respect to a lender that relies on such a certification or documentation related to a Second Draw PPP Loan, an enforcement action may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the Second Draw PPP Loan, if—(A) the lender acts in good faith relating to loan origination or forgiveness of the Second Draw PPP Loan based on that reliance; and (B) all other relevant Federal, State, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the Second Draw PPP Loan.

(3) SBA will pay lenders fees for processing Second Draw PPP Loans in the following amounts:

[38] A representative of the applicant can certify for the business as a whole if the representative is legally authorized to do so.

(i) for a Second Draw PPP Loan of up to (and including) $50,000, in an amount equal to the lesser of:

(A) 50 percent of the balance of the financing outstanding at the time of disbursement of the loan; or

(B) $2,500; and

(ii) for a Second Draw PPP Loan of more than $50,000, in an amount that is:

(A) 5 percent of the balance of the financing outstanding at the time of disbursement of the loan for a loan up to (and including) $350,000; and

(B) 3 percent of the balance of the financing outstanding at the time of disbursement of the loan for a loan above $350,000.

*(i) Will an applicant's Second Draw PPP Loan application be affected if there are unresolved issues regarding the applicant's First Draw PPP Loan?*

(1) If a First Draw PPP Loan is under review pursuant to PPP rules and/or information in SBA's possession indicates that the borrower may have been ineligible for the First Draw PPP Loan it received or for the loan amount received by the borrower, the lender will receive notification from SBA when the lender submits an application for guaranty of a Second Draw PPP Loan (''unresolved borrower'').

(2) If the lender receives notification that the Applicant for a Second Draw PPP Loan is an unresolved borrower, the lender will not receive an SBA loan number. SBA will resolve the issue related to the unresolved borrower expeditiously and will notify the lender of the process to obtain an SBA loan number for the Second Draw PPP Loan, if appropriate.

*(j) Are Second Draw PPP Loans eligible for loan forgiveness?*

Second Draw PPP Loans are eligible for loan forgiveness on the same terms and conditions as First Draw PPP Loans, except that Second Draw PPP Loan borrowers with a principal amount of $150,000 or less are required to provide documentation of revenue reduction if such documentation was not provided at the time of the loan application as specified in subsections (g)(2)(iv) and (v) of this section.

**V. Additional Information**

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at *www.sba.gov.*

Questions on the Paycheck Protection Program 7(a) Loans (First Draw PPP Loans and Second Draw PPP Loans) may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at *https://www.sba.gov/tools/local-assistance/districtoffices.*

*Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)*

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) had determined that this is a major rule under the Congressional Review Act (5 U.S.C. 804(2)). SBA, however, is proceeding under the emergency provision at Executive Order 12866 section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement the Economic Aid Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

The Administrator of OIRA has determined that this is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 *et seq.*) (CRA). Under section 801(3) of the CRA, a major rule takes effect 60 days after the rule is published in the **Federal Register**.

Notwithstanding this requirement, section 808(2) of the CRA allows agencies to dispense with the requirements of section 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 section 808(2) of the CRA, SBA finds, for good cause, that a 60-day delay in the effective date is unnecessary and contrary to the public interest.

As discussed elsewhere in this interim final rule, the last day to apply for and receive a PPP loan is March 31, 2021. Given the short duration of this program, and the urgent need to issue loans quickly, the Administrator in consultation with the Secretary has determined that it is impractical and not in the public interest to provide a delayed effective date. An immediate effective date will give small businesses the maximum amount of time to apply for loans and lenders the maximum amount of time to process applications before the program ends.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose new recordkeeping or reporting requirements under the Paperwork Reduction Act (''PRA''). This information collection (IC) consists of SBA Form 2483–SD (Paycheck Protection Program Second Draw Application Form) and SBA Form 2484–SD (Paycheck Protection Program Lender's Application—Second Draw Loan Guaranty. SBA has requested emergency approval for the IC required to implement the Second Draw PPP Program described above.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for small government jurisdictions with a population of less than 50,000, neither State nor local governments are ''small entities.''

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, ''along with a statement providing the factual basis for such certification.'' If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9.* Since this rule is exempt from notice and comment, SBA is not required to conduct a regulatory flexibility analysis.

**Authority:** 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, section 1114; and Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Pub. L. 116–260, section 303.

**Jovita Carranza,**

*Administrator.*

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## Part VII

## The President

Executive Order 13972—Promoting Small Modular Reactors for National Defense and Space Exploration

**Federal Register**

Vol. 86, No. 9

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# Presidential Documents

**Title 3—**

## The President

**Executive Order 13972 of January 5, 2021**

## Promoting Small Modular Reactors for National Defense and Space Exploration

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**. *Purpose.* Nuclear energy is critical to United States national security. That is why I have taken a series of actions to promote its development and facilitate its use. On June 29, 2017, I announced an initiative to revive and expand the nuclear energy sector and directed a complete review of United States nuclear energy policy to help find new ways to revitalize this crucial energy resource. On July 12, 2019, I signed a Presidential Memorandum entitled ''The Effect of Uranium Imports on the National Security and Establishment of the United States Nuclear Fuel Working Group,'' with the goal of examining the current state of domestic nuclear fuel production and reinvigorating the nuclear fuel supply chain, consistent with United States national security and nonproliferation goals. On August 20, 2019, I signed National Security Presidential Memorandum–20, entitled ''Launch of Spacecraft Containing Space Nuclear Systems,'' calling for development and use of space nuclear systems to enable or enhance space exploration and operational capabilities.

The purpose of this order is to take an important additional step to revitalize the United States nuclear energy sector, reinvigorate America's space exploration program, and develop diverse energy options for national defense needs. Under this action, the United States Government will coordinate its nuclear activities to apply the benefits of nuclear energy most effectively toward American technology supremacy, including the use of small modular reactors for national defense and space exploration. This work is critical to advancing my Administration's priorities for the United States to lead in research, technology, invention, innovation, and advanced technology development; its mission to promote and protect the United States national security innovation base; its drive to secure energy dominance; and its commitment to achieving all of these goals in a manner consistent with the highest nuclear nonproliferation standards.

The United States was the first nation to invent and develop the technology to harness nuclear energy. Since the 1950s, the United States Navy has been operating and advancing transportable nuclear reactors, resulting in powerfully enhanced marine propulsion for its aircraft carriers and allowing nuclear-powered submarines to remain submerged for extended periods of time.

The United States must sustain its ability to meet the energy requirements for its national defense and space exploration initiatives. The ability to use small modular reactors will help maintain and advance United States dominance and strategic leadership across the space and terrestrial domains.

**Sec. 2**. *Policy.* It is the policy of the United States to promote advanced reactor technologies, including small modular reactors, to support defense installation energy flexibility and energy security, and for use in space exploration, guided by the following principles:

(a) A healthy and robust nuclear energy industry is critical to the national security, energy security, and economic prosperity of the United States;

(b) The United States should maintain technology supremacy for nuclear research and development, manufacturing proficiency, and security and safety; and

(c) The United States Government should bolster national defense and space exploration capabilities and enable private-sector innovation of advanced reactor technologies.

**Sec. 3**. *Demonstration of Commercial Reactors to Enhance Energy Flexibility at a Defense Installation.* (a) Micro-reactors have the potential to enhance energy flexibility and energy security at domestic military installations in remote locations. Accordingly, the Secretary of Defense shall, within 180 days of the date of this order, establish and implement a plan to demonstrate the energy flexibility capability and cost effectiveness of a Nuclear Regulatory Commission-licensed micro-reactor at a domestic military installation.

(b) If the demonstration is successful, the Secretary of Defense shall identify opportunities at domestic military installations where this capability could enhance or supplement the fulfillment of installation energy requirements. In identifying these opportunities, the Secretary of Defense shall take into account considerations that are unique to national defense needs and requirements that may not be relevant in the private sector, such as:

(i) the ability to provide resilient, independent energy delivery to installations in the event that connections to an electrical grid are compromised;

(ii) the ability to operate for an extended period of time without refueling;

(iii) system resistance to disruption from an electro-magnetic pulse event; and

(iv) system cybersecurity requirements.

**Sec. 4**. *Defense Capabilities.* (a) The Department of Defense is one of the largest consumers of energy in the world, using more than 10 million gallons of fuel per day and 30,000 gigawatt-hours of electricity per year, nearly all of which is provided through civilian electrical grids. Fuel demands for a modern United States military have dramatically grown since World War II and are anticipated to continue to increase in order to support high-energy-usage military systems. In this context, nuclear power could significantly enhance national defense power capabilities.

(b) The Secretary of Defense shall, in consultation with the Secretary of State, the Secretary of Commerce, the Secretary of Energy, and the Administrator of the National Aeronautics and Space Administration (NASA Administrator):

(i) determine whether advanced nuclear reactors can be made to benefit Department of Defense future space power needs;

(ii) pilot a transportable micro-reactor prototype;

(iii) direct an analysis of alternatives for personnel, regulatory, and technical requirements to inform future decisions with respect to nuclear power usage; and

(iv) direct an analysis of United States military uses for space nuclear power and propulsion technologies and an analysis of foreign adversaries' space power and propulsion programs.

**Sec. 5**. *Space Exploration.* (a) Nuclear power sources that use uranium fuel or plutonium heat sources are essential to deep space exploration and in areas where solar power is not practical. NASA uses radioisotope power systems, such as radioisotope thermoelectric generators and radioisotope heater units, to provide power and heat for deep space robotic missions. Nuclear power sources in the kilowatt range may be needed for demonstrating In-situ Resource Utilization (ISRU) and robotic exploration of permanently shadowed craters on the Moon that contain frozen water. Nuclear reactors up to 100 kilowatts may be needed to support human habitats, ISRU, other facilities, and rovers on both the Moon and Mars. Power sources in the megawatt range would be necessary for efficient, long-duration deep space propulsion. Affordable, lightweight nuclear power sources in space would enable new opportunities for scientific discovery. The sustainable exploration of the Moon, Mars, and other locations will be enhanced if small modular reactors can be deployed and operated remotely from Earth.

(b) Within 180 days of the date of this order, the NASA Administrator, in consultation with heads of other executive departments and agencies (agencies), as appropriate, shall define requirements for NASA utilization of nuclear energy systems for human and robotic exploration missions through 2040 and analyze the costs and benefits of such requirements. In defining these requirements, the NASA Administrator shall take into account considerations unique to the utilization of nuclear energy systems in space, such as:

(i) transportability of a reactor prior to and after deployment;

(ii) thermal management in a reduced- or zero-gravity environment in a vacuum or near-vacuum;

(iii) fluid transfer within reactor systems in a reduced or zero-gravity environment;

(iv) reactor size and mass that can be launched from Earth and assembled in space;

(v) cooling of nuclear reactors in space;

(vi) electric power requirements;

(vii) space safety rating to enable operations as part of human space exploration missions;

(viii) period of time for which a reactor can operate without refueling; and

(ix) conditioning of reactor components for use in the space environment.

**Sec. 6**. *Domestic Fuel Supply.* (a) A thriving and secure domestic nuclear fuel supply chain is critical to the national interests of the United States. A viable domestic nuclear fuel supply chain not only supports defense and national security activities, but also enables the success of the commercial nuclear industry. Many advanced reactor concepts, however, will require high-assay, low-enriched uranium (HALEU), for which no domestic commercial enrichment capability currently exists. The United States must take steps to ensure a viable United States-origin HALEU supply.

(b) The Secretary of Energy shall complete the Department of Energy's ongoing 3-year, $115 million demonstration of a United States-origin enrichment technology capable of producing HALEU for use in defense-related advanced reactor applications. Within funding available for the demonstration project, the Secretary of Energy should develop a plan to promote successful transition of this technology to the private sector for commercial adoption.

(c) The Secretary of Energy shall consult with the Secretary of Defense, the Director of the Office of Management and Budget, and the NASA Administrator regarding how advanced fuels and related technologies can best support implementation of sections 3, 4, and 5 of this order.

**Sec. 7**. *Common Technology Roadmap.* (a) The Secretary of State, the Secretary of Defense, the Secretary of Commerce, the Secretary of Energy, and the NASA Administrator shall develop a common technology roadmap through 2030 that describes potential development programs and that coordinates, to the extent practicable, terrestrial-based advanced nuclear reactor and space-based nuclear power and propulsion efforts. Agencies shall remain responsible for funding their respective mission-unique requirements. The roadmap shall also include, at a minimum:

(i) assessments of foreign nations' space nuclear power and propulsion technological capabilities;

(ii) pathways for transitioning technologies developed through Federally supported programs to private-sector activities; and

(iii) other applications supporting the goals provided in section 1 of this order.

(b) The roadmap shall be submitted to the President by the Director of the Office of Management and Budget, the Assistant to the President for Domestic Policy, the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Executive Secretary of the National Space Council before submissions of budget proposals by the Secretary of State, the Secretary of Commerce, the Secretary of Energy, and the NASA Administrator.

**Sec. 8**. *Definitions.* For purposes of this order:

(a) The term ''small modular reactor'' refers to an advanced nuclear reactor of electric generation capacity less than 300 megawatt-electric. Because of the smaller size, small modular reactors can generally be designed for factory fabrication and modular construction to take advantage of economies of serial production and shorter construction times.

(b) The term ''micro-reactor'' refers to a nuclear reactor of electric generation capacity less than 10 megawatt-electric that can be deployed remotely. Micro-reactors are a subset of small modular reactors and are also known as ''very small modular reactors.''

(c) The term ''transportable micro-reactor'' refers to a micro-reactor that can be moved by truck, ship, or large military transport aircraft and is capable of both rapid deployment and teardown or removal, typically with safe teardown or removal less than 1 week after 1 year of full-power operation.

(d) The term ''space exploration'' refers to in-space scientific and resource exploration, in-space economic and industrial development, and development of associated in-space logistical infrastructure.

(e) The term ''national defense'' refers to the protection of the United States and its interests from foreign attack or other natural danger, including phenomena occurring on Earth and in space.

**Sec. 9**. *General Provisions.* (a) Nothing in this order 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 order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order 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.

THE WHITE HOUSE,
*January 5, 2021.*

[FR Doc. 2021–01013
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